## 9.10 PARTICULAR RIGHTS—FIRST AMENDMENT—PUBLIC EMPLOYEES—SPEAKING AS A PRIVATE CITIZEN

A plaintiff speaks as a public employee when he or she makes statements pursuant to his or her official duties. In contrast, a plaintiff speaks as a private citizen if the plaintiff had no official duty to make the statements at issue, or if the speech was not the product of performing the tasks the plaintiff was paid to perform.

In deciding whether a public employee was speaking as a citizen and not as part of his or her official duties, and thus whether his or her speech was constitutionally protected under the First Amendment, you may consider the following factors:

1. Did the plaintiff confine [his][her] communications to [his][her] chain of command? If so, then such speech may fall within the plaintiff’s official duties. If not, then such speech may fall outside of the plaintiff’s official duties.

2. Was the subject matter of the communication within the plaintiff’s job duties? If so, then such speech may fall within the plaintiff’s official duties. If not, then such speech may fall outside of the plaintiff’s official duties.

3. Did the plaintiff speak in direct contravention to [his][her] supervisor’s orders? If so, then such speech may fall outside of the plaintiff’s official duties. If not, then such speech may fall within the plaintiff’s official duties.

4. Was the subject matter of the communication about broad concerns over corruption or systemic abuse beyond the specific department, agency, or office where the plaintiff worked? If so, then such speech may fall outside of the plaintiff’s official duties. If not, then such speech may fall within the plaintiff’s official duties.

**Comment**

Whether the plaintiff spoke as a public employee or a private citizen is a mixed question of fact and law. *Barone v. City of Springfield*, 902 F.3d 1091, 1099, 1101-06 (9th Cir. 2018) (“Whether an individual speaks as a public employee is a mixed question of fact and law . . . . First, a factual determination must be made as to the scope and content of a plaintiff’s job responsibilities . . . . Second, the ultimate constitutional significance of those facts must be determined as a matter of law.”) (citations and quotation marks omitted). In *Dahlia v. Rodriguez*, 735 F.3d 1060, 1063 (9th Cir. 2013) (en banc), the Ninth Circuit overruled *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), and found that the district court had improperly relied on a generic job description and failed to conduct the practical, fact-specific inquiry required by *Garcetti*, 547 U.S. at 424. The Ninth Circuit also set forth guiding principles for performing the *Garcetti* inquiry in analogous cases. *Id.* at 1073-76; *see*, *e.g.*, *Hagen v. City of Eugene*, 736 F.3d 1251, 1258-60 (9th Cir. 2013) (holding that public employee reporting departmental safety concerns pursuant to duty to so report did not speak as private citizen). “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.” *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014); *see also Avila v. L.A. Police Dep’t*, 758 F.3d 1096, 1104 (9th Cir. 2014).

*See Dahlia v. Rodriguez*, 735 F.3d 1060, 1074-76 (9th Cir. 2013) (en banc) (discussing factors for when public employee speaks as private citizen).

In *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017), the Ninth Circuit held that a public high school football coach spoke as a public employee, and not as a private citizen, when he prayed on the fifty-yard line in view of students and parents immediately after high school football games. As explained by the Ninth Circuit, the football coach’s job was multi-faceted, but among other things “it entailed both teaching and serving as a role model and moral exemplar. When acting in an official capacity in the presence of students and spectators, [the football coach] was also responsible for communicating the District’s perspective on appropriate behavior through the example set by his own conduct.” *Id*. at 827; *see also Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1015 (9th Cir. 2021) (reaffirming holding).

*See also Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) (holding prior restraint prohibiting highway patrol officers from speaking about controversial canine drug interdiction program with anyone outside of law enforcement violates First Amendment); *Barone*, 902 F.3d, at 1101-06 (holding that prior restraint prohibiting police officer from speaking or writing “anything of a disparaging or negative manner related to the Department/Organization/City of Springfield or its Employees” violated First Amendment).

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