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THIS JUST IN: Supreme Court Reverses Eleventh Circuit, Finds that Subpoenaed Testimony is Citizen Speech Protected Under the First Amendment.

Speech: Subpoenaed Testimony is Inherently Citizen Speech; Firing Based on Such Testimony is Retaliatory Termination and Violates the First Amendment
Lane v. Franks, No. 13-483 (U.S. June 19, 2014)

The Supreme Court has unanimously reversed the Eleventh Circuit's finding that a municipal employee was speaking in his capacity as an employee and not as a private citizen when he gave subpoenaed testimony regarding fraudulent activity by another employee. Although alerting employers about wrongdoing by other workers may be within a public employee's job duties, the giving of sworn testimony about such wrongdoing in judicial proceedings "is a quintessential example of citizen speech" according to the Court.

Here, Edward Lane's provision of sworn testimony was outside the scope of his normal job duties, and he spoke on a matter of public concern. These ingredients placed him apart from the fact pattern in *Garcetti* (which involved in internal memorandum prepared by a deputy district attorney for his supervisors) and required a more nuanced refinement of that decision. The Eleventh Circuit had relied on *Garcetti* to focus on the fact that Lane's speech "owes its existence to [his] professional responsibilities." That point had little to do with the key question—was the giving of sworn testimony a normal part of Lane's job? (Clearly, if the giving of subpoenaed testimony *is* a normal part of the public employee's duties, a different result would obtain).

Although the termination of the employee who gave the testimony constituted retaliatory termination prohibited by the First Amendment, that right was not clearly expressed in Eleventh Circuit precedent at the time of the firing; therefore the employer's qualified immunity was preserved.

Justice Sotomayor wrote the unanimous opinion; Justice Thomas wrote a concurring opinion in which Justices Alito and Scalia joined.

http://www.supremecourt.gov/opinions/13pdf/13-483_9o6b.pdf (last accessed June 19, 2014).

Education: Principal's Refusal to Allow Distribution of Religious Messages Is Not "Clearly Established" as Unconstitutional, Preserving Qualified Immunity

Morgan v. Swanson, No. 13-40433 (5th Cir. June 3, 2014).

A parent who was prevented by a public school principal from distributing candy with religious messages in a classroom has failed in his Section 1983 claim because the principal's actions were protected by qualified immunity, under a Fifth Circuit decision.

In 2003 Thomas Elementary School in Plano, Texas had an in-class winter party. Doug Morgan attended the party with his son Jonathan and, as part of a gift exchange, gave Jonathan candy canes with a religious message to distribute. The principal, Lynn Swanson, said that no religious material could be handed out, however, and recommended placing the candy canes on an "information table" where others could take them if they chose. Having been excluded from the gift exchange, the Morgan's filed suit under § 1983, alleging the principal violated Jonathan's First Amendment rights. The initial suit in the case was heard *en banc* by the Fifth Circuit, which held that Nathan had been discriminated against by principal Swanson on the basis of viewpoint, but that she was subject to qualified immunity because the relevant First Amendment law was too "abstruse" and "complicated" for her to know how to handle religious messages at school parties.

This second case arises because Mr. Morgan now claims he, like his son, suffered viewpoint discrimination when he was not allowed to distribute the candy canes to other adults at the party. The District Court dismissed this claim, holding Swanson was also entitled to qualified immunity against Mr. Morgan's claim as well.

HELD: The Fifth Circuit affirmed the District Court, holding since there was no authority recognizing Mr. Morgan's asserted right and that the area of law was "abstruse" and "complicated," Mr. Morgan's allegations failed to override Swanson's qualified immunity.

DISCUSSION: The narrow issue before the Circuit was whether Mr. Morgan had such a clearly established First Amendment right to distribute religiously-messaged candy canes at the school party that it overrode Swanson's qualified immunity. Qualified immunity protects a school official's discretionary decisions unless her conduct is "clearly established" as unconstitutional. Furthermore, educators enjoy a presumption in favor of qualified immunity, when no malice is present, given that courts recognize they have a "difficult job." The rare exceptions when educators have been denied qualified immunity include instances such as punishing a student for silently raising his fist instead of reciting the pledge of allegiance in class, or a coach