

Free Speech Rights of Public Employees Continue to Diminish

In 2006, the U.S. Supreme Court surprised many observers by modifying the rules defining the extent of a public employee's speech rights in the workplace under the First Amendment. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), an assistant district attorney alleged that his speech rights were infringed when, after he questioned the validity of a search warrant in a particular case and recommended its dismissal, his superiors took several retaliatory actions against him. The Supreme Court ruled that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate them from employer discipline. The *Garcetti* case and its potential implications for higher education were discussed in a previous issue of *LegalWatch*. See Vol. 3-07, p. 1.

A recent case from the federal appellate circuit in which Alabama is located, the Eleventh Circuit Court of Appeals continues the trend, begun in *Garcetti*, of giving a public employer broad rights to discipline employees for statements arising out of their jobs. Adis Vila was employed under a one-year contract with Miami-Dade Community College, where she held the position of Vice President for External Affairs and, in this capacity, reported directly to the President. She was also a licensed attorney, and her position entailed oversight of legal affairs for the College. She raised legal and/or ethical concerns about several matters. Specifically, she objected to 1.) the awarding of an advertising contract, arguing that it should have been competitively bid; 2.) the financing of the purchase of a building, due to the inappropriate use of "public" funds as a match for State funds, as well as a "kick back" scheme tied into the purchase price; and 3.) the use of College funds to illustrate a children's book of poems written by a member of the College Board of Trustees.

When Vila's contract was not renewed, she alleged that the non-renewal was in retaliation for her First Amendment-protected speech activities. The trial court dismissed the case on the College's motion for summary judgment, and the Eleventh Circuit affirmed the lower court's ruling. While a public employee may not be adversely treated in retaliation for speech protected by the First Amendment, that right is not absolute. An employee must show that, with regard to the speech in question, he/she was communicating as a citizen about a matter of public concern. Speech relating to a personal matter or, under *Garcetti*, statements made pursuant to official duties are not protected. In this instance, it was clear that Vila's communications all pertained to concerns that were within her job responsibilities as Vice President, especially her duty to ensure that the College's activities complied with the law. As such, according to the Court, the First Amendment was not implicated and Vila had no basis for her suit. *Vila v. Padron*, 484 F.3d 1334 (11th Cir. 2007).

Another higher education case in this circuit, mentioned briefly in the *LegalWatch* issue cited above, involved an employee in the Office of Financial Aid and Veterans Affairs at Georgia's Fort Valley State University. This employee, Lillie Battle, had the responsibility to verify the completion and accuracy of student files as well as to report any observed fraudulent activity. She notified her supervisor and then the University President about evidence of perceived "improprieties" by her supervisor that indicated the possible fraudulent

mismanagement of federal financial aid funds. In particular, Battle reported that her supervisor was “falsifying information, awarding financial aid to ineligible recipients, making excessive awards, and forging documents.” Battle alleged that her charges were not addressed and that her employment contract was subsequently not renewed. In her suit, Battle asserted, among other claims, that the non-renewal was in retaliation for her exercise of First Amendment speech rights. She admitted, however, that her communications to university officials were all made pursuant to her employment responsibilities. The trial court granted summary judgment against her, and the Eleventh Circuit Court of Appeals affirmed based on clear evidence that Battle’s speech could not be characterized as having been made by a public employee speaking purely as a citizen, as opposed to speech in fulfillment of job duties. *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir. 2006).

A similar result was reached in a case involving an employee of the Medical College of Georgia, who sued his employer for alleged retaliation after he disclosed what he believed to be fraud, waste, and abuse of public funds in the operation of the hospital. The Eleventh Circuit Court of Appeals again affirmed the lower court’s grant of summary judgment in favor of the defendants, on the authority of *Garcetti* and its own decisions in *Vila* and *Battle*. *Andrist v. Medical College of Georgia*, 227 Fed. Appx. 884 (11th Cir. 2007). The employee’s petition for review by the U.S. Supreme Court was denied. *Andrist v. Medical College of Georgia*, 128 S. Ct. 924 (2008).

It is apparent that the Supreme Court’s *Garcetti* ruling, as expected, is having the effect of narrowing the expressive rights of public employees when their statements are made in the context of their duties and responsibilities. At the same time, public employers, such as state universities, now have enhanced discretion to discharge or otherwise discipline employees for job-related speech without running afoul of the First Amendment. Whether the outcome in cases such as those discussed above will continue to be viewed as serving the public interest is a fair question. It will only be answered as the courts explore and apply the principles laid down in *Garcetti* in additional fact settings. As always, a personnel decision based, even in part, on an employee’s speech and communications should be made only after careful review. This office and the Office of Human Resources are available to assist with such review.