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Public Employees and Constitutional Free Speech: 2014 Update

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Public Employees and Constitutional Free Speech: 2014 Update

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On June 19, 2014, Justice Sotomayer, writing for a unanimous U.S. Supreme Court, began by stating:

> Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee's speech depends on a careful balance "between the interests of the [employee] 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.[2]

The recent 2014 decision continued the discussion and analysis of public employee speech in the context of job duties and responsibilities that seemingly assumed importance in *Garcetti v. Ceballos.*[3] This paper will conclude with further review of that case, but first it will review and summarize the evolution of public employee speech.

Evolution of the Law. *Pickering* significantly changed the legal landscape. At the end of the 19th and beginning of the 20th century, when asked whether public employees had a constitutional right to speak out on public issues, courts resoundingly answered in the negative. For example, while serving on the Massachusetts Supreme Judicial Court in 1892, Justice Holmes wrote these famous words, "There may be a constitutional right to talk politics, but there is no constitutional right to be a policeman."[4] As late as 1952, the United States Supreme Court, in the words of Justice Vinson, opined "If they (certain public employees) do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[5]

The Supreme Court, however, cast a new light on public employee speech in cases arising from the efforts in the 1950s and 1960s to require public employees, particularly teachers, to swear loyalty oaths and reveal groups with which they associated, finding that the liberties of speech, religion and expression may be infringed by the denial of, or placing of conditions upon, a benefit or privilege

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[1] This paper is an update of an article originally written for Awareness in Action: The Journal of New Hampshire Public Risk Management in 2006, and updated for various IMLA seminars, including the Institute for Local Government Lawyers.
[2] *Lane v. Franks*, ___ U.S. ____ (June 14, 2014) quoting *Pickering v. Board of Ed. of Township High School Distr, 205, Will. Cty.*, 391 U.S. 563, 568 (1968).
[3] 547 U.S. 410 (2006), the initial and later impacts of which are reviewed later in this paper.
[4] *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216 (1892).
[5] *Adler v. Board of Education,* 342 U.S. 485 (1952).

associated with public employment. In 1967, the Court invalidated New York statutes barring employment on the basis of membership in subversive organizations. The Court observed that the theory that public employment – which may be denied altogether – may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected.[6]

Thus, since at least 1967, it has been settled that a state (or municipality) cannot condition at least some public employment on a basis that infringes on an employee's constitutionally protected interest in freedom of expression. That concept received a broader formulation in *Pickering* which, in turn, was refined in *Connick v. Meyers*.[7]

> In Pickering . . ., we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem . . . was arriving at a balance between the interests of the [employee], 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.

In addition to these primary opinions establishing public employee free speech rights, a number of decisions were issued that refined those rights:

- 1977: *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 Employers may use a defense based on non-speech related employee record.
- 1979: *Givhan v. School District*, 439 U.S. 410 First Amendment protects covered employee speech even if expressed privately and not broadcast publicly.
- 1976 & 1980*: Branti v. Finkel*, 445 U.S. 507; *Elrod v. Burns*, 427 U.S. 347 First Amendment protections do not apply to political, confidential, or policy-making positions.
- 1987: *Rankin v. McPherson*, 438 U.S. 378 Employee speech may be cause for employment action if it has a detrimental impact on the work environment.

Notwithstanding a relatively stable status of public employee free speech after the initial departure from prior law, federal circuit courts continued to assess and shape public employee speech. Then, the United States Supreme Court again entered the arena in 2006 when it issued its ruling in *Garcetti v. Ceballos* (supra, n. 3). It is always somewhat risky to try to summarize briefly the complicated issues involved in Supreme Court decisions. But, it can be said that this decision stands for the notion that:

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[6] *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).
[7] 461 U. S. 138, (1983).

1. 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 their communications from employer discipline.

2. Two inquiries guide interpretation of the constitutional protections accorded public employee speech: (a) Determine if the employee is speaking as a citizen on a matter of public concern. (b) If that is the case, then determine if the government employer has adequate justification for treating the employee differently from any other members of the general public.

3. The First Amendment does not prohibit managerial discipline based on an employee's expression made pursuant to official responsibilities.

In essence, the two sides on the Court appeared to agree on Free Speech protections at the outer ends of the spectrum of First Amendment protections. At one end, open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection. At the other extreme, a government employee's statement about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee.

In analyzing *Garcetti,* it should be remembered that the First Amendment limits the government's ability to control speech. The First Amendment does not impose such limits on private sector activities and conduct. Hence, private employers are not subject to the same restraints as are federal, state, and local government employers as "arms" of the state. Also, as discussed later, non-constitutional protections under federal and state labor laws and local government charter, ordinances, and personnel policies may provide protection for employee speech beyond constitutional protections.

To better understand the implications of *Garcetti*, it is helpful to have a basic understanding of the facts and the judicial proceedings that preceded the Supreme Court's recent ruling. According to the court's opinion, Ceballos was employed as a supervising deputy district attorney for Los Angeles County. As part of his duties as a "calendar deputy," he was asked by defense counsel in a pending case to review a search warrant which he claimed was based on an inaccurate affidavit. Ceballos' investigation led him to believe that was the case and he reported that to his supervisors (Najera and Sundstedt) and sent them a memo recommending that the case be dropped. After meeting with Ceballos, the deputy sheriff who filed the affidavit and others, Sundstedt decided to proceed with the prosecution. At a hearing on a motion to challenge the warrant, Ceballos was called by the defense as a witness and he recounted his observations about the affidavit. The court rejected the challenge to the warrant.

Ceballos claimed that in the aftermath of these events he was subjected to retaliation, including reassignment, transfer to a different courthouse and denial of a promotion. He filed an internal grievance that was denied and then filed a civil rights suit under 42 U.S.C. §1983 in the Federal District Court claiming a violation of First and Fourteenth Amendments by retaliating against him based on his memo.

The defendants, individual supervisors in the district attorney's office, asserted that the employment actions were all justified by legitimate reasons such as staffing needs and, in any event, the memo was not protected speech, and filed a motion for summary judgment. The court granted that motion, dismissing the case, on the basis that the memo was written pursuant to his employment duties and therefore was not protected First Amendment speech. The Ninth Circuit Court of Appeals reversed, ruling that the memo was protected speech, and an appeal to the United States Supreme Court followed.

Justice Kennedy's majority opinion first quotes language from *Connick* to the effect that it instructs courts to begin the analysis by considering whether the "expressions in question were made by the speaker 'as a citizen upon matters of public concern'." It then says the Ninth Circuit found that the speech in question was inherently a matter of public concern, but never considered whether the speech was made in Ceballos' capacity as a citizen. Having determined that the speech was the type that was protected, the Ninth Circuit then proceeded to the *Pickering* "balancing" test under which Ceballos' interest in making the speech is balanced against the employer's interest in responding to it. The Ninth Circuit ruled the employer could not assert such an interest as there was no evidence to suggest disruption or inefficiency in the DA's office resulting from the memo.

Kennedy said that *Pickering* and subsequent cases restricted public employee speech protection to instances in which the employee spoke as a private citizen. "A government entity has broader discretion to restrict speech when it acts in its role as an employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." He acknowledged that analyses can be very difficult, but the "overarching objectives" of the doctrine are as follows:

When a citizen enters government service, the citizen must accept certain limitations on freedoms. Government employers, like private employers, need a significant degree of control over their employee's words and actions, as without that control there would be little chance for efficient provision of public services.

1. In other words, every government employment decision could become a constitutional matter.
2. Public employees occupy a trusted position in society and when they speak, they can express views that contravene governmental policies or impair performance of governmental functions.
3. At the same time, a citizen who works for government is still a citizen.

4. Therefore, the First Amendment limits government's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties that employees enjoy as private citizens.

Both the employee as a citizen and the public can benefit from knowledgeable employees speaking on matters of importance to the public. Accordingly, public employees – when speaking as private citizens on matters of public concern – may face restrictions only as necessary to allow their employers to operate efficiently and effectively.

But the First Amendment has limits and does not serve to empower public employees to "constitutionalize the employee grievance." Applying these principles in this case, Justice Kennedy said:

1. That Ceballos reported his concerns about the affidavit internally is not decisive, as the First Amendment can protect some expressions made at work.
2. Although the memo concerned a subject dealing with Ceballos' employment, that is not decisive either, as some expressions related to the speaker's job are protected, too.
3. The controlling factor, here, is that the statements were made pursuant to his duties as the calendar deputy district attorney. He made the statement as a prosecutor fulfilling his responsibility to advise his supervisor about how to best proceed with the case.
4. In such an instance, the employee is not speaking as a citizen and the constitution does not insulate the communication from employer discipline.

Ceballos' speech was part of what his job required. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." In effect, the opinion equates employer response to statements made as part of official duties to employer evaluation of the employee's performance. According to the majority, even with this restriction, public employees are not prevented from participating in public debate. That right to participate in public discourse does not free employees to perform their jobs however they wish.

The majority also argued that public employers have a greater interest in controlling employee speech made by them in the their official capacity. Employees' "official" speech should be consistent, accurate and demonstrate good judgment.

To adopt a view that the Courts could intervene in matters like this would commit state and federal courts to a "new, permanent and intrusive role, mandating judicial oversight of communications between and among government employees and their supervisors in the course of official business," resulting in a displacement of managerial discretion by judicial supervision.

The delicate balancing of competing interests when a public employee speaks as a private citizen is not required when employees are "simply" performing their jobs. To those who might argue that this will dissuade employees from addressing employment concerns, the Court suggested that public employers may institute internal policies and procedures that are receptive to employee criticisms. That internal forum might discourage employees from concluding that their "safest" avenue of expression involves public statements.

While there was no doubt that Ceballos wrote his memo as part of his official duties, cases may arise in which it is not so clear. The Court thus declined to venture into formulating a comprehensive framework to define the scope of an employee's duties. To address concerns raised by dissenting Justice Souter, the majority said that job descriptions that may establish overly broad scope of duty provisions are subject to practical review and unrealistic descriptions will not be controlling. It also said that this case did not involve academic freedom that might involve somewhat different analysis.

The majority concluded by acknowledging that exposing governmental inefficiency and misconduct is a matter of considerable significance; but it pointed to the existence of whistleblower protection statutes and protective labor codes. Additionally, government attorney cases may implicate professional conduct or responsibility codes that would provide additional protections and checks on inappropriate employer actions.

Justice Stevens' short dissent said that there can be no difference in constitutional free speech analysis based on whether the speech was made pursuant to job duties or as a private citizen.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented, saying:

> " . . . private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do, public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection."

Justice Souter, like Justice Kennedy, agreed as to the nature of First Amendment protection at either end of the spectrum as discussed earlier. It is with the area between these extremes that controversy arises. Justice Souter acknowledged that protection is not absolute. In his view, the protections arise not just for the employee, but because there is a "value to the public of receiving the opinions and information that a government employee may disclose." According to Justice Souter, application of past precedent in light of the majority ruling would allow a schoolteacher to be protected when complaining about a district's minority hiring policy, but the school's personnel officer would not be so protected. While lines of

distinction must be drawn somewhere, he argued that this is not the place to draw the line. Here, he posited that public employers may seek to broaden their insulation from challenge by expanding the duties written in job descriptions.

Justice Souter also said, categorically, separation of citizen interests from employee interests ignored the notion that many public employees have high civic interests. Thus, both the employee and public interests in comment on matters of public concern were claimed to be ill-served by the majority.

Justice Souter did agree, though, that employer interests may not be served by employees speaking out, as that can create office uproars and fracture the government's authority to set policy to be carried out "throughout the ranks." It is true, after all, that "government needs civility in the workplace, consistency in policy, and honesty and competence in public service." He argued that a categorical rule about statements made as part of official duties is not needed to address those concerns, and therefore he suggests the need for only a minor "adjustment" using the basic *Pickering* balancing scheme. Thus, he would define the scope of public interest comments made in the course of official duties that can implicate First Amendment protection as those that pertain to "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety."

Justice Souter also disputed the concept that an employee's official duties statements should be considered to be those of the employer and therefore subject to control. That analysis might be appropriate if an employee in fact is hired to voice a particular government viewpoint but is not appropriate when the employee is not hired as a spokesperson or to promote such a viewpoint. Justice Souter then expresses his concern that the ruling would not extend to academic freedom as mentioned in this article's review of the majority opinion.

The dissent then moves on to the whistleblower protection argument. First, it notes that constitutional analysis should not rest on the vagaries of state and federal legislation. It goes further, though, by noting that speech may fall outside whistleblower protections, as the scope of statutes varies widely.

Justice Breyer's third dissenting opinion noted that government employers do need discretion that is not overly hampered by judicial supervision. But to say that employee speech made in the course of employment is "never" protected is erroneous, as such speech can be addressed using the usual *Pickering* balancing test. The results of applying that test, of course, will vary based upon the facts. Here, for example, the speech was made by a criminal prosecutor who is bound by case law governing disclosure in certain instances and by the legal profession's professional conduct rules that compel disclosure in some instances. These concerns would augment the need to protect the employee's speech while lessening the government's interest in controlling speech.

In summary, government employees do have substantial protections with regard to speaking out on matters of public importance that are not founded upon First Amendment Free Speech. Among the most prevalent of these are whistleblower protection statutes. In addition, many states have limited employer discretion, even in at-will employment situations, so that an employee cannot suffer adverse consequences because the employee performed an act that public policy would encourage, or refused to do that which public policy would condemn.[8] This so-called public policy exception to at-will employment status is premised upon the underlying obligation to act in good faith in respect to contractual matters, including employment contracts (even those that are not in writing). This limitation upon employer discretion also would likely apply to most instances in which verbal or written statements by an employee could be seen to substantially involve a public interest.

These statutory and common law limitations on employer ability to discipline an employee for speech-related matters, though, are not based on the First Amendment or constitutional protections for free speech. The *Garcetti* majority opinion stated that it did not seek to alter the basic formulation of the law of public employee free speech now popularly known as the *Pickering-Connick* rule. The application of that standard rule has been subject to refinement over the course of the last few decades. Reasoned analysis of this new decision would support the notion that the *Pickering-Connick* rule is still "good law."

Subsequent decisions supported the view that most courts have declined the opportunity to act as "super personnel review/arbitration boards" as Justice Kennedy mentioned in defense of his ruling. From a practical viewpoint, the existence of the good faith/contract obligations, the availability of statutory remedies in whistleblower protection and other[9] statutes may provide public employees with any protection that might have been cut off by the *Garcetti* ruling. While remedies, therefore, may exist for certain situations, not all "free speech" issues will necessarily be covered by those remedies.

After *Garcetti*, as might have been expected, the Circuit Courts dissected its impact. While some employee speech advocates viewed *Garcetti* as effectively ending free speech rights, in this author's eyes, it really did not significantly alter the framework of employee speech rights.

2014: Evolution Continues. The 2014 *Lane v. Franks* decision (supra n. 2) considered the further refinement of whether the First Amendment protects a public employee who provided truthful testimony, compelled by subpoena, outside the course of ordinary job responsibilities.

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[8] *Cloutier v. A. & P. Tea Co., Inc*., 121 N.H. 915 (1981).

[9] For example, NHRSA 98-E:1 states "a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings."

Lane had been hired by the Central Alabama Community College (CACC) as Director of Community Intensive Training for Youth (CITY). His duties included overseeing day-to-day operations, hiring and firing, and making program finance decisions.

CIY faced significant financial difficulties at the time Lane was hired. He began a program audit and discovered that an Alabama State Representative on CITY's payroll had not been reporting to her CITY office. After unsuccessful discussions with her, Lane reported his finding to the CACC president and its attorney. Their response was to warn him that her termination could have negative repercussions for him and for CACC.

Lane spoke to her again, instructing her to report to a different office to serve as a counselor. Shortly after she refused to do so, Lane fired her. She did not go quietly into the night, telling another employee she'd get back at Lane and the if he ever requested money from the legislature she would tell him "[y]ou're fired."

The firing attracted attention as might have been expected, including the FBI, which launched an investigation into her employment with CITY. Lane testified about his reasons for her termination to a grand jury which later indicted her on federal charges (claiming she had received over $175,000 in federal funds for which she performed virtually no services. To no one's surprise, her trial received extensive press coverage, and Lane, under subpoena, testified to the events leading to his firing her. The jury in this first trial failed to reach a verdict. On her retrial, at which Lane again testified under subpoena, she was convicted.

CITY's financial difficulties, meanwhile, continued. In 2008, Lane began reporting to Franks who became CACC president. Franks suggested that Lane consider layoffs and in January 2009, Franks decided to lay off 29 CITY employees, including Lane. Shortly thereafter, Franks rescinded all but 2 of the layoffs. A probationary employee and Lane were not included "due to an "ambiguity in their probationary status, later claiming that Lane was in a fundamentally different category from the other employees since he was the Director. Later in 2009, CACC ended the CITY program and terminated all its employees.

Lane responded by filing a §1983 action against Franks, individually and in his official capacity, for firing him in retaliation for his testimony, thus violating his First Amendment rights.

The District Court granted summary judgment – dismissing damage claims against Franks based on qualified immunity premised on a reasonable belief that Lane spoke as part of his official job duties. The 11th Circuit affirmed, reasoning that, even if the employee was not compelled to make his speech as part of his official duties, he enjoyed no First Amendment protection as his speech "owes its

existence to [the] employee's professional responsibilities" and is "a product that the employer himself has commissioned or created."

Recognizing that discord among the Circuits existed, SCOTUS granted certiorari. Perhaps, signaling the outcome, the opinion first notes that speech by citizens on matters of public concern lies at the heart of the First Amendment, which was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[10]

The notion that public employees should be encouraged, not inhibited in speaking, is supported because government employees are "often in the best position to know what ails the agencies for which they work,"[11] and the "interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[12]

Reviewing *Pickering*'s balancing test and *Garcetti'*s two-step inquiry,[13] the Court asked if truthful sworn testimony compelled by subpoena, outside the scope of ordinary job responsibilities, is protected. One might characterize the issue, as so stated, as being rather predictive of the outcome.

Sotomayer's analysis first determined that Lane's trial testimony was speech as a citizen on a matter of public concern. This is so even when the testimony relates to the employee's public employment or concerns information learned during that employment. She said the 11th Circuit's rejection of Lane's argument gave "short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath." When the person testifying is a public employee, there may be certain obligations to the employer (e.g., dressing in a professional manner). But any of those obligations are distinct and independent from the paramount obligation, as a citizen, to speak the truth.

Thus, the 11th Circuit read and applied *Garcetti* far too broadly. The speech at issue there was an internal memorandum prepared by an assistant D.A. for supervisors recommending dismissal of a particular prosecution. "But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." That case's critical question was whether the speech at issue was itself ordinarily within the scope of the employee's duties, not whether it merely concerned those duties.

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[10] Citing *Roth v. United States*, 354 U.S. 476, 484 (1957).
[11] *Waters v. Churchill*, 511 U.S. 661 (1994).
[12] *San Diego v. Roe*, 543 U.S. 77 (2004).
[13] (1) determine if the employee spoke as a citizen on a matter of public concern; if so, (2) determine if the government entity had an adequate justification for treating the employee differently from any other member of the general public.

Going back to *Pickering* and *San Diego v. Roe,*[14] the court has observed that public employees "are uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large."

The importance of public employee speech is "especially evident in the context of this case: a public corruption scandal." It would be "antithetical" if the "very kind of speech necessary to prosecute corruption by public officials . . . may never be the basis for a First Amendment retaliation claim."

She concludes that Lane's testimony clearly was speech as a citizen. Sotomayer then moved on the prong that asked if the speech was on a matter of public concern. That inquiry turns on content, form, and context of the speech. The subject (corruption in a public program and misuse of state funds) obviously involves a matter of significant public concern.

Thus, the basic components of the speech test conclusively show Lane's truthful testimony was speech as a citizen on a matter of public concern. That did not end the inquiry, as the next issue is whether the government had an adequate justification for treating the employee differently from any other member of the public based on "the government's needs as an employer."[15]

This was not too tough an analysis for the Court − Sotomayer said here the "employer's side of the *Pickering* scale is entirely empty."

The decision then discussed Franks' claim of protection from personal liability based on qualified immunity. To this, the Court noted that neither 11th Circuit precedent nor any Supreme Court decision was sufficiently clear to conclude that Franks could not reasonably have believed that he could fire an employee on account of testimony the employee gave under oath and outside the scope of his ordinary job responsibilities. [The court's review of 11th Circuit cases is omitted in this review.] While the Supreme Court said the 11th Circuit incorrectly decided that Lane's testimony was not entitled to First Amendment protection, that question had not been resolved conclusively in the circuit when Franks acted.

As the final part of its decision, the Supreme Court said the 11th Circuit improperly refused to address claims against the new CACC president in her official capacity seeking prospective relief.

Thus, the case was remanded for consideration of those claims.

In retrospect, *Lane* does not appear to reach a result contrary to *Garcetti.* However, the clearer delineation of lines in this situation should help to further

[14] 543 U.S. 77 (2004), adult video of police officer (wearing a generic uniform that was clearly a "police" uniform) posted on-line was not encompassed within First Amendment free speech protection for public employees.
[15] Citing *Pickering* at 150-151.

dispel the notion that *Garcetti* marked a retrenchment of public employee First Amendment speech protection.

Ongoing Developments. Supreme Court decisions like *Pickering*, *Garcetti,* and now *Lane* describe public employee speech doctrine at what might be called a "*macro*" level. Much of the legal development that leads to the pronouncements at the Supreme Court is initially formulated in the trial courts and particularly in the Federal Circuit Courts. Accordingly, this paper closes its review and update with a brief look at some recent Circuit decisions that, in some form or another, may lead to or influence the next Supreme Court opinion.

Scope of Constitutional Protection: Right to Intimate Association

Matusick v. Erie County, __F. 3d__, Nos. 11-1234 and 11-1618 (2nd Cir., Jan. 6, 2014).

Matusick, a white male, had worked at the Erie County Water Authority (ECWA) since 1992. Beginning in 2004, he claims he was assaulted, harassed, and ultimately terminated from his employment because of a romantic relationship he had with an African–American woman (Starks) (whom he married later).

A very lengthy court opinion reviews the alleged harassment, Matusick's discipline for various serious offenses, and his termination following a hearing required under state law.

While those matters are interesting, they relate primarily to state law, and this review is included here primarily with respect to the court's analysis of Matusick's §1983 claim premised upon interference with a constitutional right to "intimate association," which was first recognized by the Supreme Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), a case brought by a civic organization challenging a Minnesota statute prohibiting the group from excluding women. The Court addressed the claim under the constitutionally protected freedom of association, which exists in "two distinct senses": first, the choice to "enter into and maintain certain intimate human relationships without undue intrusion by the State," and, second, the right to associate with others for the purpose of engaging in those activities protected by the First Amendment − speech, assembly, petition for the redress of grievances, and the exercise of religion.

It was the first of these rights − the right to intimate association, as opposed to expressive association − that was the subject of the §1983 claims here. Applying Roberts, the court said the "right to intimate association is undergirded by at least two constitutional interests, each related to the protection of individual liberty against state intrusion. First, there is a social interest in preserving such protection: '[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of

the Nation by cultivating and transmitting shared ideals and beliefs,' a process essential to the maintenance of a pluralistic democracy, as these values 'foster diversity and act as critical buffers between the individual and the power of the State.' . . . Second, the right to intimate association protects individual interests central to the freedom of expression by 'safeguard[ing] the ability independently to define one's identity that is central to any concept of liberty.'"

The *Roberts* court then offered this guidance as to the types of relationships thought to implicate these constitutional interests: the personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family − marriage, childbirth, the raising and education of children, and cohabitation with one's relatives.

How far that right extends was not decided in *Roberts*, but the "reference to traditional familial relationships, most notably marriage, has led some courts to conclude that the right does not extend to romantic relationships beyond marriage. . . . We think this to be an unduly narrow reading of *Roberts*. . . . There is no question here but that the relationship between Starks and Matusick was a bona fide betrothal. They were involved in a long-term romantic relationship, held themselves out as engaged and were recognized as such, maintained together a relationship with Starks' children, and shared significant features of their private life together in anticipation of marriage.

Having concluded that Matusick possessed a constitutional right protecting his intimate association with Starks, the next question was whether that right was violated. First, we note that this is an association which most ECWA witnesses testified to being aware of. Even had they not, the evidence is clear that the ECWA defendants knew of the nature of Matusick and Starks' relationship. The ECWA had no legitimate interest in interfering with Matusick's espousal relationship with Starks or terminating him on account of this relationship—in other words, there is nothing to be placed in the balance against Matusick's exercise of his right of intimate association.

Speech within the Scope of Duty & Impact on the Workplace

Durham v. Jones, __F. 3d__, No. 12-2303 (4th Cir., Dec. 10, 2013). Durham, a veteran deputy sheriff used pepper spray and physical force to subdue a motorcyclist fleeing from a fellow law enforcement officer. The deputy duly prepared his report of the incident and submitted the report to his superiors, who in turn passed it along to their superiors. Alarmed that a damages lawsuit against the Office of the Sheriff might result from the deputy's actions, superior officers authorized detectives to interrogate him

aggressively, while ordering him to revise his incident report. The deputy opposed this order as factually and legally unwarranted.

After one session with a supervisor, he did revise the report, but then filed an internal grievance and on the same day, he was demoted, and later suspended. The county responded to the grievance by saying it would be investigated by, essentially, those in the Sheriff's office who had previously been involved.

In response, he compiled a set of documents outlining the events and sent it to Durham sent this packet of materials to: (1) the Somerset County State's Attorney; (2) the Governor of Maryland; (3) the Police Academy where he had been trained; (4) the Maryland Police Training Commission; and (5) the Maryland State Police, and (6) to a number of media outlets.

Durham was charged with violating department rules and had a hearing before a "trial board" which acquitted him of all charges except two relating to unauthorized dissemination of information, and recommended ten days' suspension. The sheriff wanted a longer suspension, and eventually terminated Durham's employment. Durham sued the sheriff in his personal capacity who then claimed qualified immunity. [Claims against others were not involved here.]

As there was no doubt that Durham's speech was a causal factor, the only prongs of traditional analysis were whether the speech concerned a matter of public concern and whether itoutweighed the government's interest in managing the workplace. As to the former, the Court described Durham as publicizing the materials in connection with his overarching allegations of serious and pervasive law enforcement misconduct in the sheriff's office not to air his internal grievance. As to the latter prong, the court listed nine factors identified in a prior case for assessing impact on the workplace, including whether the speech:

> (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.

The court had little difficulty concluding that the law was sufficiently clear.

Garcetti's Breadth

Gibson v. Kilpatrick, __F. 3d__, No. 12-60905 (5th Cir., Oct. 29, 2013). The Circuit Court had rejected a contention that, under *Garcetti*, as long as a public employee's speech could be classified as citizen speech, the inquiry ended even if the speech was part of the employee's official duties, and had held a police chief's report to outside law enforcement of his mayor's improper use of gasoline credit card was "official speech." On June 30, 2014, the Supreme Court granted certiorari, vacated the ruling, and remanded for further consideration in light of *Lane* case.

*Swetlik v. Crawford***,** __F. 3d__, No. 12-2675 (7th Cir., Dec. 23, 2013). An officer was terminated and then reinstated after, inter alia, he made statements about his chief's alleged directives to lie to jailers and threatening him if he did not do so. Initially, it was believed the officer misrepresented the Chief's statements but later it was determined he could have misinterpreted what was said. Notwithstanding his reinstatement, the officer filed a grievance (noting that there was a very contentious situation in the department) and made statements that he claimed were used in the disciplinary action against him.

In reviewing the defendants' motion for summary judgment, the Circuit Court said "If the only basis for the defendants' taking action against Swetlik were statements he had made as part of his official duties, *Garcetti* would indeed bar the claim, and we assume for purposes of argument that the defense theory would apply to to Swetlik's statements to the deputy chief and investigators. But Swetlik has also offered evidence that defendants were acting on the basis of his other statements on the matter, including the grievances that the union presented to the Common Council and the Police and Fire Commission. Those statements were made in his capacity as a union member, not as part of his official duties as a police detective. See *Nagle v. Village of Calumet Park*, 554 F.3d 1106, 1123–24 (7th Cir. 2009) (police officer's statements made at a union meeting were made in his capacity as a union representative, not as a police officer, but summary judgment for employer was affirmed because statements did not address matter of public concern). Thus, with regard to his statements at the union meeting and in the list of grievances, *Garcetti* "does not deprive his comments of First Amendment protection." Thus, an officer's statements made in his capacity as a union representative, not as a police officer, are not deprived of their First Amendment protection under *Garcetti*.

The following, briefly noted cases, were described in a paper by Carmel, IN, City Attorney Douglas Haney presented at an IMLA Employment Law Webinar held on July 16, 2014.

Hemminghaus v. Missouri, __F. 3d__, No. 13-1566 (8th Cir., July 1, 2014).

A court employee's blog entries expressing concern about her children's child abuse in the hands of their nanny and about the county prosecutor's refusal to prosecute the nanny constituted speech related to a matter of public concern.

Scheffler v. Molin, __F. 3d__, No. 13-1008 (8th Cir., Feb. 25, 2014).
A city building inspector who yelled at a citizen, called him a criminal, accused him of unlawful conduct, escorted him from the building and threatened to call the police when he returned, did not violate the citizen's First Amendment right to petition the government for redress of grievances. The other city employees did not condone the inspector's conduct, and the citizen was eventually able to file a grievance against the inspector.

Hagen v. City of Eugene, __F. 3d__, No. 12-35492 (9th Cir., Dec. 3, 2013).
The repetitive nature of an employee's speech to his supervisors, and the fact that he complained of well-known facts rather than reporting anything new, does not remove that speech from the application of *Garcetti* for purposes of determining whether it constituted protected "private speech" on a matter of public concern.

Fields v. Tulsa, __F. 3d__, No. 12-5218 (10th Cir., May 22, 2014).
Requiring an officer to either attend, or to order another officer to attend, a law-enforcement appreciation event hosted by an Islamic Society does not violate his First Amendment right to personal religious beliefs.

Conclusion. It should be remembered that public employees may still seek to assert free speech claims in hopes of prevailing in a civil rights action under 42 U.S.C. §1983, thereby potentially entitling a successful claimant to attorney's fees and damages. Thus, public employers are advised to be wary of issues that might involve protected public employee speech. Here are some words to live by when considering action that in any way might be considered as being related to public employee speech:

- Think and examine employee speech before acting.
- Watch out for prior restraint issues that may arise from blanket prohibitions on speech.
- If the conduct does constitute protected speech, is there still legitimate justification for employer action?
- Consider "real" effects and impacts on the workplace

- .Consider employee performance (but "*caveat user*," meaning be sure to have support for any disciplinary action that may be taken; and that support should exist and be documented prior to taking the action).

- Consider if there is a less restrictive/intrusive means of regulating speech/expression.

- Document! Document! Document!