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## THE GARCETTI VIRUS

Nancy Modesitt

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## THE GARCETTI VIRUS

*Nancy M. Modesitt\**

*In an era where corporate malfeasance has imposed staggering costs on society, ranging from the largest oil spill in recorded history to the largest government bailout of Wall Street, one would think that those who uncover corporate wrongdoing before it causes significant harm should receive awards. Employees are particularly well-placed to uncover such wrongdoing within companies. However, rather than reward these employees, employers tend to fire or marginalize them. While there are statutory protections for whistleblowers, a disturbing new trend appears to be developing: courts are excluding from the protection of whistleblowing statutes employees who report wrongdoing as part of their jobs. Under this doctrine, the internal safety inspector who uncovers illegal behavior while performing his duties and reports it to his boss can legally be fired for blowing the whistle.*

*This Article explains how this doctrine, the job duties exclusion, was developed by the Federal Circuit over a decade ago to limit claims brought by federal employees under the federal Whistleblower Protection Act. Flawed at its inception, the doctrine languished, with no states adopting it until the Supreme Court's decision in Garcetti v. Ceballos. In Garcetti, the Court applied the job duties exclusion to a claim brought under the First Amendment. Even though Garcetti involved a constitutional, not a statutory, claim, the decision has given new life to the doctrine developed by the Federal Circuit. Since Garcetti, courts have begun applying the job duties exclusion to state statutory whistleblower claims, placing protections for employees at grave risk. This Article examines this developing trend, explaining how Garcetti has had an impact on what is fundamentally a state statutory interpretation issue. It identifies the flaws of the job duties exclusion as first articulated, the reasons why state courts should not apply it to state whistleblower protection statutes, and recommends that legislatures amend statutory protections to ensure that employees who do the right*

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*thing and report corporate malfeasance are protected against retaliation.*

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## I. INTRODUCTION

In *Garcetti v. Ceballos*,<sup>1</sup> the Supreme Court effectively discouraged federal and state employees from blowing the whistle on governmental wrongdoing by adopting a limitation on these employees' First Amendment rights. Specifically, the Court held that governmental employees are not engaged in protected speech for First Amendment purposes where the employees' speech is made pursuant to their official duties.<sup>2</sup> Thus, when an employee is performing his job, uncovers illegal behavior, and reports it through the proper chain of command, his speech in disclosing the governmental wrongdoing is not protected by

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

2. *Id.* at 421.

the First Amendment.<sup>3</sup>

One of the justifications for the Court's decision was that government employees have other protections provided by a variety of state and federal statutes against retaliation when the employee engages in whistleblowing.<sup>4</sup> Ironically, while the *Garcetti* Court relied upon these protections to justify the decision, *Garcetti* itself appears to be placing these protections at risk. Despite significant criticism in the popular press and scholarly literature,<sup>5</sup> the "job duties exclusion" articulated in *Garcetti* has slowly begun to spread. Employers have increasingly argued for its application to state statutes protecting public and private sector employees, with some success. If this developing trend continues, it represents a significant threat to whistleblowing behavior, as those most likely to notice employer wrongdoing are the employees who see it firsthand as part of their jobs.

This Article contains four parts. Part II traces the historical development of the job duties exclusion, which was created long before *Garcetti* as a limitation on federal employee whistleblowing claims brought under the Whistleblower Protection Act. Part III examines the substance and effect of the exclusion and concludes that it unjustifiably threatens the goals of whistleblower protection statutes. Part IV explores the post-*Garcetti* expansion of the exclusion, including the extent of this developing trend and why it is occurring. Part V argues that Congress and state legislatures should amend whistleblower protection statutes to eliminate the potential for the application of this exclusion and that judges should stop the spread of this trend by rejecting arguments for its application to state statutes.

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3. *See id.* This Article refers to this limitation on whistleblowing protections as the "job duties exclusion."

4. *Id.* at 425 (noting the "powerful network of legislative enactments—such as whistleblower protection laws and labor codes" and citing the federal Whistleblower Protection Act as an example of such protections).

5. *See, e.g.,* Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117 (2008); Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22 (2008); Christie S. Totten, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech under Garcetti v. Ceballos*, 12 LEWIS & CLARK L. REV. 233 (2008). *But see* Andrew Bernie, *A Principled Limitation on Judicial Interference: Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), 30 HARV. J.L. & PUB. POL'Y 1047 (2007).

## II. THE DEVELOPMENT OF THE JOB DUTIES EXCLUSION

At present, there are four potential sources of whistleblowing protection for employees: (1) common law claims for wrongful discharge in violation of public policy,<sup>6</sup> which are generally available only to private sector employees;<sup>7</sup> (2) constitutional claims for infringement on First Amendment rights, which are available only to public sector (governmental) employees;<sup>8</sup> (3) generalized statutory prohibitions on retaliation against whistleblowers, which are available to nearly all state and federal government employees as well as some private sector employees;<sup>9</sup> and (4) topic-specific statutory prohibitions on retaliation against whistleblowers who report wrongdoing in specific statutory contexts, which vary from statute to statute as to whether they apply to public sector employees, private sector employees, or both.<sup>10</sup>

In order to understand the development of the job duties exclusion, it is necessary to understand the history of whistleblowing protection, including the development of these four modern types of whistleblowing protection.

### *A Brief History of Whistleblower Protection*

The history of whistleblowing protections in the United States is well documented.<sup>11</sup> This area of law developed slowly and began with modest efforts that did not truly protect whistleblowers at all. The False Claims Act (FCA), which was passed during the Civil War, created a bounty system for those who disclosed fraud perpetrated against the

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6. See, e.g., *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (describing claim).

7. See, e.g., *Lloyd v. Cnty. of Los Angeles*, 90 Cal. Rptr. 3d 872, 879 (Cal. Ct. App. 2009) (noting that no common law claim for wrongful discharge exists for public sector employees).

8. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983) (describing parameters of the claim).

9. See DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* apps. A, B (2d ed. 2004 & Supp. 2010) (listing statutes).

10. See, e.g., 42 U.S.C. § 2000e-3 (2006).

11. See WESTMAN & MODESITT, *supra* note 9; Roberta Ann Johnson, *WHISTLEBLOWING: WHEN IT WORKS—AND WHY*, 94–95 (2001); Wim Vandekerckhove, *WHISTLEBLOWING AND ORGANIZATIONAL SOCIAL RESPONSIBILITY: A GLOBAL ASSESSMENT*, 164–85 (2006); Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 191–95 (2007).

government.<sup>12</sup> At that time, the concern was focused on fraud perpetrated by contractors/suppliers in the war effort. As a result, the FCA created a bounty system whereby the reporter of the wrongdoing was given a share of the recovery. However, the FCA provided no protections to prevent retaliation against the whistleblower; if the whistleblower was an employee of the contractor, the contractor was free to fire, demote, suspend, or reprimand the employee.<sup>13</sup>

The next step in the development of whistleblowing protections was the recognition of anti-retaliation rights for employees engaging in union-organizing activities, which developed during the early labor movement.<sup>14</sup> The Railway Labor Act, for example, passed in 1926, was the first act to prohibit employers from retaliating against employees who promoted, organized, or joined labor unions.<sup>15</sup> Protection for workers outside of the railroads came with the passage of the National Labor Relations Act (NLRA) during the Great Depression, which prohibited discrimination against employees in order to encourage or discourage membership in a union.<sup>16</sup>

The number of federal laws containing prohibitions on employer retaliation against employees has increased in the decades since the NLRA. Antiretaliation provisions are now found in dozens of federal laws, ranging from the little-known Asbestos Hazard Emergency Response Act<sup>17</sup> to the well-known protections contained in Title VII of the Civil Rights Act of 1964.<sup>18</sup> In addition to the increasing number of federal statutes protecting employees against retaliation, the scope of protection against retaliation by employers has become more encompassing over time. For instance, Title VII prohibits retaliation against employees who oppose employer conduct made unlawful by

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12. See WESTMAN & MODESITT, *supra* note 9, at 4. For a more detailed description of the history of whistleblower protections, see WESTMAN & MODESITT, *supra* note 9, at ch. 1.

13. See WESTMAN & MODESITT, *supra* note 9, at 4.

14. See *id.*; Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 443 (2009) (noting 1986 amendment to the FCA to protect employee-whistleblowers from retaliation).

15. 45 U.S.C. § 152 (2006).

16. See 29 U.S.C. § 158(a)(3) (2006).

17. 15 U.S.C. § 2651 (2006).

18. See WESTMAN & MODESITT, *supra* note 9, at app. C (listing federal laws protecting employees against retaliation).

Title VII or participate in any Title VII investigation or proceeding.<sup>19</sup> Courts have construed these provisions to prohibit retaliation even against former employees.<sup>20</sup>

Part of the reason for the increase in the number and scope of protections for employee whistleblowers can be attributed to the development of greater governmental oversight and regulation of corporations and industry.<sup>21</sup> For instance, the early environmental protection movement and the civil rights movement spawned legislation regulating companies. The package of legislative limitations on corporate freedom included protections for whistleblowers.<sup>22</sup>

All of the above statutes prohibiting retaliation are topic-specific statutes; that is, they provide retaliation protection only for whistleblowing on a particular topic, such as employers engaging in unlawful employment discrimination under Title VII.<sup>23</sup> This topic-specific approach was the first stage in the development of modern statutory employee whistleblower protections. As some of the topic-specific statutory whistleblower protections were being enacted, legislators began developing generalized employee whistleblower protections as well. The development of generalized whistleblower protection for employees took three separate routes: (1) common law, (2) constitutional, and (3) statutory protections.

Common law protections were developed by the states as an exception to the employment at-will regime that governs the vast majority of employees in the private sector.<sup>24</sup> This common law claim, wrongful discharge in violation of public policy, is a tort-based remedy for employees whose employers fired them for exposing employer wrongdoing.<sup>25</sup> The core concept of this claim is that while employers can fire employees for any or no reason, they cannot fire employees for reasons that would violate “public policy.”<sup>26</sup> In one of the earliest cases

19. 42 U.S.C. § 2000e-3(a) (2006).

20. *Robinson v. Shell Oil, Co.*, 519 U.S. 337 (1997).

21. See WESTMAN & MODESITT, *supra* note 9, at 7–9.

22. *Id.*

23. See 42 U.S.C. § 2000e-3 (2006).

24. See WESTMAN & MODESITT, *supra* note 9, at 16–17.

25. See STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 21 (2001).

26. *Id.* at 23.

to apply this protection, *Petermann v. Teamsters Local 396*, the California Court of Appeals held that an employee had a claim for wrongful discharge where he was fired for refusing to follow his employer's instructions to commit perjury.<sup>27</sup>

Since that decision courts have broadened the scope of protected behavior.<sup>28</sup> Today, claims generally have been recognized where employees have been fired for (1) refusing to violate a statute, (2) performing a statutory obligation, (3) exercising a statutory right or privilege, and (4) reporting a statutory violation.<sup>29</sup>

While the wrongful discharge in violation of public policy claim was not developed specifically or solely for whistleblowers, it can be a significant source of protection for them.<sup>30</sup> Nearly every state recognizes some form of the wrongful discharge claim; however, the parameters of the claim vary widely, meaning that whether an employee-whistleblower is protected will vary significantly from state to state.<sup>31</sup> These common law protections generally apply only to private sector employees.

While public sector employees generally lack access to the common law claim of wrongful discharge in violation of public policy, in the decade after the seminal *Petermann* case was decided, the U.S. Supreme Court opened the door to whistleblower retaliation claims for government employees under the First Amendment. In *Pickering v. Board of Education*,<sup>32</sup> the Court held that the First Amendment could protect employee statements criticizing their employers if the employee spoke on a matter of public concern.<sup>33</sup> In *Pickering*, the employee was a teacher who publicly spoke against the need for additional school

27. *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959).

28. See KOHN, *supra* note 25, at 23.

29. See *Gannt v. Sentry Ins.*, 824 P.2d 680 (Cal. 1992) (discussing the generally accepted formulation of the claim); see also KOHN, *supra* note 25, at 23.

30. Note that the first three claims do not involve disclosure of employer wrongdoing, which is the hallmark of whistleblower protection statutes. These cases focus instead on forcing employers to respect the law and, in particular, to respect employees' statutory rights and obligations.

31. For a discussion of the variations among state common law claims, see WESTMAN & MODESITT, *supra* note 9, at ch. 5, app. D.

32. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

33. *Id.* at 568.



funding.<sup>34</sup> The teacher vocally expressed a belief that the school district had improperly allocated funds in the past as a reason for the funding opposition. While this disclosure of mishandling funds could make the employee a whistleblower, the school district fired the employee for opposing the funding, not primarily because of the disclosure of wasted funds, which could be seen as whistleblowing behavior. The focus of Pickering's claim, and many other subsequent First Amendment claims, was not primarily on whistleblowing but on the more general right of employees to voice disagreements with employers.<sup>35</sup> Thus, cases involving clashes of political opinions drove the initial development of this constitutional protection for public employees.<sup>36</sup>

Subsequent cases clarified that a balancing test would be used to determine whether the speech could be protected. This test balanced the employer's legitimate interests in running the workplace effectively and the employee's free speech interests.<sup>37</sup> Under the line of cases applying this test, state and federal employees who disclosed unlawful conduct at work might be protected from retaliation under the First Amendment if the unlawful conduct were a matter of public concern and the disruptions caused by the whistleblowing behavior were not too great.<sup>38</sup>

Soon after the development of the common law and constitutional claims that provided some protection for some whistleblowing employees, legislators began to enact generalized statutory protections. These generalized whistleblower protection statutes were initially focused on government employees at both the federal and state level. For example, the federal government led the way by passing the Civil Service Reform Act of 1978.<sup>39</sup> This law provided whistleblower protections to civil service employees who reported fraud, illegal conduct, or mismanagement in the federal government.<sup>40</sup> The states

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34. *Id.* at 566–67.

35. *See id.* at 568–69.

36. *See, e.g.,* *Connick v. Meyers*, 461 U.S. 138 (1983) (involving an employee who was terminated for speaking critically of the president); *Rankin v. McPherson*, 483 U.S. 1056 (1987) (regarding the firing of employees due to political associations).

37. *See Connick*, 461 U.S. 138; *Rankin*, 483 U.S. 1056.

38. *See Connick*, 461 U.S. at 152–53.

39. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

40. *Id.*

then followed suit by passing whistleblower protection statutes covering state (and sometimes local) employees. Now nearly every state has enacted some type of whistleblower protection statute for state employees.<sup>41</sup> These statutes vary greatly from state to state in terms of protected disclosures, remedies to employees, and to whom the disclosures can be made.<sup>42</sup>

Legislatures have been much slower to pass generalized whistleblower protections for private sector employees. There is no federal statute providing generalized whistleblowing protections for employees in the private sector. At the state level, less than half of the states have enacted generalized whistleblower protection statutes for private sector employees.<sup>43</sup> Like state statutes for public employees, statutes governing the private sector also vary greatly.<sup>44</sup>

Within this mix of whistleblowing protections, the job duties exclusion was created in one small corner: under the federal Whistleblower Protection Act of 1989 (WPA).<sup>45</sup> The WPA amended the Civil Service Reform Act of 1978<sup>46</sup> and expanded the general whistleblowing protections it provided.

### *B. The Whistleblower Protection Act: The Source of the Job Duties Exclusion*

The source of the job duties exclusion lies with the interpretations of the WPA.<sup>47</sup> Prior to the WPA, protection of whistleblowers had been

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41. See WESTMAN & MODESITT, *supra* note 9, at app. A (listing state statutes).

42. See *id.*; see also *State Whistleblower Laws—Overview*, PUB. EMPS. FOR ENVTL. RESPONSIBILITY, <http://www.peer.org/docs/wbp2/overview.pdf> (last visited Feb. 24, 2012) (identifying different protections afforded by state whistleblower laws).

43. See WESTMAN & MODESITT, *supra* note 9, at 77; see also WESTMAN & MODESITT, *supra* note 9, at 4-2 (Supp. 2010).

44. See *id.*

45. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989).

46. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

47. It is more accurate to state that the courts are interpreting the WPA and the Civil Service Reform Act of 1978 together because the WPA merely amended the Civil Service Reform Act. However, the court decisions in this area generally refer to the WPA as the source of whistleblower protection, perhaps as a shorthand for both statutes, a practice this Article will follow. The primary anti-retaliation provisions of the Act are found at 5 U.S.C.A. § 2302 (West 2008).

provided as part of the general civil service laws.<sup>48</sup> The WPA revised and, in general, increased the protections afforded to whistleblowers.<sup>49</sup> This encouraged greater protection of whistleblowers by the federal Office of Special Counsel—the office charged with investigating whistleblowing complaints.<sup>50</sup>

The WPA prohibits the federal government, as an employer, from firing, retaliating against, or threatening to retaliate against employees who engage in protected behavior.<sup>51</sup> The WPA defines this protected behavior as “any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (1) a violation of any law, rule, or regulation, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>52</sup> In addition, employees are protected when they exercise a statutory right, testify regarding a protected disclosure, cooperate with or disclose information to an Inspector General when required by law, or refuse to obey an illegal order.<sup>53</sup>

Claims brought under the WPA are heard first by the Merit Systems

48. Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope For Whistleblowers*, 43 RUTGERS L. REV. 355 (1991).

49. For instance, prior to the WPA, if a federal agency could establish that it would have taken action against a whistleblower even if the employee had not blown the whistle, the claim was barred. However, the WPA revised this requirement by allowing the claim to stand so long as the whistleblowing was a factor in the decision, even if, on balance, the agency would have taken the action anyway. *Id.* at 377–380. One scholar noted that the WPA was one more step in the “minuet” of whistleblower protections; in this dance, Congress attempts to enact greater protections, taking one step forward, while the federal courts circumscribe the effective scope of these protections through their decisions “interpreting” federal law. *Id.* at 361.

50. *Id.* at 371.

51. The adverse employment actions that are prohibited are: “(i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions.” 5 U.S.C.A. § 2302(a)(2)(A) (West 2008).

52. 5 U.S.C.A. § 2302(b)(8)(A) (West 2008).

53. 5 U.S.C.A. § 2302(b)(9) (West 2008).

Protection Board (MSPB),<sup>54</sup> which is the governmental entity primarily responsible for claims brought by federal employees who have been fired, demoted, or disciplined.<sup>55</sup> An administrative judge initially decides these cases, which can then be appealed to the Board itself.<sup>56</sup> If the employee is dissatisfied with the Board's decision, the employee may elect to appeal to the Court of Appeals for the Federal Circuit, which has the sole authority to decide these appeals.<sup>57</sup>

In 1998 the Federal Circuit heard the issue of whether an employee performing normal job duties was entitled to protections against retaliation if, in the course of performing his duties, he reported the type of wrongdoing covered by the WPA.<sup>58</sup> In *Willis v. Department of Agriculture*, an employee in the Department of Agriculture reported to his supervisor his belief that some of the supervisor's actions were improper. Specifically, the employee had determined that a number of farms were not in compliance with a government soil-protection program. The supervisor disagreed and overruled the employee's decisions in six out of the seven situations at issue. The employee subsequently complained about the supervisor's decision and alleged that he was retaliated against for his complaint.<sup>59</sup>

The Federal Circuit determined that these complaints were not protected disclosures under the WPA because they were merely typical

54. 5 U.S.C. § 1214(a)(3) (2006). In a few instances, the claims follow an entirely different administrative procedure. If the employee is also claiming unlawful employment discrimination, a pendant whistleblowing claim would be heard as part of that discrimination case. There, the case is decided by an administrative judge with the Equal Employment Opportunity Commission (EEOC), appeals are made to the Office of Federal Operations within the EEOC. If the employee is dissatisfied with the administrative decision, the employee can bring suit in federal district court (generally the federal district court for the district where the employee is employed). The result of these different procedural processes is that while most WPA claims are decided by the Federal Circuit, there are still a few that are decided by the various federal district and circuit courts. See 5 U.S.C. § 7702 (2006).

55. See 5 U.S.C. § 4303 (2006) (noting that appeal rights for performance-based disciplinary actions exist only for demotions or terminations); 5 U.S.C. § 7701 (2006) (describing MSPB appellate procedures). Only significant disciplinary decisions—discharge, demotion, and lengthy suspension—are heard by the MSPB. Lesser disciplinary actions such as reprimands and short suspensions are left to the employing agency to decide on its own.

56. 5 U.S.C. § 7701(b)(1) (2006). While the statute provides that the MSPB may hear the case itself, it is routine to refer these cases to administrative judges for the initial hearing.

57. 5 U.S.C. § 7703 (2006).

58. *Willis v. Dep't of Agric.*, 141 F.3d 1139 (Fed. Cir. 1998).

59. *Id.* at 1141.

disagreements between supervisor and employee.<sup>60</sup> The court expressed concern that were the WPA to cover this type of situation, far too many typical disagreements would be the basis for a WPA claim.<sup>61</sup> The court further explained its decision:

Part of Willis's job duties . . . was to review the conservation compliance of farms within his area. In reporting some of them as being out of compliance, he did no more than carry out his required everyday job responsibilities. This is expected of all government employees pursuant to the fiduciary obligation which every employee owes to his employer. Willis cannot be said to have risked his personal job security by merely performing his required duties. Determining whether or not farms were out of compliance was part of his job performance and in no way did it place Willis at personal risk for the benefit of the public good and cannot itself constitute a protected disclosure under the WPA.<sup>62</sup>

In reaching its decision that the disclosures were not protected, the court failed to consider the language of the statute or its legislative history. The court failed to discuss the fact that the statute's language covers "any disclosure"—language lacking any limitation on the type of disclosure, the individual's reason for making the disclosure, or whether the employee's job involves reporting wrongdoing. The only portion of the court's explanation that can be read as conducting statutory interpretation is its assertion that the goal of the WPA was to protect employees who risk their job security by reporting certain types of misconduct.<sup>63</sup>

The court jumped from this proposition to two conclusions without any support from the text of the WPA, its legislative history, or the policies underlying it. First, the court concluded that performing obligatory job duties does not entail risking one's job security; thus, the conduct is not protected.<sup>64</sup> However, it is quite possible that employees performing their normal job duties who expose wrongdoing are risking their job security. There are three possible reactions to exposing wrongdoing that such employees may face in the workplace. First, the

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60. *Id.* at 1143.

61. *Id.*

62. *Id.* at 1144.

63. *See id.*

64. *Willis v. Dep't of Agric.*, 141 F.3d 1139 (Fed. Cir. 1998).

employee's supervisor may affirmatively want the employee to disclose all wrongdoing. In this situation, the employee will not be facing reprisal for whistleblowing and, therefore, will have no need for protection. Second, the supervisor may be apathetic as to the disclosure of wrongdoing. Again, in this situation, the employee will have no need for protection against retaliation. Third, the supervisor may want limited or no disclosure of wrongdoing. This may be where the supervisor has some connection with the wrongdoing or where the supervisor is concerned about his or her own job security. In this scenario, by simply doing his job, the employee is risking his job. Providing protections in this third scenario is precisely the point of whistleblower protection statutes for employees.

The second conclusion that the *Willis* court reached was that Congress did not intend for the WPA to cover nearly every disclosure by a federal employee of a possible violation of the law.<sup>65</sup> The court made this assertion without providing any support for it.

Three years later, in 2001, the Federal Circuit was forced to revisit the issue decided in *Willis* because of confusion over its scope. In *Huffman v. Office of Personnel Management*,<sup>66</sup> an employee worked in the Office of the Inspector General (OIG). He reported several different types of wrongdoing to his supervisor: (1) the supervisor's own alleged violation of law by "preselecting" employees to be hired rather than through the lawful, merit service process; (2) the supervisor's gross mismanagement and waste in the hiring of a contractor; (3) other employees' improper hiring practices, where employees were hired without a competitive hiring process in violation of the civil service laws; and (4) another supervisor directing applicants to falsify their applications for employment.<sup>67</sup>

The plaintiff in *Huffman* alleged that he was retaliated against for having made the complaints. On appeal to the Federal Circuit, the court held that the WPA protected only some of these complaints of wrongful behavior.<sup>68</sup> The court concluded that the WPA did not protect

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65. *Id.* (discussing the implications of allowing *Willis*'s claim to stand).

66. *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, (Fed. Cir. 2001).

67. *Id.* at 1345.

68. *Id.* at 1353.

disclosures made by an employee as part of his normal job duties.<sup>69</sup> However, the court did allow for two exceptions to this general rule. First, disclosures that were a normal part of the employee's job, if made to someone outside of the normal chain of command, would be protected. Second, if the type of disclosure were one that the employee would not ordinarily make, then that disclosure would be protected.<sup>70</sup>

In concluding that disclosures made pursuant to the employee's normal job duties were not protected, the court reiterated one of the rationales it expressed in *Willis*. The court focused on the goal of the WPA, which the court defined in both *Willis* and *Huffman* as protecting employees who "go above and beyond the call of duty" by disclosing hidden wrongdoing.<sup>71</sup> According to the court, Congress did not intend to protect employees whose normal job duties require such disclosures.<sup>72</sup> While the court in *Willis* provided no real support for this supposition, the *Huffman* court did identify some indirect support by citing to several statements made during the legislative process, which noted that the WPA was not designed to protect poor performing employees from discipline.<sup>73</sup> It is unclear how these statements indicate that disclosures made pursuant to normal job duties should not be covered. Perhaps the court was suggesting that all whistleblowers whose jobs require reporting wrongdoing are poor performers seeking to shield themselves from adverse employment action by claiming protection under the WPA.

The court also justified its conclusion by determining that the WPA was "ambiguous,"<sup>74</sup> despite the fact that just paragraphs earlier the court had interpreted the same portion of the statute<sup>75</sup> without referencing any ambiguity.<sup>76</sup> The court did not rely on one of the key rationales it cited in *Willis*—that this was the normal type of disagreement between

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1353 (Fed. Cir. 2001).

73. *Id.*

74. *Id.* at 1352.

75. The court failed to specify what aspect of the WPA was ambiguous. However, the language at issue appears to be the "any disclosure" language.

76. *Id.*

supervisors and subordinates and thus was not appropriate for protection under the WPA.

The court's analysis is flawed in many ways. First, the *Huffman* court began its analysis with an incorrect assessment of the statutory language by claiming that it was ambiguous<sup>77</sup> and, therefore, required analysis of legislative history. Had the court begun from the normal starting point of statutory construction, it would have had a difficult time justifying its conclusion. The statute states that "any disclosure" of illegal activity, gross mismanagement, or waste of government funds is protected activity.<sup>78</sup> The statute provides no limitation as to whom the disclosure must be made. The plain language is unambiguous and thus supports the interpretation that a disclosure made in the course of one's normal job duties is protected. Furthermore, the lack of an express exclusion should be considered in light of the fact that many whistleblower statutes do specify to whom protected disclosures must be made.<sup>79</sup> Therefore, in these jurisdictions, disclosures made in the course of performing one's job may not be protected in all circumstances; instead, protections will depend on the person to whom the disclosure is made.<sup>80</sup>

The *Huffman* court was also incorrect in its assertion that there was "no clear evidence in the legislative history" of the WPA to support the idea that disclosures made in the course of an employee's normal job duties were covered by the WPA.<sup>81</sup> The WPA amended the whistleblower provisions created by the Civil Service Act of 1978. Under that statute, "a disclosure" was protected if it met certain criteria. The WPA changed the statutory language from "a disclosure" to "any disclosure," indicating that a broader meaning should be used.<sup>82</sup> Further solidifying this evidence of intent to provide coverage to more disclosures than under the CSRA is a 1988 report discussing the

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77. *Id.*

78. 5 U.S.C.A. § 2302(b)(8)(A) (West 2008).

79. *See* WESTMAN & MODESITT, *supra* note 9, at 70–71, app. A at 281, app. B at 309 (compiling state statutes protecting whistleblowers and noting that many contain such limitations).

80. Some states have imposed limitations on the type of disclosure that is protected. The most common type is that the disclosure must be made in good faith. This is a far narrower limitation on protections than the job duties exclusion, as it focuses on the employee's motivation in making the disclosure. *See, e.g.,* *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000).

81. *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1353 (Fed. Cir. 2001).

82. *See* S. REP. NO. 100-413, at 13 (1988).



proposed WPA. In this report, a Senate Committee noted:

For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employee or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase ‘a disclosure’ to ‘any disclosure’ in the statutory definition.<sup>83</sup>

Thus, the plain language and legislative history of the WPA are at odds with the *Huffman* decision.

Looking beyond the plain language and legislative history, the *Huffman* court also adopted the *Willis* conclusion that an employee executing his normal job duties and thereby disclosing wrongdoing is not risking his job and therefore not a person who should be entitled to protection.<sup>84</sup> As noted above, there are significant flaws in this conclusion.

*Huffman* has been applied in numerous cases since its decision and remains unquestioned in the Federal Circuit.<sup>85</sup> Indeed, *Huffman*'s scope has expanded over the years because the Federal Circuit has broadly interpreted the scope of what constitutes disclosures made pursuant to normal job duties. For example, in a broad interpretation of the job duties exclusion, the Federal Circuit determined that where an employee's normal job duties are to investigate wrongdoing and that employee voluntarily follows up on an initial report of wrongdoing, disclosures made pursuant to that voluntary work are also not protected.<sup>86</sup> The court justified its decision by asserting that follow-up work—even if it is not required by an employer—is a normal part of one's job and, therefore, falls within the scope of the *Huffman* decision.<sup>87</sup>

### *C. Other Federal Statutes: Generally, No Job Duties Exclusion*

*Huffman* and *Willis* are not the only decisions grappling with the

83. *Id.*

84. *Huffman*, 263 F.3d at 1353.

85. A current KeyCite search of *Huffman* reveals over 370 citing references, almost exclusively positive.

86. *Fields v. Dep't of Justice*, 452 F.3d 1297 (Fed. Cir. 2006).

87. *Id.* at 1305.

question of whether disclosures made pursuant to one's job duties would be protected by a federal statute prohibiting retaliation against employees.<sup>88</sup> Courts have addressed this situation in cases involving the anti-retaliation provisions of Title VII and the Fair Labor Standards Act (FLSA). In these cases, courts responded to the job duties issue in a fundamentally different manner than the *Huffman* and *Willis* courts. In Title VII and FLSA cases, courts have considered the precise statutory language to determine whether job-related disclosures of wrongdoing are protected rather than relying upon the judicially-created job duties exclusion. While the anti-retaliation language in these statutes differ,<sup>89</sup> like the WPA, neither of them contain any language expressly excluding from coverage those employees who disclose unlawful conduct as part of their job duties.<sup>90</sup>

Perhaps because of this, for many years, the job duties exclusion was not developed or discussed. Title VII provides an interesting example because its anti-retaliation provisions have existed for half a century. These provisions provide protection for two forms of employee conduct: (1) conduct opposing unlawful employment discrimination and (2) conduct where an employee participates in a Title VII proceeding or investigation.<sup>91</sup> Employees in human resources are an obvious target for the job duties exclusion, as they must frequently assess and report to supervisors whether unlawful discrimination has occurred. The job duties exclusion argument would be that those who report unlawful discrimination as part of their jobs, such as human resources personnel who report violations of Title VII to their supervisors, are not entitled to protection against retaliation under Title VII.

Rather than adopting a per se exclusion for those whose jobs involve

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88. As discussed above, in addition to generalized whistleblower protection statutes, some whistleblowers are also protected under other, topic-specific federal statutes. Probably the best-known of these types of whistleblower protections is found in Title VII of the Civil Rights Act of 1964, which protects employees who oppose unlawful employment discrimination or participate in a Title VII proceeding or investigation. 42 U.S.C. § 2000e-3(a) (2006). Environmental protection statutes also contain protections for whistleblowers; for instance, the Clean Air Act contains a provision prohibiting retaliation against employees who commence proceedings or assist in enforcement of the Act. 42 U.S.C. § 7622(a) (2006).

89. Compare 42 U.S.C. § 2000e-3(a) (2006) with 29 U.S.C. § 215(a)(3) (2006).

90. 42 U.S.C. § 2000e-3(a) (2006); 29 U.S.C. § 215 (a)(3) (2006).

91. 42 U.S.C. § 2000e-3(a) (2006).

the investigation and participation in discrimination claims, courts have assessed each situation on a case-by-case basis. For example, in 1986, the Sixth Circuit addressed a retaliation claim of a human resources employee.<sup>92</sup> The court did not mention the idea of a per se job duties exclusion at all.<sup>93</sup> Instead, the court focused on the particular actions of the employee and whether the employee's conduct opposed unlawful discrimination, whether the employee participated in a Title VII investigation or proceeding, or instead, whether the employee was a passive observer.<sup>94</sup> Merely acting as a scribe to document claims of discrimination was held insufficient to be protected activity due to the lack of active participation or opposition.<sup>95</sup> Other cases also show an analysis of the particular conduct of the plaintiff in each case and include no discussion of a categorical exclusion for reports made as a part of one's job.<sup>96</sup>

The approach courts used for interpreting Title VII is similar to that used for interpreting the FLSA. For instance, in *McKenzie v. Renberg's, Inc.*<sup>97</sup> the court examined a human resources employee's actions to determine whether she had engaged in protected activity under the FLSA. The FLSA protects employees who file a complaint or bring a claim under the FLSA or who testify in any proceeding under the Act.<sup>98</sup> The court was unwilling to allow a claim by an employee who raised

92. *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745 (6th Cir. 1986).

93. At one point, the court indirectly suggested that the prevailing thinking might go in the opposite direction when it stated that, "[a]n employee does not receive special protection under Title VII simply because the employee handles discrimination complaints . . ." *Id.* at 751.

94. *See id.*

95. Interestingly, this passive versus active participation rationale is now of questionable validity. In 2009, the Supreme Court determined that an employee who was merely responded to a company's questions regarding a co-worker's allegations of sexual harassment was protected against retaliation for providing information that supported the co-worker's allegations. *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271 (2009).

96. *See, e.g., EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998) (holding that human resources employee who refused to implement an order violating Title VII engaged in protected activity); *Matta v. Snow*, No. Civ.A. 02-862(CKK), 2005 WL 3454334 (D.D.C. Dec. 16, 2005) (holding that engaging in neutral assessment of other employees' Title VII complaints was not sufficient to establish protected activity).

97. *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996).

98. 29 U.S.C. § 215(a)(3) (2006). The FLSA also prohibits retaliation for serving on an industrial committee, but that was not an issue in this case.

concerns about other employees' rights.<sup>99</sup> Focusing on the specific statutory language, the court noted that the human resources employee had merely advised the company of potential violations; she had not filed a complaint nor had she assisted other employees in raising a complaint.<sup>100</sup> On the other hand, where a human resources employee took the additional step of refusing to obey an order that violated the FLSA, that conduct was held to be protected.<sup>101</sup> Here, again, no categorical job duties exclusion was adopted.

However, there is one instance of a federal court adopting the job duties exclusion in interpreting antiretaliation provisions of federal law. In 2005, a Court of Appeals panel for the Sixth Circuit determined that when an employee engages in activities that are a part of the employee's job duties, such activities cannot be protected activities under the Clean Air Act, the Solid Waste Disposal Act, or the Federal Water Pollution Control Act.<sup>102</sup> The plaintiff in *Sasse* was an Assistant United States Attorney whose job was to investigate and prosecute environmental crimes. He alleged that after one such investigation and prosecution, he was retaliated against by receiving heavier caseloads, worse assignments, taunting at the office, and the assignment of a drunken secretary who harassed him.<sup>103</sup>

The issue of whether the employee's actions were protected even though they were a part of his job duties was one of first impression under these environmental protection statutes. Rather than drawing upon the Title VII and/or FLSA cases, which are more similar to the environmental statutes in the sense that they are topic-specific whistleblower protections, the court cited to both *Huffman* and *Willis*,

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99. See *McKenzie*, 94 F.3d at 1486.

100. *Id.* There is language in *McKenzie* that could be read as consistent with the job duties exclusion. At one point, the court states that the plaintiff must "step outside of his or her role" as a human resources employee who advises the employer on conduct in order to engage in protected activity. See *id.* at 1486–87. However, until *Garcetti*, this language had been interpreted to mean that the employee must act in a way that shows opposition to the employer's conduct, not that conduct undertaken within one's normal job duties was unprotected. See, e.g., *Robinson v. Wal-Mart Stores, Inc.*, 341 F. Supp. 2d 759 (W.D. Mich. 2004) (focusing on employee taking a position adverse to the company).

101. See *Frazier v. United Parcel Serv., Inc.*, No. 1:02CV65090OWWDLB, 2005 WL 1335245 (E.D. Cal. May 3, 2005).

102. *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 780 (6th Cir. 2005).

103. *Id.* at 777.

and adopted the courts' approach.<sup>104</sup> The court used one of the rationales from *Huffman* and *Willis*: only employees who risk their job security by taking steps to protect the public good are protected by whistleblower provisions and that doing one's job does not constitute risking one's own job security.<sup>105</sup> As in *Huffman* and *Willis*, the court purported to engage in statutory construction and to rely on the plain language of the statutes. However, the court actually engaged in even less statutory interpretation than in *Huffman*; the court never identified any language in the statutes that would support the job duties exclusion and failed to even address the policies underlying the statutes.<sup>106</sup> In fact, there is nothing in the plain language of the statutes that suggests reports made pursuant to one's job are excluded from coverage of the statutes.<sup>107</sup>

*Sasse* remains the only example of any court adopting the *Huffman* job duties exclusion, other than cases brought under the WPA, before *Garcetti*.<sup>108</sup> It is quite possible that the *Huffman* job duties exclusion would have remained in its limited universe in perpetuity had *Garcetti* not been decided as it was by the Supreme Court.

### III. ASSESSING THE JOB DUTIES EXCLUSION

This Article has already assessed the job duties exclusion as a matter of statutory interpretation and concluded that the analyses of courts that have adopted the job duties exclusion are fundamentally flawed.<sup>109</sup> Looking beyond the analytical failings of these decisions, the job duties exclusion is incompatible with the policies behind whistleblower protection statutes and inconsistent with whistleblowing theory and research. The job duties exclusion also creates behavioral incentives for external reporting that are not optimal for individuals or employers.

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104. *Id.* at 780.

105. *See id.* at 780.

106. *See id.* at 779–80.

107. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1367(b) (2006); Solid Waste Disposal Act, 42 U.S.C. § 6971(b) (2006); Clean Air Act, 42 U.S.C. § 7622(b)(1) (2006).

108. For a complete discussion of the cases citing to *Huffman* before *Garcetti*, see Part III.B., *infra*.

109. *See supra* Part II.C.

*A. Incompatibility with Statutory Policy and Whistleblowing Research*

One of the fundamental policy justifications underlying whistleblowing statutes and common law claims is the need to disclose wrongdoing in order to protect the public. In statutes involving government whistleblowers, this is seen in the text of the law, which focuses on the need to protect the public purse against improper use of funds.<sup>110</sup> This justification finds its genesis as far back as the False Claims Act, which sought to limit the fraud being perpetrated by contractors against the federal government. The need to have employee-whistleblowers uncover this misuse of government funds lies in the nature of the wrongdoing. It is hidden, a type of corporate white-collar crime. Unlike the victims of violent crime, the government is unaware of the wrongdoing most of the time.<sup>111</sup> The goals of protecting the public purse and public safety were highlighted in the Senate Report on the Civil Service Reform Act of 1978, which states:

Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.<sup>112</sup>

As is evident from this passage, the goals behind whistleblowing protections also range from protecting public funds to protecting the public's physical safety. A recent example of the focus on physical safety is seen in the 2007 passage of a law to implement recommendations of the 9/11 Commission.<sup>113</sup> Parts of this law focus on

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110. *See, e.g.*, 5 U.S.C. § 2302 (2006).

111. *See* TERANCE D. MIETHE, WHISTLEBLOWING AT WORK 28–29 (1999) (discussing the hidden nature of criminal activity in the modern workplace); Ramirez, *supra* note 11, at 226 (discussing the hidden nature of white collar crime as a rationale for creating a blanket federal whistleblower protection statute).

112. S. REP. NO. 95-969, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730.

113. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053.

increasing the safety of public transportation, and these portions contain strong whistleblower protection provisions.<sup>114</sup>

In the private sector, safety concerns were the driving force behind the beginning of the modern whistleblowing movement. Ralph Nader's consumer safety advocacy in the 1970s is frequently credited as one of the driving forces behind modern whistleblower protection.<sup>115</sup> The focus of this movement was protecting the public from dangerous products produced by private companies. This goal of protecting public interests, as opposed to private interests, is evident in the decisions limiting whistleblowing claims to situations where there is a public interest present, not merely a private interest of the disclosing employee.<sup>116</sup>

While the need to protect the public purse was an initial rationale for encouraging whistleblowing in the government, recently, the protections for whistleblowers in the private sector have extended beyond protecting physical safety to protecting financial security. For instance, the Dodd-Frank Wall Street Reform and Consumer Protection Act created whistleblower protections for employees who provide information about violations of securities laws. This act also created a bounty system allowing these employees to share in a portion of the Securities and Exchange Commission's recovery of funds from the employer.<sup>117</sup>

Beyond the protection of the public's financial and physical safety, protecting employees who are carrying out job duties when they disclose wrongdoing also comports with the concept of the rule of law.<sup>118</sup> Disclosure of wrongdoing promotes enforcement and compliance with the law.<sup>119</sup> Employees are particularly effective at promoting compliance because of their placement and ability to detect unlawful behavior. Outsider inspectors and auditors put companies on alert,

114. *Id.* at § 1413. For a description of these provisions, see WESTMAN & MODESITT, *supra* note 9, at 3-18 (Supp. 2010).

115. See WESTMAN & MODESITT, *supra* note 9, at 10.

116. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988).

117. See Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203, § 922.

118. See Robert Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 586 (1999).

119. See MIETHE, *supra* note 111, at 85-86 (discussing importance of whistleblowing provisions to ensuring compliance with laws).

allowing the concealment of unlawful conduct. Employees are better positioned to see the normal conduct of the company. Protecting those who engage in disclosure encourages such disclosure and thereby promotes greater compliance by companies with legal requirements.

In addition, whistleblower statutes also embody a policy in favor of protecting employees' other, non-whistleblowing rights.<sup>120</sup> In other words, whistleblowing protection provisions help protect an employee's other substantive rights by ensuring that employees do not have to choose between losing their jobs and exercising other rights.<sup>121</sup>

All these policy goals—to protect public money, promote safety, protect private finances, encourage compliance with the law, and support individual rights—support strong protections for employee-whistleblowers. The job duties exclusion renders this valuable insider extremely vulnerable to retaliation for engaging in whistleblowing behavior. Employees are most likely to have insider information about employer wrongdoing when that conduct is something that they encounter on the job. It seems doubtful that most employees are actively looking outside of their duties for wrongdoing by their employers. The job duties exclusion forecloses protection in most instances where the employee's job involves investigation and disclosure of wrongdoing. This means that where employees are likely to have the most accurate information about wrongdoing, they are least likely to be protected if they disclose it. The lack of protection for these employees suggests that less whistleblowing will occur to the detriment of public safety and public and private financial interests.<sup>122</sup>

Empirical research on whistleblowing suggests employees whose job requires disclosure of wrongdoing are particularly well-situated to be effective whistleblowers. In a study of what makes individuals more likely to report wrongdoing, one of the key factors affecting whistleblowing behavior was the role of the employee.<sup>123</sup> Where the

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120. See Lobel, *supra* note 14, at 456–57 (describing the rights-based rationale for whistleblower protections).

121. Lobel, *supra* note 14, at 456–57.

122. However, those employees who have an obligation to disclose that is derived from a source outside of their employment duties, such as an attorney's ethical obligations, may still disclose wrongdoing due to such obligation. See, e.g., *Balla v. Gambro*, 584 N.E.2d 104 (Ill. 1991).

123. See Janet P. Near et al., *Explaining the Whistleblowing Process: Suggestions from Power*



employee's role was one in which the employee had some responsibility for reporting wrongdoing, the employee was more likely to engage in whistleblowing behavior.<sup>124</sup> These individuals were perceived of as having more credibility when they engaged in whistleblowing, as compared to employees whose jobs lacked such a role.<sup>125</sup> These employees are most clearly barred from whistleblower protection by the job duties exclusion because the terms of their job require reporting wrongdoing.

The exclusion is also unjustifiable because it operates to place greater weight on the employer's interests in controlling its employees than on the need to disclose illegal behavior. The exclusion, which is not written into whistleblowing statutes, represents a judicial re-weighing of the relative interests of the employer, the employee, and the public. Were the exclusion incorporated into the claim for wrongful discharge in violation of public policy, it might be justifiable as a part of the balancing of interests that the judicial branch has undertaken in creating new substantive legal rights. However, when the exclusion is grafted onto statutes which lack any language suggesting its existence, its legitimacy is questionable at best.

What interest of the employer, other than the general interest in controlling the workplace, might justify the job duties exclusion? One that has been raised is an employee's fiduciary obligations to the corporation.<sup>126</sup> The duty of loyalty requires that the employee act on behalf of the company and in the best interests of the company. The obligations imposed on an employee by this duty depend on the employee's position within the company. For example, a CEO is bound by much tighter constraints than is a janitor. A CEO would be prohibited from working for a competitor company by the duties of care and loyalty; a janitor would not.

The practical impact of the job duties exclusion is to foreclose protection even where, in reality, there is no tension between the goals

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*Theory and Justice Theory*, 4 ORG. SCI. 393, 398, 402 (1993).

124. *Id.*

125. *Id.* at 404.

126. *See, e.g., Willis v. Dep't of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (discussing the employee's "fiduciary obligations" to his employer); *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 780 (6th Cir. 2005); *see also WESTMAN & MODESITT, supra* note 9, at 28–30.

of promoting public safety and employee's duty of loyalty to the corporation. The tension between the whistleblowing policy goals of protecting the public and the employee's duty to be loyal to the company can be obvious in some instances. Where an employee knows that the company's product could be made safer by changes in the manufacturing or design of the product that would come at a high cost, does the employee act in the interest of the public (greater safety) or the interests of the company (cost savings)? Not all situations, however, exhibit such a tension; what may be in the best interests of the public (greater safety) may also be in the best interests of the company. For example, if the product in question could be made safer at a slightly increased cost, it may be in the interests of the company to change the design or manufacturing of the product in order to decrease the number of tort claims brought against it for harms caused by the product. The savings created by reducing the number of claims may offset or exceed the costs of making the design changes, manufacturing changes, or both.<sup>127</sup> What does this mean for the job duties exclusion? Given the goal of producing a safer society, if there is no tension, then there is no benefit to the job duties exclusion. If it is in the interests of the company to have the behavior disclosed, then there is no theoretical justification for allowing retaliation against the employee. At a minimum, this suggests that the job duties exclusion is unjustified where the best interests of the company lie in disclosure of the unlawful conduct.

Other employer interests merit inclusion in the assessment of the job duties exclusion. First, there is the need to control the workplace and engage in normal disciplinary practices.<sup>128</sup> The concern here appears to be that if reports made pursuant to one's job duties are protected disclosures, the employee can never be disciplined for making a bad report. Or, to put it more generally, employers fear that poor performers will use whistleblower protections as a shield against legitimate

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127. This type of situation could arise where there is imperfect information sharing within the company, such as where key decision makers are not informed of possible alternative designs, costs of litigation, or the likelihood of litigation.

128. This argument was made by the court in *Huffman* and is discussed in Part II.A., *supra*. This argument was also made by the employer in *Kidwell*. See Brief and Appendix of Respondent Sybaritic, Inc., *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010) (No. A07-584), 2008 WL 7967961.

discipline. Another employer concern relates to jobs involving compliance with legal standards. Employers fear that any discussion of compliance will be a protected report: if there is a genuine disagreement as to whether conduct is lawful, the employee cannot be disciplined for continuing to raise the issue even if the employer tells the employee to drop it.<sup>129</sup> Thus, this employee becomes disruptive in the workplace.

These are legitimate concerns of the employer. However, the answer to these concerns is not to exclude all reports made pursuant to an employee's job. First, as to the disciplinary concern, if the employer engages in discipline due to poor job performance, the disclosure of wrongdoing does not render the discipline unlawful merely because the poor performance relates to the discipline.<sup>130</sup> The finder of fact would be responsible for determining whether the true reason for discipline was a report of wrongdoing or poor performance.<sup>131</sup> Second, as to employees in compliance positions, these are the most crucial persons to protect in order to ensure whistleblowing continues. Employees in compliance positions are the ones most likely to see violations of the law in the company—it is in the nature of their work. Broadly excluding these employees' reports from protection would greatly undermine efforts at disclosing unlawful employer conduct. However, courts need not give carte blanche to these employees in the manner and the nature of their reports. For instance, the employee who keeps pressing his concerns after the employer has attempted to address them can lose protection by being unduly disruptive in reporting alleged wrongdoing.<sup>132</sup> Legitimate employer concerns can be addressed using existing doctrines that are more narrowly tailored to meet these concerns

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129. *See, e.g.,* Haddox v. Att'y Gen., No. 07AP-857, 2008 WL 3918077 (Oh. Ct. App. Aug. 26, 2008) (discussing the compliance position situation).

130. Most courts allow the employer to avoid liability by proving that the employer would have taken the same action even if the employee had not engaged in the whistleblowing behavior. *See* WESTMAN & MODESITT, *supra* note 9, at 234–35, 239–40 (noting that whistleblowing claims typically borrow Title VII burdens of proof); *see also* Suggs v. Dep't of Veterans Affairs, 415 F. App'x 240 (Fed. Cir. 2011) (affirming decision that employer's discipline of poor performing employee was proper despite employee's assertion that it was retaliation for engaging in whistleblowing).

131. *See, e.g.,* Ivey v. Department of the Treasury, 107 F. App'x 918 (Fed. Cir. 2004) (containing factual allegations of poor performance by employer versus whistleblowing activity by the employee).

132. *See, e.g.,* Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986); *see also* WESTMAN & MODESITT, *supra* note 9, at 236–37 (discussing potential employer defenses involving disruptive employees).

than is the job duties exclusion. The job duties exclusion replaces these fact-specific approaches with a broad exclusion, favoring interests of employers over the interests of the public and of the employee disclosing wrongdoing.

*B. Internal vs. External Reporting and the Job Duties Exclusion*

The job duties exclusion incentivizes external reporting by foreclosing protections for reports made to one's supervisor pursuant to one's job. Under the job duties exclusion, there are only two situations in which a person whose job involves the investigation and/or disclosure of wrongdoing is protected: (1) where the disclosure is made outside of normal reporting channels and (2) where the disclosure is not one that is normally a part of the job.<sup>133</sup> The simplest way to avoid the job duties exclusion is to report wrongdoing to an outside entity. Making a disclosure to the press, for example, will generally not be a disclosure in the normal channel or a disclosure that the employee is normally required to make, placing it within both exceptions to the job duties exclusion.

One might believe that because external disclosures are likely to remain protected even under the job duties exclusion, the exclusion will not have a significant negative impact on whistleblowing behavior. There are two flaws with this belief. First, most whistleblowers do not use external channels to report wrongdoing. In a study of whistleblowers, only 30% indicated that they would report wrongdoing externally.<sup>134</sup> The author of the study, Terance Miethe, posits that one of the reasons for this is the social conditioning not to air private dirty laundry in public.<sup>135</sup> Furthermore, in some instances internal reporting is not mere social conditioning: it is required. For instance, if an employee wants to obtain monetary relief under Title VII for reporting certain types of unlawful harassment on the job, the employee must report the harassment to the employer internally, use the company's normal reporting procedures, and give the company the opportunity to

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133. See *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1353 (Fed. Cir. 2001).

134. MIETHE, *supra* note 111, at 64.

135. *Id.*

take corrective action and stop the harassment.<sup>136</sup> In addition, reporting externally may lead to the employee breaching confidentiality requirements and, ultimately, may result in the employee losing the protection of whistleblowing statutes.<sup>137</sup> These types of legal requirements strengthen the sense of employees that one should first report internally. The job duties exclusion penalizes the employee who does what he is socially and legally conditioned to do.

In addition, excluding internal reporting from protected behavior helps create a workplace where the culture discourages whistleblowing. Where employees receive the message that internal disclosures are not welcome, a belief that no disclosures should be made, either internally or externally, is fostered. This leads to the development of a company that has fewer overall disclosures of wrongdoing.<sup>138</sup>

Furthermore, a disclosure to outsiders rather than insiders is typically not the ideal way to address wrongdoing. First, it is contrary to the duty of loyalty. The duty of loyalty requires an employee to act in the best interests of the employer. When faced with disclosing wrongdoing to the company itself or disclosing it externally, it would be better for the company to have a chance to correct the problem internally before the wrongdoing becomes known to outsiders.<sup>139</sup> In addition, putting to one side duty of loyalty considerations, external reporting is likely to be either disruptive to an organization or ineffective.<sup>140</sup> If the person receiving the report of wrongdoing does nothing, the report is ineffective. If the person receiving the report acts on it, disruption ensues for a number of reasons. First, the employer will not be receiving the information through its normal channels. Those best equipped to address the wrongdoing may be placed in a defensive position, reacting to outside pressure rather than conducting a more neutral investigation. This is particularly possible if, as is the case in

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136. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (establishing an affirmative defense for employers to certain Title VII claims).

137. For instance, under SOX, the disclosure of confidential information externally resulted in the employee losing his whistleblowing claim. See *Tides v. Boeing Co.*, 644 F.3d 809 (9th Cir. 2011).

138. See MIETHE, *supra* note 111, at 64 (discussing how corporate culture can affect rates of whistleblowing behavior).

139. See Near et al., *supra* note 123, at 395.

140. See Vaughn, *supra* note 118, at 599 (discussing the potential for disruption).

most larger organizations today, the entity has personnel and channels devoted to handling such reports. For instance, most employers have created mechanisms for reporting violations of Title VII, particularly instances of sexual harassment. A report to an external entity may not trigger the normal investigative process. For instance, newspaper reports of harassment may trigger a response at a higher corporate level and involve those who are not normally a part of such investigations, tainting the result and removing those individuals from their daily duties.

Additional empirical support for the perverse results of the job duties exclusion is found in a recent study of whistleblowers and what legal structures were the best at maximizing reporting of wrongdoing.<sup>141</sup> Yuval Feldman and Orly Lobel concluded that imposing a duty to report wrongdoing can increase rates of whistleblowing. If a duty to report increases whistleblowing behavior and suggests that those whose jobs involve a required report (making it a duty) are more likely to engage in whistleblowing behavior. The job duties exclusion places employees into a bind, where they owe an obligation to report but are not protected when they do so. The exclusion also creates potential for employer abuse. Specifically, by drafting employees' job descriptions to include a duty to report unlawful conduct, the employer limits the likelihood of employees' reports being protected by whistleblowing statutes.

In addition, the job duties exclusion also has the potential to bar another likely group of whistleblowers: those who know the appropriate channels within an organization to report wrongdoing.<sup>142</sup> Research has indicated that whistleblowing is more likely to occur among employees who are aware of the proper reporting channels and procedures.<sup>143</sup> Those who report within appropriate channels are unlikely to be protected due to the job duties exclusion. This may push individuals to report wrongdoing outside of the organization. The unfortunate result of this is likely to be greater retaliation against the employee, as there is also evidence that external whistleblowers are more likely to be

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141. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151 (2010).

142. Near et al., *supra* note 123 at 398.

143. *Id.* at 398.

retaliated against than those who report internally.<sup>144</sup>

On the other hand, there are some benefits to external reporting. First, it has the potential to bring unlawful behavior to the attention of law enforcement more quickly, before the company can engage in a cover-up. However, the determination of whether external or internal reporting is to be preferred has already been made by legislatures in crafting whistleblower protection statutes. As noted above, some statutes require internal reporting, while others require reporting to external entities.<sup>145</sup> The fact that such variations exist illustrates the legislative choices that are incorporated into the whistleblower statutes. The judicially created job duties exclusion ignores this legislative preference.

A second justification for requiring external reporting is that it creates a bright-line rule that is easy for courts to administer. Indeed, the ease of judicial administration is a potential justification for the entirety of the job duties exclusion, not just the aspect of it that encourages external reporting. After all, an inquiry into the parameters of an employee's job is eminently susceptible to resolution without a trial, as there are relatively few facts at issue. The entire debate over whether the employee was subject to negative treatment, and if so, why it occurred, can be sidestepped if the report was within the employee's job duties. Even so, the ease of judicial administration is an insufficient justification for a doctrine that effectively erases statutory protections for some whistleblowers.

#### IV. INFECTING THE STATES AND OTHER FEDERAL STATUTES

The job duties exclusion has existed for over a decade. During much of that time, it remained solely applicable to the WPA. It has only been since *Garcetti*<sup>146</sup> that the job duties exclusion has shown signs of

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144. MARCIA MICELI ET AL., WHISTLEBLOWING IN ORGANIZATIONS 115 (2008).

145. See, e.g., ALA. CODE § 36-26A-1 (2010); ARIZ. REV. STAT. ANN. § 38-531 (2010).

146. The notable exception to this is the *Sasse* decision applying the job duties exclusion to three federal environmental statutes. *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773 (6th Cir. 2005). However, this seems to be a unique case, as it involved a federal employee seeking whistleblower protection; as noted above, this put the attorneys in the case in the position of being aware of *Willis*, and *Huffman*. It is highly unlikely that the job duties exclusion would show the signs it is currently showing of becoming generally applicable based solely on *Sasse*; the publicity surrounding *Garcetti* popularized the concept.

beginning to expand its reach to state statutes, as will be discussed in detail below. Before discussing the expansion of the job duties exclusion, it is necessary to first understand *Garcetti* itself and its effect on the whistleblower protections available to governmental employees.

#### A. *Garcetti as a Whistleblower Case*

As noted above, there has been much scholarly analysis of *Garcetti v. Ceballos*,<sup>147</sup> most of it negative in nature.<sup>148</sup> This Article will consider *Garcetti* from a different perspective than much of the existing scholarship. To date, many of the analyses of *Garcetti* assess it from the perspective of First Amendment doctrine as applied to governmental employees.<sup>149</sup> This is the obvious context in which to assess *Garcetti*. However, there is another context in which *Garcetti* exists as well: the web of protections for governmental employee whistleblowers.

The plaintiff in *Garcetti* was a district attorney in California. Defense counsel contacted him and expressed concern about certain aspects of a specific case, particularly a warrant that had produced evidence leading to an indictment of defense counsel's client. Ceballos investigated the situation, which was something "not unusual" for a district attorney in his position as a calendar deputy officer to do.<sup>150</sup> The district attorney reported to his supervisors his belief that a warrant contained serious factual misrepresentations and that the indictment it produced should be dismissed. Ceballos's recommendation led to a meeting that included Ceballos, his supervisors, and the sheriff's officers who had been involved in the case. The meeting was heated and, ultimately, Ceballos's recommendations were rejected. Ceballos brought suit, alleging violations of his First Amendment rights because he allegedly

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

148. *See supra* note 5.

149. *See, e.g.*, Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008); Andrew Bernie, *A Principled Limitation on Judicial Interference: Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), 30 HARV. J.L. & PUB. POL'Y 1047 (2007); Stephen Safstrom, *Government Employee, Are You a "Citizen"?: Garcetti v. Ceballos and the "Citizenship" Prong to the Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, pt. 1 (2008).

150. *Garcetti*, 547 U.S. at 414.



suffered retaliation after the contentious meeting.<sup>151</sup>

Ceballos' employer argued that because Ceballos had been speaking in the meeting as an employee, not a citizen, his speech was not protected under the First Amendment.<sup>152</sup> The Supreme Court agreed, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>153</sup>

*Garcetti* has been much discussed and much criticized. Within this discussion, there has been some analysis of *Garcetti*'s implications for whistleblowers.<sup>154</sup> However, less attention has been paid to *Garcetti*'s role in acting as the final nail in the coffin of the federal employee who discloses wrongdoing as part of his job.<sup>155</sup> While the employee in *Garcetti* was a state attorney, the same situation could easily present itself to a federal attorney. The WPA does not protect the federal employee who informs his supervisors of wrongdoing—a potentially illegal search—because his report is part of his job duties. He is not covered by the exceptions to *Huffman* because he made the report to his supervisor within his chain of command, and this type of report is one that a federal employee is normally expected to make in performing his job. Nor is he protected by the First Amendment due to *Garcetti*.

Scholars have failed to note the fascinating adoption of a doctrine that appears to be derived from *Huffman*, without discussion or attribution, into First Amendment jurisprudence. Certainly the Supreme Court must have been aware of the job duties exclusion applicable to WPA claims. It was brought to the Court's attention in several of the many amici briefs filed in *Garcetti*.<sup>156</sup> The Government Accountability Project

151. *Id.* at 414–15.

152. Petition for Writ of Certiorari at 13–14, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2004 WL 2260964.

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

154. See, e.g., Lobel, *supra* note 14, at 451–55; Amanda Leiter, "Whistle . . . and You've Got an Audience," 36 FORDHAM URB. L.J. 747, 765–66 (2009); John Sanchez, *The Law of Retaliation after Burlington Northern and Garcetti*, 30 AM. J. TRIAL ADVOC. 539, 562–63 (2007).

155. Lobel, *supra* note 14, at 453 (addressing, albeit briefly, the issue of a federal employee disclosing wrongdoing as part of his job).

156. Brief of Amici Curiae Gov't Accountability Project, Nat'l Emp't Lawyers Ass'n and Ass'n of Trial Lawyers of Am. in Support of Respondent at 6, 22, *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

(GAP), together with the National Employment Lawyers Association and the American Trial Lawyers Association, filed a brief that explained how the WPA's job duties exclusion would bar a statutory claim for a federal employee. The brief noted that, "the [WPA] no longer covers speech that is part of carrying out assigned duties, except if the results are taken outside channels."<sup>157</sup> The brief cited both *Willis* and *Huffman* in support of this proposition.

The National Treasury Employees Union also brought the job duties exclusion to the Court's attention, noting, "Courts have denied er protection to employees who are performing their normally assigned duties in reporting waste, fraud and abuse."<sup>158</sup> The brief then cited *Sasse*, *Huffman*, and *Willis* in support of this proposition. The United States' amicus brief in *Garcetti* also mentioned *Huffman* but downplayed its significance.<sup>159</sup> The United States was supporting the state government's position in *Garcetti*, seeking to limit the employee's First Amendment rights. Its reference to *Huffman* focused on the fact that under some circumstances, an employee could still be protected for reports made in the workplace.<sup>160</sup> This discrepancy in the descriptions of *Huffman*<sup>161</sup> contained in the briefs should have at least triggered some inquiry into the contours of the *Huffman* holding, which would lead the Court to an understanding of the limited statutory protections for federal employees.

The Supreme Court's awareness of the job duties exclusion is also evident from the fact that one of the dissenting opinions discusses the problem created by *Garcetti* and the pre-existing job duties exclusion. Justice Souter's dissent expressly acknowledged the lack of protection under the WPA for federal employees' statements made in connection

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(No. 04-473), 2005 WL 1767695.

157. *Id.* at 22 (citing *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341 (Fed. Cir. 2001)).

158. See Brief for the Nat'l Treasury Emps. Union as Amicus Curiae Supporting Respondent at 19, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1749167.

159. See Brief for the United States as Amicus Curiae Supporting Petitioners at 27, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1276045.

160. *Id.*

161. Another brief brought to the Court's attention the somewhat disingenuous description of *Huffman* provided by the United States. See Brief of Elaine Mittleman as Amicus Curiae Supporting Neither Party, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2006 WL 730744.

with their normal job duties, stating that, “significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties . . . the very speech that the majority says will be covered by ‘the powerful network of legislative enactments’ . . . available to those who seek to expose wrongdoing.”<sup>162</sup> Justice Souter also cited both *Willis* and *Huffman* in his dissent. Despite this, the majority opinion in *Garcetti* failed to discuss or even acknowledge that the job duties exclusion it adopted had its genesis elsewhere.

In *Garcetti*, the Court assessed behavior that can be seen as whistleblowing—the report of an improper warrant—only from a First Amendment perspective. The Court did not consider whether the job duties exclusion it articulated would be appropriate as applied to a claim brought under a whistleblower protection statute. Whether the job duties exclusion should be applied to a particular whistleblower protection statute is a vastly different analysis than determining whether it applies to a First Amendment claim. This is primarily because of the divergent sources of these protections. On the one hand, the very idea that a governmental employee’s speech on the job may be protected under the First Amendment is a doctrine developed by the Supreme Court.<sup>163</sup> The test developed by the Supreme Court, even at the outset, was one that required the courts to balance employer interests against employee interests.<sup>164</sup> As the Court noted in *Pickering v. Board of Education*,<sup>165</sup> “the problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>166</sup> A doctrine that directs the courts on how to engage in that balancing under certain circumstances is, on some level, consistent with this balancing concept of the First Amendment. On the other hand, for whistleblower protection statutes, courts are not directed to balance the employer and employee interests—the balancing has already been

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162. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006) (citations omitted).

163. See *Connick v. Meyers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987).

164. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

165. *Id.*

166. *Id.* at 568.

done by the legislature in drafting the statute. Despite the fact that these are fundamentally different types of analysis, the imprimatur of Supreme Court approval of the job duties exclusion concept appears to have provided an unanticipated boost to the viability of the doctrine as applied to statutory whistleblower claims. This is discussed in the following subparts.

*B. The Garcetti Virus: Preparing Courts to Accept the Huffman Job Duties Exclusion*

Before analyzing the degree to which the job duties exclusion has infected state statutes, it is helpful to understand the manner in which this infection has been occurring. Before *Garcetti*, the job duties exclusion existed almost in a vacuum because it applied in such a limited context—to federal employees.<sup>167</sup> This would have made it known primarily to attorneys handling federal employee whistleblowing claims, not to employment lawyers handling whistleblowing issues in the private sector. *Garcetti* seems to have popularized the job duties exclusion, making the concept known more generally to attorneys and judges. Of these groups, the driving force behind the increasing number of courts accepting the job duties exclusion appears to be employers' attorneys. They have argued for its application in most whistleblowing cases,<sup>168</sup> with some success.

This is not to suggest that courts have unquestioningly accepted the job duties exclusion. The difficulty that attorneys have faced in arguing for the job duties exception has been that *Garcetti*'s adoption of the job duties exclusion took place under the First Amendment. While there are a few state statutes that mirror the First Amendment, making the application of *Garcetti* immediately apparent,<sup>169</sup> the holding cannot simply be applied to most statutory claims. The First Amendment analysis, with its focus on the topic of the speech and the balancing test

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167. While *Sasse* could be applied to private sector employees, it had not been.

168. As one plaintiff's lawyer stated, "Employers always argue for it [the job duties exclusion] to apply." Telephone interview with Jason Zuckerman, Senior Legal Advisor, U.S. Office of Special Counsel (July 2, 2010).

169. See, e.g., CONN. GEN. STAT. § 31-51q (2010).

of governmental and employee interests,<sup>170</sup> is entirely different from an analysis of the precise terms of a specific federal or state statute that would be necessary to determine whether the job duties exclusion should apply. However, the Supreme Court's acceptance of the job duties exclusion in one context (pursuant to the First Amendment) appears to have given indirect support for the job duties exclusion to be applied to state statutory whistleblower claims.<sup>171</sup>

In addition to validating the concept of the job duties exclusion, albeit in a different context, *Garcetti* indirectly provided assistance to attorneys in transferring its holding to whistleblowing statutes. In his dissent, Justice Souter commented on the effect of *Garcetti* for federal employees and discussed *Huffman* and *Willis*. Once attorneys were aware of *Huffman* and *Willis*, the argument became simple: generalized state whistleblowing statutes should be interpreted consistent with the WPA, using *Huffman* and *Willis* as a guide.

One of the significant flaws with this argument is that whistleblowing statutes vary, making adoption of an interpretation of the WPA subject to the similarities in language in the statutes. Of particular importance here is the variance in statutes in identifying the person to whom reports of wrongdoing must be made in order for statutory protections to apply to the employee. Some of these provisions are entirely incompatible with the job duties exclusion, while others render the job duties exclusion unnecessary. For instance, New York's whistleblower protection statute affirmatively requires that employees report wrongdoing to their supervisors and provide the employer with an opportunity to correct the alleged wrongdoing in order to be protected.<sup>172</sup> In other states, employees are required to report to appropriate enforcement authorities, making the job duties exclusion effectively unnecessary.<sup>173</sup> These varying statutory provisions are indicative of the fact that state statutory whistleblower protections embody a legislative balancing of employer interests versus employee

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170. See *Connick v. Myers*, 461 U.S. 138 (1983).

171. To continue with the infection analogy, *Garcetti* is the virus that invades the host-court and makes it more amenable to accepting the *Huffman* job duties exclusion.

172. N.Y. LABOR LAW § 740 (McKinney 2006).

173. See, e.g., MISS. CODE ANN. § 25-9-171 (West 2010) (requiring reports of government employees be made to a state investigative body).

and public interests. Thus, courts should not simply apply *Huffman* and *Willis* without considering the precise language of the state statute at issue.

Despite this, it appears that something, most likely *Garcetti*'s holding, is overriding the normal process of statutory interpretation. The fact that the Supreme Court's adoption of the job duties exclusion occurred in the context of the First Amendment is likely overshadowed by the fact that the Supreme Court accepted the *concept* of the job duties exclusion. Because of this, *Garcetti*'s acceptance of the job duties exclusionary concept has prepared courts to accept these arguments.

### *C. Increasing Employer Use and Court Acceptance of the Job Duties Exclusion*

Since *Garcetti*, employers' have, apparently, increasingly attempted to rely on the job duties exclusion to defeat a whistleblowing claim based on state statutory protections. Before *Garcetti*, there were only a few such reported cases.<sup>174</sup> Since then, this number has more than tripled.<sup>175</sup>

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174. A search of Westlaw revealed four such instances of employers relying on *Huffman* as a guide to interpreting a state statute in the five years between *Huffman* and *Garcetti*. During this timeframe there were also two jurisdictions whose courts had addressed the concept of the job duties exclusion without reference to *Huffman*. See *Colores v. Bd. of Trs.*, 130 Cal. Rptr. 2d 347 (Cal. Ct. App. 2003); *Erickson v. City of Orr*, No. A05-481, 2005 WL 2277395, at \*7 (Minn. Ct. App. Sept. 20, 2005); *Andrews v. Northwestern Travel Servs.*, No. C5-97-1766, 1998 WL 100608, at \*4 (Minn. Ct. App. Mar. 10, 1998); *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548 (Minn. Ct. App. 2005); *Freeman v. Ace Tel. Ass'n*, 404 F. Supp. 2d 1127 (D. Minn. 2005). In neither jurisdiction did the courts adopt a broad job duties exclusion. In *Colores*, the California Court of Appeals refused to apply any exclusion at all. In Minnesota, the courts developed a requirement that an individual whose job required reporting wrongdoing prove that his intent was to expose wrongdoing, not merely to fulfill the employee's job duties. There have also been less-successful attempts to apply the job duties exclusion to the anti-retaliation provisions of federal, topic-specific statutes, using *Sasse* as the guide and basis for the argument. See Defendant's Motion for Directed Verdict, *Mather v. Exec. Office of Pub. Safety*, No. 04-1476 (Mass. Super. Ct. May 12, 2006), 2006 WL 3495504; Opposition to Motion for Leave to File Amended Complaint, *Cates v. State*, No. GIC 809037 (Cal. Super. Ct. Mar. 12, 2004), 2004 WL 5651460; *Dunleavy v. Wayne Cnty. Comm'n*, No. 04-74670-CL, 2005 WL 2545740 (E.D. Mich. Aug. 12, 2005); *Rogers v. City of Fort Worth*, 89 S.W.3d 265 (Tex. Ct. App. 2002).

175. The following are cases in which the *Huffman* job duties exclusion was raised: *Lehmann v. Conn. Legal Rights Project, Inc.*, No. CV054018378, 2007 WL 1053941, at \*1 (Conn. Super. Ct. Mar. 27, 2007); Defendant's Reply Brief in Support of Motion for Summary Judgment, *Nobles v. Indus. Powder Coatings, Inc.*, No. 3:05-CV-311 (E.D. Tenn. July 3, 2007), 2007 WL 4834450; *Haddox v.*

Furthermore, none of the four cases relying on *Huffman* that predated *Garcetti* explicitly adopted the job duties exclusion. In *Mather v. Executive Office for Public Safety*, the defendant made the argument in a motion for a directed verdict, which was denied.<sup>176</sup> In *Cates v. State*, the defendant asserted the job duties exclusion in the trial court as part of its opposition to the Plaintiff's Motion for Leave to Amend,<sup>177</sup> but that court ultimately decided the issue on other grounds.<sup>178</sup> The court in *Dunleavy v. Wayne County Commission* dismissed the state statutory whistleblower claim for lack of subject matter jurisdiction as part of its decision dismissing a federal claim without addressing the defendant's proffered argument on the job duties exclusion.<sup>179</sup>

In only one of these cases before *Garcetti* did the court expressly address the applicability of the *Huffman* job duties exclusion to a state

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Att'y Gen., No. 07AP-857, 2008 WL 3918077 (Ohio Ct. App. Aug. 26, 2008); Defendants' Motion in *Limine*, *Clifford v. Commonwealth*, No. 2003-0682 (Mass. Super. Ct. Sept. 29, 2008), 2008 WL 6858342; Petition for Review, *Vera v. Sun Land Beef Co.*, No. CV-09-0085-PR (Ariz. Ct. App. 2009), 2009 WL 2335091; Defendant's Reply in Support of Motion for Summary Judgment, *Prendergast v. Fundamental Long Term Care Holdings, L.L.C.*, No. CV 07-01265 (D. N. Mex. June 15, 2009), 2009 WL 2817454; Plaintiff's Brief in Opposition to Motion to Dismiss, *Hess v. Borough of Blairsville*, No. 209-CV-00935 (W.D. Penn. Aug. 20, 2009), 2009 WL 3212944; Brief for the Defendants-Appellees, *Malone v. Lockheed Martin Corp.*, No. 09-2060 (1st Cir. Nov. 10, 2009), 2009 WL 6809429; *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010); Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, *Barker v. UBS AG & UBS Sec., L.L.C.*, No. 3:09-CV-02084 (D. Conn. Jan. 22, 2010), 2010 WL 1228029; *Trusz v. USB Realty Investors, L.L.C.*, No. 309-cv-268, 2010 WL 1287148, at \*9 (D. Conn. Mar. 30, 2010); Appellant's Opening Brief, *Mize-Kurzman v. Marin Comm. Coll. Dist.*, No. CV-073384 (Cal. Ct. App. Aug. 10, 2010), 2010 WL 3481775; *Gammon v. Crisis & Counseling Cntrs., Inc.*, 762 F. Supp. 2d 165 (D. Me. 2011). Not all these cases resulted in a court decision addressing the job duties exclusion. Five jurisdictions—California, Connecticut, Ohio, Louisiana, and Minnesota—have addressed the job duties exclusion.

176. See Defendant's Motion for Directed Verdict, *Mather v. Exec. Office of Pub. Safety*, No. 04-1476 (Mass. Super. Ct. May 12, 2006), 2006 WL 3495504 (articulating *Huffman* argument); Special Verdict, *Mather v. Exec. Office of Pub. Safety*, No. 04-1476 (Mass. Super. Ct. May 16, 2006), 2006 WL 2158974 (indicating that directed verdict was denied as the case ultimately went to the jury).

177. See Opposition to Motion for Leave to File Amended Complaint, *Cates v. State*, No. GIC 809037 (Cal. Super. Ct. Mar. 12, 2004), 2004 WL 5651460 (arguing for *Huffman* as a basis for denying leave to amend complaint); Memorandum of Points and Authorities in Support of Defendant DGC's Motion for Attorneys' Fees, *Cates v. State*, No. GIC 809037 (Cal. Super. Ct. May 25, 2005), 2005 WL 6226000 (noting that whistleblowing claim was dismissed but not specifying basis for decision).

178. See *Cates v. Div. of Gambling & Control*, No. D. 046874, 2007 WL 702229, at \*11 (Cal. Ct. App. Mar. 8, 2007).

179. See Opinion and Order of Dismissal, *Dunleavy v. Wayne Cnty. Comm'n*, No. 04-cv-74670 (E.D. Mich. Aug. 16, 2009), 2006 WL 2375679.

statutory whistleblower claim. In 2002, the Texas Court of Appeals declined to adopt the job duties exclusion in *Rogers v. City of Fort Worth*.<sup>180</sup> *Rogers* involved a deputy sheriff who was allegedly fired for writing a report which contained information about a co-worker's conduct that violated a city ordinance.<sup>181</sup> The defending employer argued that the *Huffman* job duties exclusion applied, apparently because the employee had written the report at his supervisor's request.<sup>182</sup> The Court articulated two reasons for its refusal to follow *Huffman*. First, the Court noted that the *Huffman* rationale for the adoption of the job duties exclusion was based on its legislative history, which the *Huffman* court described as limiting the goal of the WPA to protecting employees who go above and beyond the call of duty.<sup>183</sup> The *Rogers* court found no similar legislative history in the Texas whistleblower protection statute and determined that even though the Texas statute was generally modeled after the WPA, this was insufficient to justify the adoption of the *Huffman* approach.<sup>184</sup> Second, the *Rogers* court indicated that the *Huffman* job duties exclusion was inconsistent with Texas precedent and suggested that the terms of the statute lacked any language that would justify the exclusion.<sup>185</sup>

Since *Garcetti*, there has been an increase in the incidence of employers relying on the job duties exclusion.<sup>186</sup> In addition, there are indications that courts are more willing to accept the job duties exclusion. While the majority of the post-*Garcetti* cases have resulted in no direct discussion of the job duties exclusion, four jurisdictions since *Garcetti* have accepted the job duties exclusion, and one jurisdiction appears to have accepted the job duties exclusion in part, applying it to public employees but not private employees. Only one jurisdiction has refused to apply the job duties exclusion at all. In sum, what appeared to be a losing argument pre-*Garcetti* is now viable.

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180. See *Rogers v. City of Fort Worth*, 89 S.W.3d 265 (Tex. Ct. App. 2002).

181. *Id.* at 271–74.

182. See *id.* at 276 (declining to apply *Huffman*).

183. *Id.*

184. *Id.*

185. See *id.*

186. Of the thirteen cases where the *Huffman* job duties exclusion has been raised, only the seven cases discussed below appear to have resulted in a decision on whether to apply it.



Minnesota provides insight into how *Garcetti* has indirectly influenced courts to accept the job duties exclusion. Minnesota had grappled with the issue of whether disclosures made as a part of an employee's job were protected under the Minnesota Whistleblower Protection Act before *Garcetti*.<sup>187</sup> While pre-*Garcetti* cases interpreting the Minnesota Act did discuss an employee's job duties, the primary focus was on the statute's "good faith" requirement. The good faith requirement provides that, in order to be protected, an employee's disclosure must be made in good faith.<sup>188</sup> This term was defined to provide protection only to disclosures made for the purpose of exposing illegality.<sup>189</sup> Thus, the inquiry was whether the disclosure was made with the purpose of exposing illegality or simply done because the employee's job required it. These Minnesota cases did not cite to *Willis*, *Huffman*, or *Sasse*.<sup>190</sup>

After *Garcetti*, it still took some time before *Huffman* and *Willis* intruded into Minnesota's analysis. In 2008, the Minnesota Court of Appeals addressed the job duties issue in *Kidwell v. Sybaritic, Inc.*,<sup>191</sup> yet none of the briefs mentioned *Garcetti*, *Huffman*, *Willis*, or *Sasse*,<sup>192</sup> and the court's decision followed the Minnesota analysis described

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187. See, e.g., *Freeman v. Ace Tel. Ass'n*, 404 F. Supp. 2d 1127 (D. Minn. 2005) (explaining that the Minnesota Act protects employees in the public and private sectors).

188. See, e.g., *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555–56 (Minn. Ct. App. 2005) (focusing on "good faith" and intent to expose illegality in assessing whether employee performing job engaged in protected activity); *Erickson v. City of Orr*, No. A05-481, 2005 WL 2277395, at \*7 (Minn. Ct. App. Sept. 20, 2005) (noting that intent must be to expose illegal behavior); *Freeman*, 404 F. Supp. 2d at 1139–41 (discussing the "good faith" requirement and concluding that merely performing one's job is insufficient to establish the requisite good faith). While the good faith requirement is the primary mode of analysis, some cases do exist where the court fails to analyze the issue in depth and cursorily concludes that the report was made not to expose illegality but to perform one's job. See, e.g., *Andrews v. Northwestern Travel Servs., Inc.*, No. C5-97-1766, 1998 WL 100608 (Minn. Ct. App. Mar. 10, 1998) (discussing job duties without focusing on good faith or intent in making report).

189. See *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000).

190. See *Gee*, 700 N.W.2d at 555–56; *Erickson*, 2005 WL 2277395, at \*7; *Freeman*, 404 F. Supp. 2d at 1139–41.

191. *Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855 (Minn. Ct. App. 2008).

192. See *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555–56 (Minn. Ct. App. 2005); *Erickson v. City of Orr*, No. A05-481, 2005 WL 2277395 at \*7 (Minn. Ct. App. 2005); *Freeman*, 404 F. Supp. 2d at 1139–41.

above.<sup>193</sup> By the time that *Kidwell* made it to the Minnesota Supreme Court, however, *Huffman*, *Willis*, and *Garcetti* were heavily cited in the parties' briefs,<sup>194</sup> and *Huffman* went on to take center stage in the court's analysis.

*Kidwell*<sup>195</sup> serves as an example of the extent to which *Garcetti* is affecting the state court interpretations of state whistleblowing statutes. Minnesota had a decade of decisions that focused on good faith in assessing whether a disclosure was protected.<sup>196</sup> Despite this, the Minnesota Supreme Court took a radically different approach in *Kidwell*; one that, in effect, adopted the *Huffman* job duties exclusion. While the court explicitly stated that it was not adopting a blanket rule that "as a matter of law, 'an employee does not engage in protected conduct under the whistleblower act if the employee makes a report in fulfillment of the duties of his or her job,'"<sup>197</sup> it effectively replaced its good faith test with the *Huffman* job duties exclusion.

In order to reach this result, the court first determined that it was appropriate and helpful to consider cases interpreting the WPA, ignoring the fact that the WPA and Minnesota statute's language differs.<sup>198</sup> The court then suggested that it was combining the traditional Minnesota analysis, described above, with the *Huffman* approach when it decided

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193. The Court of Appeals appeared to go one step further than earlier cases, though, when it stated that employees are not protected under the state whistleblower statute if the report of illegality is done pursuant to their job duties. This seemed to suggest that the case-by-case assessment of the employee's good faith intent was being replaced with an absolute bar. See *Kidwell*, 749 N.W.2d at 857.

194. In *Kidwell*, the employee, did not cite any of these sources in his initial brief. See Brief and Appendix of Appellant Brian Kidwell, *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010) (No. A07-584), 2008 WL 7967955. However, his employer relied on all of these cases in its initial brief. See Brief and Appendix of Respondent Sybaritic, Inc., *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010) (No. A07-584), 2008 WL 7967961, at \*24–25, \*27. Kidwell's subsequent brief addressed these cases as well. Reply Brief of Appellant Brian Kidwell, *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010) (No. A07-584), 2008 WL 7967964, at \*1–2, \*6–7.

195. *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (Minn. 2010).

196. See *Erickson v. City of Orr*, No. A05-481, 2005 WL 2277395, at \*7 (Minn. Ct. App. Sept. 20, 2005); *Andrews v. Northwestern Travel Servs.*, No. C5-97-1766, 1998 WL 100608, at \*4 (Minn. Ct. App. Mar. 10, 1998); *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548 (Minn. Ct. App. 2005); *Freeman v. Ace Tel. Ass'n*, 404 F. Supp. 2d 1127 (D. Minn. 2005).

197. *Kidwell*, 784 N.W.2d at 226–27.

198. The dissent in *Kidwell* notes that drawing on interpretations of the WPA is inappropriate because there are textual distinctions between the two statutes. See *Kidwell*, 784 N.W.2d 220, 236 (Minn. 2010) (Anderson, J., dissenting).

that where the employee's report of wrongdoing is made pursuant to the employee's job duties, the employee will need to show "something more" in order to prove that the report was made with the intent to blow the whistle. This appears to do little to change existing Minnesota law. However, the court then went on to analyze the question of what "something more" would be by explicitly approving *Huffman*'s exceptions to the job duties exclusion.<sup>199</sup> First, the court adopted the *Huffman* exception that protects reports made outside of the normal reporting structure.<sup>200</sup> Second, the court adopted the *Huffman* exception that protects reports where the employee is generally required to report wrongful behavior (as would be the case where a statute or regulation requires the reporting), but the requirement is not a specifically assigned duty.<sup>201</sup>

The result of this marriage of existing Minnesota doctrine and the job duties exclusion is, at the end of the day, likely to become simply the job duties exclusion. This is evident by the manner in which the court applied its announced rules. Rather than a general assessment of the employee's intent, the court determined that the employee's report was not protected because neither of the two *Huffman* exceptions applied and specifically noted that "this case falls within the first situation described above in *Huffman*, where an employee, with a specific assignment for ensuring legal compliance, discovers and reports a potential problem to his client."<sup>202</sup> Minnesota has become infected with the job duties exclusion.<sup>203</sup> Moreover, this marks a significant doctrinal shift because the exclusion will now be applied to public and private sector employees' whistleblowing claims.<sup>204</sup>

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199. *Id.* at 228–29 (majority opinion).

200. *Id.* at 229–30.

201. *Id.*

202. *Id.* at 230.

203. Once adopted, the job duties exclusion seems to become a driving force in much whistleblowing litigation. For example, since *Huffman* was decided, the job duties exclusion has been relied upon in hundreds of cases involving the WPA. This can be seen by Key Citing *Huffman* and then limiting the display to those cases relying upon the headnotes addressing the job duties exclusion. Since these are only the cases that end up being reported by Westlaw, it is fair to assume there are a significant number of cases dismissed early on based on the job duties exclusion that do not end up reported.

204. *Kidwell* involved a private sector employee. The Minnesota statute covers both public and private sector employees. MINN. STAT. ANN. § 181.931 (West 2010).

The second, and perhaps most enthusiastic, acceptance of the job duties exclusion since *Garcetti* is seen in *Haddox v. Ohio Attorney General*,<sup>205</sup> a decision by the Ohio Court of Appeals. *Haddox* involved a state attorney who alleged that she had been demoted because she reported a subordinate for misreporting her time, resulting in an accrual of compensatory time to which the subordinate employee was not entitled.<sup>206</sup> The court noted a scarcity of authority interpreting the Ohio whistleblowing statute, and therefore turned to *Willis* and *Huffman* for guidance. The court quoted extensively from *Willis* and *Huffman*,<sup>207</sup> then noted that “we find the reasoning of the federal courts equally applicable to [the Ohio statute] . . . .”<sup>208</sup>

The *Haddox* court did not, however, take the initial step of considering whether the language of the statutes is sufficiently similar to justify following *Huffman*. In fact, there are differences between the statutes. For instance, the WPA does not delineate to whom protected disclosures must be made; however, Ohio’s statute does by specifically identifying supervisors as those to whom reports may be made.<sup>209</sup> This specific inclusion of reports made to supervisors within the protection of the statute undercuts part of *Huffman*’s rationale—that Congress could not have intended to cover disclosures to supervisors because that would encompass too many workplace disputes. As a matter of statutory analysis, *Haddox* is less than compelling.

What appeared to be driving the decision in *Haddox* was the court’s concern about the potential number of whistleblowing claims that could be brought without having a limitation like the job duties exclusion.<sup>210</sup>

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205. *Haddox v. Att’y Gen.*, No. 07AP-857, 2008 WL 3918077 (Ohio Ct. App. Aug. 26, 2008).

206. *Id.* at \*6–7.

207. The court also mentioned a third case, *Anderson v. Dep’t of Energy*, 89 Fed. App’x 711 (Fed. Cir. 2004) (per curiam), which applied *Huffman* and cited to *Sasse* and *Skare v. Extendicare Health Servs., Inc.*, 515 F.3d 836 (8th Cir. 2008) (applying Minnesota law in a federal case).

208. *Haddox*, 2008 WL 3918077, at \*9.

209. Compare 5 U.S.C. § 2302 (2006) with OHIO REV. CODE ANN. § 124.341(A) (West 2010). Another example of differences between the statutes is that the WPA protects “disclosures”, while the Ohio statute protects only written “reports”. While this particular language may not affect the adoption of the job duties exclusion, it illustrates how differently the statutes are written, which suggests that wholesale adoption in Ohio of a judicially-created exception to the WPA should be viewed skeptically.

210. See *Haddox v. Att’y Gen.*, No. 07AP-857, 2008 WL 3918077, at \*9 (Ohio Ct. App. Aug. 26, 2008) (expressing concern that accepting the employee’s argument would open the door to every supervisory report being the basis for a whistleblowing claim).

As discussed in Part II.A., *supra*, this concern can be addressed in a far more focused manner than by categorically excluding all reports made pursuant to one's job.

Another flaw in the *Haddox* court's analysis was its second rationale for adopting the job duties exclusion. Looking beyond *Huffman* and its progeny, the *Haddox* court found support for its decision in the Minnesota Court of Appeals decision in *Kidwell v. Sybaritic*.<sup>211</sup> The problem with this approach, however, is that the Minnesota statute contains a good faith requirement that serves as the statutory basis for the *Kidwell* version of the job duties exclusion;<sup>212</sup> such a requirement is not necessary under the Ohio statute.<sup>213</sup>

The third example of adoption of the job duties exclusion is seen in the state of Louisiana, and the decision shows a lack of analysis far greater than that in *Haddox*. In *Matthews v. Military Dep't of the State of Louisiana*,<sup>214</sup> the Louisiana Court of Appeals determined, without discussion of the facts or law, that the job duties exclusion applied to a whistleblower provision in Louisiana's environmental protection statute.<sup>215</sup> Rather than relying on *Huffman*, the court used *Sasse* to support its decision. Even so, since *Sasse* relied on *Huffman* as support for its adoption of the job duties exclusion, *Matthews* ultimately rests upon *Huffman*. Much like *Haddox*, though, the court failed to assess the language of the whistleblower protection provision in the Louisiana statute and whether the language was sufficiently similar to that in the environmental protection statutes at issue in *Sasse*.<sup>216</sup> The court's summary conclusion in *Matthews* was followed in a later case, *Stone v. Entergy Services, Inc.*,<sup>217</sup> also without any analysis of the rationale for

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211. *Id.* at 10.

212. *Id.*

213. See OHIO REV. CODE ANN. § 124.341(A) (West 2010).

214. *Matthews v. Military Dep't*, 970 So. 2d 1089 (La. Ct. App. 2007).

215. *Id.* at 1090.

216. *Id.* The entire discussion of the job duties exclusion and *Sasse* consists of the following statement: "We also find that plaintiff is afforded no protection under La. R.S. 23:967 or 30:2027 for his reports relative to the State's potential liability for acquisition of the Gillis Long Hansen Disease Center insofar as the reports were required as part of his normal duties. See *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773 (6th Cir. 2005)." *Id.*

217. *Stone v. Entergy Servs., Inc.*, 9 So. 3d 193 (La. Ct. App. 2009).

adopting the exclusion.<sup>218</sup>

As with the Ohio statute, the language of the Louisiana environmental protection whistleblower provision is at least somewhat at odds with the job duties exclusion. The Louisiana statute explicitly covers reports made to an employee's supervisor.<sup>219</sup> Neither *Matthews* nor *Stone* addressed this language. Nor, for that matter, did these decisions address any statutory language before reaching the conclusion that the job duties exclusion would apply. Similarly, these courts failed to discuss the purpose of the Louisiana statute. In fact, the courts failed to articulate *any* rationale whatsoever for adopting the job duties exclusion.<sup>220</sup>

The fourth adoption of the job duties exclusion is found in *Mize-Kurzman v. Marin Comm. College District*.<sup>221</sup> In *Mize-Kurzman*, the trial court gave a limiting jury instruction on a state statutory whistleblower claim that incorporated the job duties exclusion in *Huffman*.<sup>222</sup> The party's appellate brief indicated that the trial court accepted *Huffman*, but there was no indication of the rationale behind the decision.<sup>223</sup> The case is on appeal, and it remains to be seen whether the decision will stand.

Despite these applications of the job duties exclusion, employers have not prevailed in every jurisdiction that has addressed the issue. In Connecticut, the results for employers have been mixed, with public but not private sector employee claims under the Connecticut statute being subject to the job duties exclusion. Connecticut presents an interesting case study of the influence of *Garcetti* because the state has a statute codifying freedom of speech protections for employees in both government and private sector that has been used as the source of whistleblower protections by some employees.<sup>224</sup> Even though the

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218. In *Stone*, the parties discussed both *Matthews* and *Sasse* in their briefs; however, the court's opinion states that it finds "no Louisiana cases directly on point." *Id.* at 200.

219. LA. REV. STAT. ANN. § 30:2027(A)(1) (2010).

220. See generally *Stone*, 9 So. 3d 193; *Matthews v. Military Dep't*, 970 So. 2d 1089 (La. Ct. App. 2007).

221. Appellant's Opening Brief, *Mize-Kurzman v. Marin Comm. Coll. Dist.*, No. A126937 (Cal. Ct. App. Aug. 10, 2010), 2010 WL 3481775, at \*20 (discussing trial court's decision).

222. *Id.*

223. *Id.*

224. See CONN. GEN. STAT. § 31-51q (2010) (providing that "[a]ny employer . . . who subjects

argument for adopting the job duties exclusion seems far more compelling under such a statute, courts have, so far, been reluctant to apply it to employees in the private sector. For instance, in 2007, a Connecticut Superior Court refused to apply *Garcetti* to a private sector employee who brought a claim under the Connecticut statute (§ 31-51q), but provided no explanation other than the fact that *Garcetti* involved a public employee.<sup>225</sup> A more recent U.S. District Court decision provided more substance while reaching the same conclusion. In *Trusz*, the court indicated that *Garcetti* would not apply, noting that *Garcetti*'s holding applied only to public employees and that it “[did] not follow that the rationale for public workplace limitations delineated in *Garcetti* should also apply to private workplaces.”<sup>226</sup> These cases suggest that while *Garcetti* will not apply to private sector employee claims under § 31-51q, it will apply to government employees.

Since *Garcetti*, there has been only one case in which the result has been a clear repudiation of the job duties exclusion. In *Vera v. Sun Land Beef Co.*<sup>227</sup> the Arizona Court of Appeals refused to adopt the employer's argument to apply the job duties exclusion. The case involved a former employee of a beef processing company who alleged he was fired for reporting to his supervisor incidents where the company violated a host of environmental laws.<sup>228</sup> The former employee sued, based in part on Arizona's whistleblower protection statute. On appeal, the employer relied heavily on *Garcetti* and argued that the *Huffman* job duties exclusion should apply to the Arizona whistleblower protection statute.<sup>229</sup> In rejecting this contention, the court noted:

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any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the [F]irst [A]mendment to the United States Constitution or section 3, 4, or 14 of article first of the Constitution of the state . . . shall be liable to such employee for damages . . .”). Connecticut also has a general whistleblower protection statute which is more similar to the WPA and the Minnesota and Texas statutes discussed previously. See CONN. GEN. STAT. § 31-51m (2010).

225. *Lehmann v. Conn. Legal Rights Project, Inc.*, No. CV054018378, 2007 WL 1053941, at \*1 (Conn. Super. Ct. Mar. 27, 2007).

226. *Trusz v. USB Realty Investors, L.L.C.*, No. 309cv268, 2010 WL 1287148, at \*9 (D. Conn. Mar. 30, 2010).

227. *Vera v. Sun Land Beef Co.*, No. 1 CA-CV 07-0479, 2009 WL 532625 (Ariz. Ct. App. Mar. 3, 2009).

228. *Id.* at \*1.

229. See Appellant/Cross-Appellee's Opening Brief, *Vera v. Sun Land Beef Co.*, No. 1 CA-CV 07-0479 (Ariz. Ct. App. Sept. 28, 2007), 2007 WL 3047534, at \*26–27.

[Defendant] nevertheless contends that Vera's claim should be rejected because he merely reported to [Defendant] issues that were public knowledge and because he performed his regular employment duties in making such warnings. However, these arguments are based on out-of-state cases and statutes and cannot add to or subtract from the statutory provisions set forth by A.R.S. § 23-1501(3)(c)(ii).<sup>230</sup>

This approach, while not an in-depth analysis of the issue, at least has the virtue of considering the state's statutory language.

In short, before *Garcetti* was decided, employers sought to apply the job duties exclusion in only a handful of cases, and no court adopted it. Since *Garcetti*, however, employers more frequently argue the job duties exclusion and with greater success. Six states have directly addressed the job duties exclusion. Four of these have adopted it, one shows signs of a mixed approach, adopting it for public employees but not private sector employees, and only one has refused to adopt it.

## V. FIGHTING THE INFECTION

Immediate action is required to prevent the job duties exclusion from gaining greater acceptance. Three steps can be taken in this effort. First, on the federal level, Congress should amend the WPA to overrule *Willis* and *Huffman* and eliminate the job duties exclusion. The necessary amendment is simple, and has been proposed several times in the last few years, but it has never been enacted.<sup>231</sup> An amendment could expand the definition of a protected disclosure by adding the following language: “including a disclosure made in the ordinary course of an employee's duties.”<sup>232</sup> Amending the WPA might also have an impact beyond the federal employee whistleblower situation, as it would discredit *Huffman* and *Willis* as a source of support for adopting the job duties exclusion.

Second, at the state level legislatures can proactively amend whistleblower protection statutes to explicitly protect job-related

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230. *Vera v. Sun Land Beef Co.*, No. 1 CA-CV 07-0479, 2009 WL 532625, at \*3 (Ariz. Ct. App. Mar. 3, 2009).

231. *See* S. 274, 110th Cong. (2007); S. 995, 107th Cong. (2001).

232. This is the language that has been proposed by Senator Akaka, an ardent supporter of the amendment, on numerous occasions. *See* S. 274, 110th Cong. (2007); S. 995, 107th Cong. (2001).



disclosures. California and the District of Columbia recently became the first jurisdictions to take this step.<sup>233</sup> Both of these jurisdictions revised the definition of a protected disclosure to explicitly include reports made within the course of performing ordinary job duties.<sup>234</sup> While California has taken one proactive step toward ensuring that whistleblower protections are not eviscerated by the job duties exclusion, not all whistleblowers are covered by this legislative fix. California has numerous statutes protecting whistleblowers,<sup>235</sup> and only one of these, the primary source of protection for state governmental employees, has been amended to affirmatively cover disclosures made pursuant to one's job duties. Private sector whistleblowers are not covered by the amendment. It may be that the legislature believed that the job duties exclusion would only apply to public sector employees and thus saw no need to amend the private sector whistleblower statutes. However, as is evident from *Kidwell*, the job duties exclusion has been applied to statutes that protect private sector employees. More work by the legislature is needed to adequately protect California's private sector employees.

In addition to legislative action, courts should be more cautious in adopting the job duties exclusion. Courts should consider the precise language in state statutes to determine whether the exclusion is consistent with the statute. Further, while employers have legitimate interests in controlling the workplace, and courts have concerns over excessive volume of claims, existing doctrines can be used to address these concerns more specifically and narrowly. Foreclosing whistleblowing protection to reports made pursuant to one's job and within the chain of command without statutory authority for such a broad exclusion represents judicial activism with potential to severely constrict legitimate reporting of unlawful activity.

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233. See 2009 Cal. Legis. Serv. ch. 452 (West) (codified at CAL. GOV'T CODE § 8547.2(d)); 2010 D.C. Laws 18-117, Act 18-265 (2010) (codified at D.C. CODE § 1-615.52(a)(6)).

234. See 2009 Cal. Legis. Serv. ch. 452 (West) (codified at CAL. GOV'T CODE § 8547.2(d)); 2010 D.C. Laws 18-117, Act 18-265 (2010) (codified at D.C. CODE § 1-615.52(a)(6)).

235. For a listing of the most significant statutes providing generalized whistleblower protections, see WESTMAN & MODESITT, *supra* note 9, at app. A at 281, app. B at 309.