

Is a Public Employee's Subpoenaed Testimony Protected Speech under the First Amendment?

By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

On April 28, 2014, the Supreme Court will hear oral argument in *Franks v. Lane*,[1] the first public employment First Amendment case the Court has taken up since *Garcetti v. Cebellos*.[2] As with any employment case, there are two sides to the story in *Franks*. According to the Respondent employer, Edward Lane, the former director of a program for at-risk youth, was laid off pursuant to a reduction in force that was necessitated by budget cuts.[3] Lane on the other hand, claims that he was fired in retaliation for his subpoenaed testimony in violation of his First Amendment rights.[4] Before diving into the issues and arguments presented in *Franks*, it is important to understand *Garcetti*; the decision in *Franks* will either rely on *Garcetti*, or chip away at the protections *Garcetti* has afforded to municipal employers.

In 2006, the Supreme Court ruled in *Garcetti v. Cebellos* that statements made by a public employee as a part of his or her official duties are not protected under the First Amendment.[5] The Court explained that in order to establish a claim of retaliation for protected speech under the First Amendment, a public employee must show, among other things, that he or she "spoke as a citizen on a matter of public concern."[6] The Court acknowledged the importance of balancing the government's interest as an employer against the employee's First Amendment right as a citizen, explaining:

> A government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations... At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens...
>
> 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 private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.[7]

If the rule were otherwise, the Supreme Court warned, the judiciary would be displacing the employer's supervisory role, which, as the Court noted, finds no support in its precedents.[8] Thus, the rule under *Garcetti* establishes that a government employee whose speech is made pursuant to his official duties is not speaking as a citizen and that speech is therefore not protected under the First Amendment.[9]

Franks, like *Garcetti*, involves a public employee who was subjected to an adverse employment action. In both cases the employees argued they faced these adverse actions in retaliation for their speech, in violation of the First Amendment.[10, 11] While *Garcetti* involved an employee who claimed he was reassigned to another position and denied a promotion as a result of a memorandum he wrote pursuant to his job duties, in *Franks*, the employee claims his employment was terminated as a result of testimony he provided pursuant to subpoena.[12] The crucial distinction between *Franks* and *Garcetti* is whether the fact that the employee's speech was made pursuant to subpoenaed testimony changes the analysis for the purposes of the First Amendment.

In *Franks*, Lane accepted a job working for the Central Alabama Community College ("CACC" or the "program"), a public employer.[13] He discovered that a then-state representative, Suzanne Schmitz, was listed on his program's payroll but never came to work or performed any job duties for CACC.[14] After numerous failed attempts to get her to come to work, Lane fired her, despite being warned against doing do by CACC's lawyer and president Steve Franks.[15] Lane was later subpoenaed to testify about his interactions with Schmitz before a grand jury and a criminal trial.[16] Thereafter, Lane's employment was terminated.[17] CACC and Franks claim that due to budget cuts Franks laid off 29 probationary employees—including Lane.[18] All but three, however, were called back because Franks realized many of those employees were not in fact probationary.[19] Lane was one of the three who was not called back because, according to Franks, he was a probationary employee.[20] On the other hand, Lane claims he was terminated as a result of his testimony against Schmitz in violation of the First Amendment.[21]

Neither side disputes that Lane was acting pursuant to his official job duties when he investigated the state representative's failure to report to work and ultimately terminated her employment.[22] Relying on *Garcetti*,

Continued on page 32

Hiring and Firing *Cont'd from page 31*

11. Katz v. United States, 389 U.S. 347, 350-51 (1967) ("[T]he protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual [s]tates.")
12. In 2012, a district court in Minnesota held that Facebook messages and postings are covered by Fourth Amendment privacy protections against compelled disclosure in the context of public school students facing discipline for such postings. *See* R.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp.2d 1128, 1142 (D. Minn. 2012). Further, although in the context of constitutional claims, two other courts have held that employees enjoy an expectation of privacy in Facebook postings sufficient to give rise to a claim under the Stored Communications Act ("SCA"). Crispin v. Christian Audigier, Inc., 717 F.Supp.2d 965, 991 (C.D. Cal. 2010); Ehling v. Monmouth-Ocean Hospital Serv. Corp., No. 2:11-cv-03305, 2013 WL 4436539 (D. N.J. Aug. 23, 2013). The reasoning of these cases provides a strong argument to extend Fourth Amendment protections to applicants for public employment.
13. As of October 23, 2013, Arkansas, California, Colorado, Delaware, Illinois, Maryland, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont, and Washington had passed laws restricting employers from requesting social media passwords from employees and/or job applicants.
14. *See* National Conference of State Legislatures, http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx
15. Skinner v. Railway Labor Executive's Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
16. If an applicant volunteers information that implicates the ADA, or has an obvious disability, it is permissible to inquire about any reasonable accommodations that may be needed in order to assist the applicant if he/she is chosen for the position (just be sure that the applicant is not ruled out because of the disabling condition or the need for an accommodation, particularly if the applicant is highly qualified for the position).
17. Fiscal year 2013 statistics will be available in early 2014.
18. Typically, municipal charters and state statutes take precedence in determining whether employment of public employees at the local level is "at will" or not. *See, e.g.,* Gomez v. Town of West New York, Civ. No. 2:13-689 (D. N.J. Nov. 4, 2013). However, in states where "at will" employment has been preserved for public employees, promissory estoppel and other implied contract theories are gaining traction to help employees establish the necessary property right to survive dismissal of due process claims.
19. Deprivation of a liberty interest in the employment context may arise when, after an adverse employment action, a public employer stigmatizes the employee by making public comments impugning his [or her] good name, honor or reputation or imposes a stigma that forecloses other employment opportunities. Bd. of Regents v. Roth, 408 U.S. 564, 573-74 (1972).
20. "The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." Tri-Health, Inc. v. Board of Commissioners, 430 F.3d 783, 788 (6th Cir. 2005). ML

Supreme Court *Cont'd from page 19*

the Eleventh Circuit held that Lane was acting pursuant to his official job duties when he testified and his speech, according to that court, was therefore not protected by the First Amendment.[23] The Eleventh Circuit explained that an employee's speech is not protected under the First Amendment simply by virtue of the fact that it came about as a result of a subpoena or in the context of litigation.[24] The Eleventh Circuit reasoned:

> No one disputes that Lane was acting pursuant to his official duties as CITY'S Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment. That Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment. Furthermore, because formal job descriptions do not control, that Lane's official duties did not distinctly require him to testify at criminal trials falls short of triggering First Amendment protection. Although not dispositive, we consider it pertinent that the subject matter of Lane's testimony touched only on acts he performed as part of his official duties... nothing evidences that Lane testified at Schmitz's trial "primarily in [his] role as a citizen" or that his testimony was an attempt to comment publicly on CITY'S internal operations.[25]

On petition for certiorari to the Supreme Court, the former employee framed the issue in *Franks* as whether a government employer is "free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and *was not a part of the employee's ordinary job responsibilities*."[26] By framing the issue in this manner – i.e., that the testimony itself was not a part of the employee's ordinary job responsibilities - the petitioner is seeking to distinguish the case from *Garcetti*; however, as the Eleventh Circuit noted, the fact that testifying was not one of the employee's job duties should not be dispositive. Rather, the subject matter of that testimony would determine whether the speech is protected under the First Amendment. In its ruling, the Eleventh Circuit disagreed with three other Circuits on this point, necessitating review by the Supreme Court.[27]

The way the petitioner has framed the issue likely leads many to conclude that the Eleventh Circuit's decision resulted in injustice. After all, it seems fundamentally unfair that someone could be fired for testifying in court pursuant to a subpoena. However, as the Court explained in *Garcetti,* public employees should not be given *expanded* rights simply because they work for a governmental entity. An employee who is acting as an employee in the scope and context of his or her employment should be protected by all rights and benefits afforded to any employee (both public and private) under state and federal law.

The Constitution should not be used as a tool to convert an employment dispute into a federal claim simply because the employee works for the government. Were the rule otherwise, it would open the door to significant headaches for government employers, including preventing them from dealing with insubordinate or disruptive employees in the same manner that their private employer counterparts can. Additionally, the Supreme Court's warning in *Garcetti* would likely come to pass if the Court rules in the petitioner's favor: courts would have to sit as super-personnel deciders for a large number of decisions made by government employers, again simply by virtue of the fact that the employer is the government.

IMLA has submitted an amicus brief in the *Franks* case in support of the Respondent's position to highlight these points.

Notes

1. No. 13-483.
2. 547 U.S. 410 (2006).
3. *See* Lane v. Cent. Ala. Cmty. Coll., 523 Fed. Appx. 703, 710 (11th Cir. 2013).
4. *Id.*
5. *Garcetti,* 547 U.S. at 421.
6. *Id.*
7. *Id.* at 418-19, 421-22 (internal citations omitted) (emphasis added).
8. *Id.* at 423.
9. *Id.* at 421.
10. *Compare Garcetti,* 547 U.S. at 412-15; w*/ Lane,* 523 Fed. Appx. at 710.
11. *See Garcetti,* 547 U.S. at 415; *Lane,* 523 Fed. Appx. at 710.
12. *See Garcetti,* 547 U.S. at 415; *Lane,* 523 Fed. Appx. at 710.
13. *Lane,* 523 Fed. Appx. at 710.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Lane,* 523 Fed. Appx. at 710.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 712.
23. *Lane,* 523 Fed. Appx. at 712.
24. *Id.*
25. *Id.* (internal citations omitted).
26. *See* Brief of Petitioner, Petition for a Writ of Certiorari, No. 138-483, available at: http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/Lane-Petition-and-Appendix.pdf (last accessed on February 27, 2014) (emphasis added).
27. *See* Clairmont v. Health, 632 F.3d 1091 (9th Cir. 2011) (concluding that employee's subpoenaed testimony was not a part of his official job duties and therefore was protected under the First Amendment); Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) (explaining that a police officer's trial testimony was protected by the First Amendment because, although the testimony stemmed from the officer's official duties, the officer had an "independent obligation as a citizen to testify truthfully."); Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (concluding that a public employee's subpoenaed deposition testimony about speech he made pursuant to his official duties was protected speech under the First Amendment). In *Morales,* the Seventh Circuit distinguished between the police officer's speech made in a deposition pursuant to a subpoena versus the exact same speech made to the assistant district attorney in a conversation. *Morales,* 494 F.3d at 597-98. Specifically, the court held that the deposition testimony was protected speech, even though he was testifying about his official duties because testifying in a civil suit pursuant to a subpoena was, according to the Seventh Circuit, "unquestionably not one of [the police officer's] job duties..." *Id.* at 598. The Seventh Circuit recognized the "oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected..." but nonetheless held that *Garcetti* established just such a framework. *Id.* ML

Second Look *Cont'd from page 20*

A few years later, the Court held that "[49 U.S.C.] § 14501(c) does not bar a State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property, including tow trucks." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 428 (2002). Again, the holding carried the negative implication that Congress could have barred state control over municipal regulatory powers if Congress intended to do so.

The Supreme Court revisited our issue in 2004, holding that Federal Telecommunications Act § 253(a) did not preempt a Missouri law that barred cities from offering telecommunications services because the term "any entity" in the federal law did not unmistakably include a city. The Court was overtly hostile to the idea that federal law could preempt state laws limiting city powers but grudgingly admitted that Congress could do so if it spoke with absolute clarity:

> The municipal respondents' position holds sufficient promise of futility and uncertainty to keep us from accepting it, but a complementary principle would bring us to the same conclusion even on the assumption that preemption could operate straightforwardly to provide local choice, as in some instances it might. Preemption would, for example, leave a municipality with a genuine choice to enter the telecommunications business when state law provided general authority and a newly unfettered municipality wished to fund the effort. But the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607–608, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory*[5] requires. What we have said already is enough to show that § 253(a) is hardly forthright enough to pass *Gregory*: "ability of any entity" is not limited to one reading,

Continued on page 34