

Supreme Court Rules on Public Employee's Speech Claim

When may public employees be disciplined for exercising their rights of free expression at work? This issue has occasioned considerable litigation in recent years, including some cases involving public universities. Two interests intersect in this area: the free speech rights of public employees, which are not lost when they accept public employment, and the inherent right of public employers to deal with disruptive employee behavior, even if that behavior includes speech.

Where to draw the line of demarcation between these two interests has been the subject of several U.S. Supreme Court decisions. The leading case is *Pickering v. Board of Education*, 391 U.S. 563 (1968), involving a teacher who was dismissed after he wrote a letter to the local newspaper criticizing the board of education's financial plans. The Court first held that the teacher's speech was within the ambit of the First Amendment's protection because it related to a "matter of legitimate public concern." A balancing test was then applied, in which five factors were examined to determine whether the employee's interest in speaking out as he did outweighed his employer's interest in maintaining an efficiently functioning education system. Several factors dealt with the impact of the communication on the teacher's workplace and employment relationships, and another factor addressed the matter of whether the teacher, in writing the letter, was acting in his role as a citizen or as a public employee. The Court concluded that the teacher was exercising his rights as a citizen in writing about a matter of public importance and, after considering the other factors, that he could not be discharged for his comments.

In a second case decided 15 years later, the Court upheld the dismissal of an assistant prosecutor who had circulated written materials questioning office personnel policy. *Connick v. Meyers*, 461 U.S. 138 (1983). The Court's ruling was based on a finding that the prosecutor's speech did not touch on matters of public interest but was limited to intra-office concerns more personal to the employee. The *Connick* decision provided some helpful guidance for courts on the issue of whether or not speech addresses an issue of public concern, stating that courts must review the "content, form and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147.

The *Pickering/Connick* analysis has remained the authoritative rule for evaluating the free speech claims of public employees, though the Supreme Court and lower courts have continued to explore its implications in various factual contexts. As summarized by one observer, "a public employee's comments as a citizen are protected; comments as an employee are protected as long as they are on a public issue . . . If the comments are found to be touching on a matter of public concern, then the court will balance the interests of the parties." Edgar Dyer, "*Collegiality's Potential Chill Over Faculty Speech*," 119 Ed.Law Rep. [309] (Sept. 4, 1977). That rule may have recently been changed, however, as a result of last year's decision by the Supreme Court in the much-discussed case, *Garcetti v. Ceballos*, 126 S.Ct.1951 (2006).

The *Garcetti* case also involved an assistant district attorney (Ceballos), who was a "calendar deputy" with certain supervisory responsibilities over other attorneys in the office.

Ceballos concluded that an affidavit used to secure a search warrant in a pending criminal case was deficient, and he conveyed his concerns in a memorandum to his superiors, recommending dismissal of the case. Ceballos claimed that he was thereafter subjected to a number of retaliatory actions by the district attorney's office, and he sued. After conflicting rulings in the trial and appellate court, the case reached the Supreme Court.

The Court reiterated its public employee-speech doctrine, as articulated in *Pickering*, *Connick*, and subsequent cases: "The Court's decisions . . . have sought to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." However, the Court proceeded to frame the critical issue for this case in a slightly different way. The inquiry was not simply whether the subject or topic of the employee's speech fell within the arena of public discussion and concern, which would indicate that the employee was acting as a citizen in his communication. The issue that the Court found dispositive was that Ceballos' speaking occurred in the course of carrying out his assigned duties, as a calendar prosecutor, to provide advice regarding the handling of pending cases. In such an instance, the employee is, almost by definition, not functioning as a public citizen: "We hold 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."

A number of cases have been decided in the period since the *Garcetti* ruling was handed down. There is a difference in view among the courts as to whether *Garcetti* merely represents a further development of the *Pickering/Connick* jurisprudence or whether it introduces dramatic changes in the law. Most courts appear to be treating *Garcetti* as requiring a new initial question: did the employee's expressive activity result from his/her acting as a citizen or did it grow out of his/her official duties. A trend appears to be developing according to which communications made to an external audience tend to be viewed as possibly protected "citizen speech," while communications confined to the workplace tend to be viewed as unprotected "official employee speech." See Len Niehoff, *Garcetti v. Ceballos: The Case, Its Progeny, and Its Implications for Higher Education Law*. Presentation, 2007 Conference, National Association of College and University Attorneys.

In the higher education arena, one post-*Garcetti* case has been decided, involving a financial aid employee at Fort Valley State University. The employee alleged that, exercising her rights of free speech, she attempted to expose fraud in her department, and as a result her contract was not renewed. The court found that her employment duties included ensuring the integrity of student files and reporting any mismanagement or fraud she encountered. Her communications to university officials about inaccuracies and indications of fraud in the student financial aid files were thus made as part of her official employment responsibilities and were not constitutionally protected. *Bradley v. James*, 479 F.3d 536 (8th Cir. 2007).

Does *Garcetti* have any application to "academic speech," that is, to faculty speech connected with classroom and related activities usually considered to fall under the umbrella of "academic freedom"? The Court indicated that it does not extend this far:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. *Garcetti*, 126 S.Ct at 1962.

The Court's revisiting of "public employee speech" issues in *Garcetti* would appear to give public employers, such as the University, greater leeway in dealing with expressive conduct by employees. However, because the contours of speech that is "pursuant to official duties" are not self-evident and that determination rests upon a careful analysis of the pertinent facts (what are the employee's responsibilities, how did the topic of the employee's speech relate to those duties, did the employee actually have an affirmative to speak out regarding that topic, who was the audience of the communication, etc.) any retaliatory action taken in response to employee communications should only be undertaken after full consultation with human resources personnel and legal counsel.