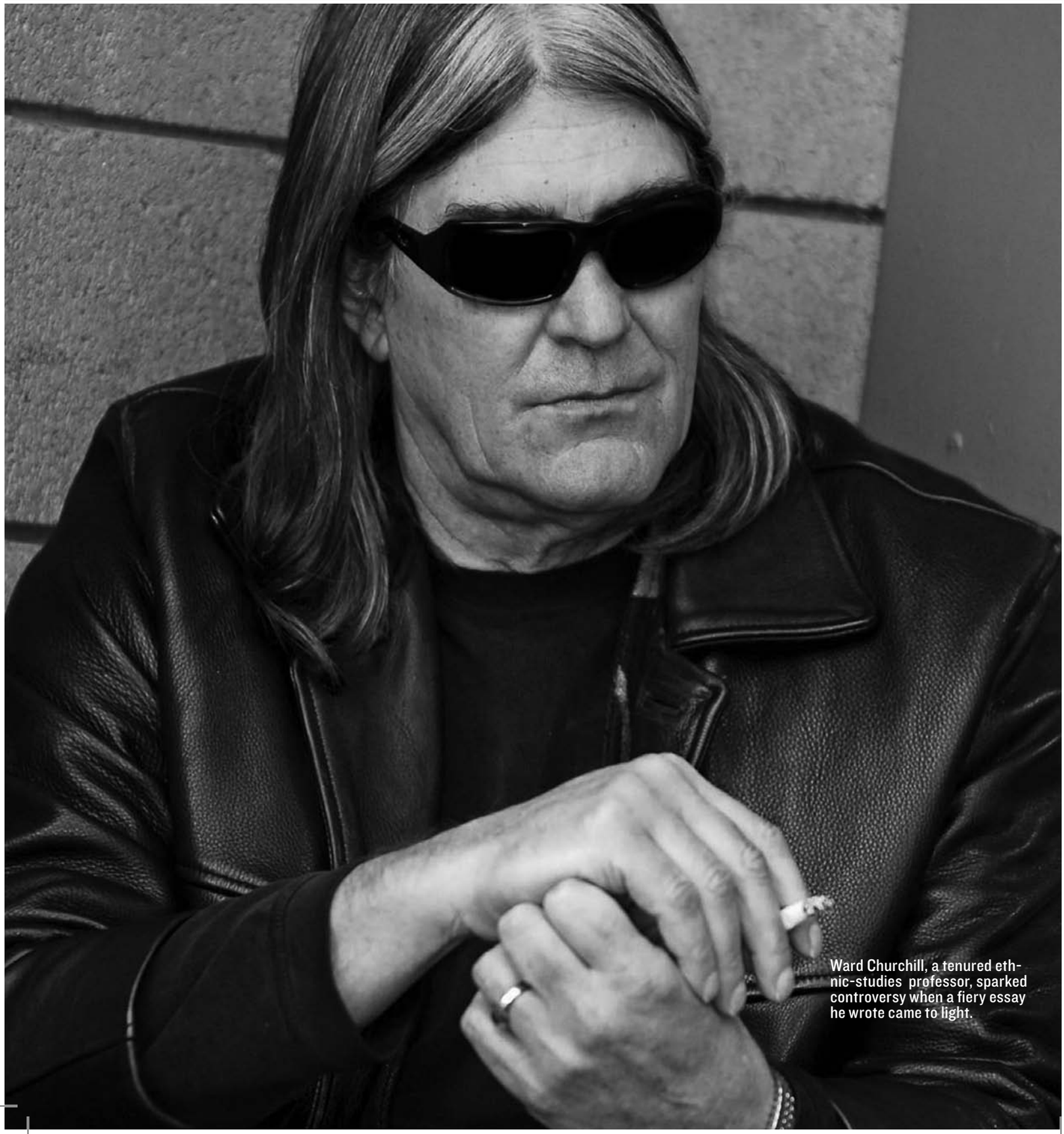
High-Profile Litigation in Public Employment Lawsuits

by Lawrence L. Lee and Raj Chohan



Ward Churchill, a tenured ethnic-studies professor, sparked controversy when a fiery essay he wrote came to light.

Employment lawsuits filed by public employees for wrongful termination can develop into headline news and take on a life of their own. When an adverse employment action becomes a topic for the media (something usually initiated by counsel for the terminated employee), governmental entities find themselves facing a potential three-headed monster of bad facts, bad issues, and bad press. Here's a review of cases that made recent headlines, and the lessons learned.

Churchill v. University of Colorado

In April of 2009, Professor Ward Churchill obtained a favorable jury trial verdict against the University of Colorado (CU) for discharging him in violation of his First Amendment rights.[1] This case contained all the elements of a perfect storm.

Churchill, a tenured ethnic-studies professor, sparked controversy in 2005 when a fiery essay he wrote several years earlier came to light.[2] The piece compared some of the victims of the 9/11 attacks on the World Trade Center to the notorious Nazi, Adolph Eichmann.[3] Public outrage led to a chorus of criticism from elected government officials across the state. The then Colorado Governor, Bill Owens, openly called for Churchill's resignation.[4] CU's Board of Regents issued a public apology, which reached the national media, condemning the professor's caustic composition.[5] Some CU donors threatened to curtail their fundraising efforts until something was done about Churchill.[6] Fox News personalities Bill O'Reilly and Sean Hannity provided a flurry of critical commentary.[7] Denver television stations and newspapers explored every conceivable angle, and local talk-radio hosts hammered away about the professor for months on their daily drive-time shows.[8] The media scrutiny was intense.

After lengthy review, CU decided that Churchill's essay was constitutionally protected political speech.[9] However, the University announced it would be looking into allegations of research misconduct involving some of Churchill's other published works.[10] Several committees reviewed his scholarly writings and concluded that he had plagiarized material and fabricated research.[11] Ultimately, the University revoked Churchill's tenure and dismissed him for academic misconduct, but it insisted he had not been terminated for his controversial 2001 essay.[12]

Professor Churchill filed suit, claiming that the University violated his First Amendment rights by terminating him in retaliation for the unpopular, but constitutionally protected, remarks he made.[13] The case went to trial, and the professor's attorney repeatedly referred to a "howling mob" which included Bill Owens, the State's former governor, and CU and elected officials.[14] In cross-examination, Owens was forced to explain statements he had made on *The O'Reilly Factor* television show, in which Owens appeared to be making veiled threats that CU's budget would be cut if the school didn't fire Churchill.[15] Moreover, plaintiff's counsel played a videotaped deposition from former CU President Betsy Hoffman, who testified that the governor called her after the Churchill controversy had become national news, demanding that she terminate the professor immediately.[16] On the stand, Owens denied pressuring CU to fire Churchill.[17] When interviewed by various media outlets after the verdict, one juror explained that the governor's testimony stuck out in particular.[18]

Both sides called a parade of public officials to testify. Some fortified the University's defense, others weakened it.[19] Numerous scholars opined on the intricacies of plagiarism and whether Churchill's writings constituted academic fraud. Despite weeks of trial and credible evidence that Churchill lost his job because of shoddy scholarship, the jury concluded otherwise. All six jurors agreed Churchill had been fired in retaliation for his incendiary essay, in violation of his constitutional rights.[20] However, the jury awarded Churchill only nominal damages – the sum of one dollar.[21] The trial judge subsequently vacated the jury's verdict based on quasi-judicial immunity and denied Churchill's request to be reinstated.[22]

Powers v. City of Seattle

In 2008, the City of Seattle settled a defamation lawsuit brought by a former police officer who claimed that the City leaked confidential information about a pending misconduct case to a newspaper, *The Seattle Times*. The City settled the suit for the bargain sum of $12,000,[23] but not before unwittingly picking an embarrassing fight with the press.

Officer John Powers was an eight-year veteran of the Seattle Police Department when he was fired in 2005 for misconduct. According to *The Seattle Times* (citing anonymous sources), he was being investigated in connection with a drug-related offense.[24] He was suspected, among other things, of giving cocaine to his girlfriend. Powers filed a defamation lawsuit against the City for allegedly leaking the details of the investigation to the media.[25]

According to Seattle City Attorney Tom Carr, a good legal strategy led to a bad tactical decision.[26] Powers could not prove that the City gave confidential information to reporters because *The Seattle Times* cited only anonymous sources.[27] Journalists in the State of Washington are protected from reveal-

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ing their sources by a particularly strong reporter-shield law.[28] The City could have Powers' claims dismissed if the reporters who wrote the stories exercised their privilege to protect their sources. The City's lawyer exchanged e-mails with the *Seattle Times*' attorney, attempting to get some agreement on how the reporters would assert the privilege. Thinking that there was an agreement, the City's lawyer sent the subpoenas to the *Times*' lawyer. The City's lawyer expected the journalists to exercise their privilege and refuse, which was what the City wanted them to do.[29] What he wasn't expecting was the barrage of new stories, editorials, and condemnations that followed.[30] Suddenly, a heated public debate took place in the media on how the First Amendment applied in this matter. Local television stations covered the controversy, while pundits commented on the wisdom of going after journalists. Politicians started to weigh in – Governor Christine Gregoire said the subpoenas targeting the reporters "troubled" her.[31]

Mr. Carr subsequently got on the phone himself; he quickly resolved the issue with *The Seattle Times* attorney and withdrew the subpoenas.

Johnson v. Village of Rockton

In 2007, a jury returned a verdict in favor of Jeremiah Johnson, a police officer who was terminated by the Village of Rockton, Illinois shortly after being called into action in Iraq.[32] The damages award was approximately $27,000.00.[33] While the relatively low amount suggests the outcome was a good one for the Village, there was a tremendous amount of bad press associated with the case: high-ranking state officials publicly criticized the Village government, news reports appeared in local and regional newspapers, and major market publications like the *Los Angeles Times* covered the story.[34]

By way of background, the Village hired Johnson in 2002 as a part-time police officer.[35] At the time, Johnson was a member of the Illinois National Guard. He alleged that the Village delayed in giving him a full-time position because in his military status, even though other police officers who were sworn in at the same time as he was received full-time duties within a shorter time.[36] Johnson also alleged that the police chief complained about "scheduling conflicts" involving Johnson's military obligations.[37] When Johnson was ordered to active duty in Iraq, the Village terminated his employment eleven days later.[38] When Johnson returned from duty, he re-applied for his previous position. The then Illinois Lieutenant Governor, Pat Quinn, and Attorney General, Lisa Madigan, attempted to intervene on behalf of the returning soldier. During a press conference, Lt. Gov. Quinn stated, "[w]e do not want our soldiers fighting terrorism abroad to have to fight for their jobs when they come back home."[39] Local newspapers ran sympathetic articles explaining that, "[i]n the heat of combat in Iraq, Jeremiah Johnson would picture his wife and young daughter – and wonder how he'd support them when he returned from the war zone."[40]

The Village refused to re-hire Johnson and he sued, claiming wrongful termination in violation of state and federal laws that protect reservists summoned to action.[41] At trial, the Village insisted it terminated Johnson because of concerns over his poor performance. There was evidence that Johnson had made a traffic stop and "challenged a combative suspect to a fight,"[42] and the police department had received complaints that Johnson had a habit of tailgating other drivers. Moreover, the Village argued that Johnson had exhausted his personal leave and had gone beyond his allotted sick time.[43] At trial, the jury concluded that Johnson's military service was a motivating factor in his firing, and it found the Village liable for the wrongful termination.[44]

Eng v. Cooley

In 2009, the U.S. Court of Appeals for the Ninth Circuit decided that the Los Angeles County District Attorney and other defendants were not entitled to qualified immunity in their individual capacities with respect to a First Amendment retaliation lawsuit filed by David Eng, a senior attorney in the District Attorney's office.[45]

Eng was assigned to investigate allegations of crime and fraud in connection with a development project, the Belmont Learning Complex.[46] The newly-elected District Attorney, Steve Cooley, vowed to clean up apparent improprieties that were associated with the $200 million project.[47] His office placed Eng on a task force designed to produce criminal indictments against prominent people involved with the project.[48] However, after months of investigation, the task force concluded that there were no violations that warranted prosecution.[49] Eng reported his findings to Special Assistant District Attorney Anthony Patchett, who headed the task force. Eng alleged he was threatened with "severe personal consequences" if he didn't change his report to reflect what Patchett believed the District Attorney "wanted to hear."[50] Eng refused.

During the next several months, Cooley initiated several internal investigations to "[force] David Eng out of the District Attorney's Office,"[51] including one into Eng's alleged sexual harassment of a law clerk. The inquiry proceeded despite the law clerk's insistence that the two had engaged in a private consensual relationship with no sexual harassment.[52] The District Attorney ordered Eng to work from home until that investigation was concluded. Upon Eng's return to the office, he was demoted.[53] Cooley later suspended Eng and filed misdemeanor charges against him for using an office computer to access personal information. The charges were dismissed when the prosecution's star witness invoked his right to remain silent, apparently because he had also misused office computers.[54]

In 2003, the *Los Angeles Times* published a detailed story on Eng's case, including an interview with his attorney.[55] The article explained Eng's belief that he had experienced retaliation because he refused to recommend criminal charges against people involved with the Belmont project.[56] Several weeks later, officials in the District Attorney's Office offered to "resolve matters" with Eng if he agreed to publicly apologize to the District Attorney and tell the *Los Angeles Times* that his attorney's interview was "unauthorized and inaccurate."[57] Eng

returned to work without agreeing, and the Civil Service Commission subsequently "resolved all outstanding allegations in favor of Eng."[58]

Eng filed a Section 1983 lawsuit claiming that Cooley violated his First and Fourteenth Amendment rights.[59] Eng alleged that Cooley retaliated against him for commenting on the Belmont project and speaking to reporters through his attorney.[60] The district court granted partial summary judgment, but left intact the constitutional claims pertaining to Eng's criticism of the District Attorney's Office, and the statements his attorney made to the *Los Angeles Times*.[61] The court concluded that the defendants were not immune from liability.[62] On appeal, the Ninth Circuit affirmed that Eng had "properly alleged a violation of his First Amendment rights."[63] Moreover, it held that Eng had "clearly established" a First Amendment interest in his public comments to the press, even if they were delivered through his attorney.[64]

Lessons Learned

Employees Have an Incentive to Air Grievances in Public

In 2006, the U.S. Supreme Court made it more difficult for public employees to win employment retaliation cases involving First Amendment claims.[65] The Court's ruling in *Garcetti v. Ceballos* added another hurdle to the *Connick-Pickering* test.[66] Now, in order to receive First Amendment protection, employees must show, as a threshold matter, that they were speaking as private citizens on matters of public concern.[67] Importantly, the First Amendment does not protect a government employee whose speech occurs pursuant to his official duties.[68] While the Supreme Court has not defined "speech pursuant to official duties," most courts agree that speech that is commissioned or required by the job itself almost always constitutes speech that falls within an employee's official duties.[69]

For employees that encounter situations similar to that of David Eng, there is an implicit incentive to air grievances outside of the employment context. Eng's decision to go to the media strengthened his ultimate argument in his lawsuit – that he spoke as a private citizen on matters of public concern. Had Eng kept his grievances about the Belmont project within the confines of his work environment, his speech would likely have been construed as being made pursuant to his official duties, and it would have been much more difficult for his First Amendment claims to survive summary judgment. An employer should bear in mind that disciplining an employee for providing information which supports a contrary position to that of an elected or appointed official will invite a future claim of retaliation, even in politically-charged public offices. It is also critical that employers immediately involve human resource personnel to encourage employees to resolve their internal grievances at the first and lowest possible level in the employment hierarchy. Without such available internal safeguards, employees may have a legal incentive to air their personnel issues in public, which may ultimately work to support a claim of retaliation.

Have a Responsive Message and Use a Single "Pipeline"

In situations where the employer is suddenly faced with media attention before internal resolution measures can be fully utilized, the entity is immediately expected to provide a response as to its position. Patrick O'Rourke from the University of Colorado not only lived through several years of the Ward Churchill controversy, he was also lead counsel in the civil trial, defending CU in the district court. He believes it is critical to have an action plan in place to "circle the wagons" and focus the message.[70] When Professor Churchill's essay first appeared on the national scene and the initial firestorm of controversy hit, elected officials frequently gave public comments to reporters without fully appreciating the implications. To the extent possible, it makes sense to deliver a focused message to the media through a single source, as this cuts down on the "freelancing" some public officials may be inclined to engage in when there is no pipeline in place. Strong admonitions by employers' counsel, advising the employers that statements in the press may be used against them in a deposition and at trial, usually (as evidenced in the Churchill lawsuit) provides the necessary medicine to avoid strengthening a plaintiff's lawsuit.

Caution elected officials to learn both sides of the story. Often reporters catch public officials before they have been fully apprised of an issue or controversy. A journalist working on a deadline will simply provide whatever information he has and seek a response from the public official. Often this information is incomplete. When officials are able to take a step back and check with the government entities involved in the controversy, there is a good chance that they will be better informed when they talk to the media.

Don't Subpoena Reporters

There's an old saying about picking fights with people who buy ink by the barrel. Issuing subpoenas to compel reporters to reveal their sources is almost always a bad idea. In most cases, their attorneys will put up a mighty effort to quash the subpoenas. Even if the subpoenas survive, there's a good chance the reporters will refuse to divulge their sources, particularly if the sources are confidential informants. Then, every media organization around will stand in unity with the beleaguered journalists. The public entity seeking the sources will face a barrage of bad press from one end of the country to the other. Unless it is absolutely necessary, avoid this tactic.

"No Comment" = An Undesirable Vacuum

While lawyers are usually loath to talk to the media during a period of pending litigation, the rules can change in the context of high-profile litigation involving public employees. If the public entity under fire doesn't define the message that it ultimately wants to convey in the litigation, someone else will do it. Plaintiffs' employment attorneys may have an interest in putting their "spin" in the public consciousness during the pretrial period. This gives them a head start in controlling the message, as the employer is usually caught off-guard when a reporter calls for comment, often being unable to provide more than the default cliché of not being able to respond due to pending litigation. Employers faced with this should ask the reporter for a copy of the lawsuit and arrange a time for another conference, ideally within a couple of hours of the initial conversation. This gives the employer's representative time to develop an appropriate response and

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"Substantial Burdens"

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Conclusion

Stay tuned for part two of this article in the January/February 2010 *Municipal Lawyer*, where more RLUIPA decisions deciphering the "substantial burden" conundrum will be digested.

Notes

1. 42 U.S.C.A. § 2000cc, *et seq.* (West 2009).
2. 112 Fed. Appx. 445 (6th Cir. 2004).
3. 218 F. Supp.2d 1203 (C.D. Cal. 2002).
4. 289 F. Supp.2d 87 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005).
5. 456 F.3d 978 (9th Cir. 2006).
6. 739 N.W.2d 664 (Mich. Ct. App. 2007), *vacated*, 746 N.W.2d 105 (Mich. 2008), *on remand*, 761 N.W.2d 230 (Mich. Ct. App. 2008).
7. No. Civ.A. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004).
8. 396 F.3d 895 (7th Cir. 2005).
9. 504 F.3d 338 (2d Cir. 2007).
10. Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp.2d 309 (D. Mass. 2006), Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 03, 2007), City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406 (Wash. 2009), Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder, 612 F. Supp.2d 1163 (D. Colo. 2009), Grace Church of North County v. City of San Diego, 555 F. Supp.2d 1126 (S.D. Cal. 2008), Church of Universal Love and Music v. Fayette County, No. 06-872, 2008 WL 4006690 (W.D. Pa. Aug. 26, 2008), Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp.2d 766 (D.Md. 2008), Guatay Christian Fellowship v. County of San Diego, No. 08cv1406 JM(CAB), 2008 WL 4949895 (S.D. Cal. Nov. 18, 2008), Barr v. City of Sinton, No. 06-0074, 2009 WL 1712798 (Tex. June 19, 2009), and Merced v. Kasson, Nos. 08-10358, 08-10506, 2009 WL 2343172 (5th Cir. July 31, 2009).
11. 146 Cong. Rec. 16,700 (2000).
12. *Id.*
13. Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (addressing the validity of laws that have the effect of burdening particular religious practices).
14. 42 U.S.C. § 2000cc-5 (7)(B) (2000).
15. 42 U.S.C. § 2000cc-5 (7)(A) (2000).
16. Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning and Zoning Comm'n of the Town of Newtown, 941 A.2d 868, 890 (Conn. 2008).
17. Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).
18. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).
19. *Id.*
20. Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).
21. Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp.2d 766, 785-86 (D. Md.2008) (approving jury instructions consistent with *Lovelace*).
22. Murphy v. Mo. Dept of Corr., 372 F.3d 979, 988 (8th Cir. 2004).
23. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
24. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).
25. Vision Church v. Village of Long Grove, 468 F.3d 975, 997-1000 (7th Cir. 2006).
26. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70 (3d Cir. 2004).
27. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006).
28. Omnipoint Communications, Inc. v. City of White Plains, 202 F.R.D. 402 (S.D.N.Y. 2001).
29. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228 (11th Cir. 2004).
30. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp.2d 961, 986 (N.D. Ill. 2003).
31. *Id.*
32. N. Pac. Union Conf. Ass'n of Seventh Day Adventists v. Clark County, 74 P.3d 140, 147 (Wash. Ct. App. 2003).
33. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
34. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004).
35. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 746 (Mich. 2007).
36. *Id.* at 750.
37. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 111 P.3d 1123, 1125 (Or. 2005).
38. *Id.* at 1130.
39. 386 F.3d 183, 188 n.3 (2d Cir. 2004).
40. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp.2d 507 (D.N. J. 2005).
41. Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp.2d 691 (E.D. Mich. 2004).
42. Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp.2d 1207 (S.D. Fla. 2005).
43. Konikov v. Orange County, 410 F.3d 1317, 1323-24 (11th Cir. 2005).
44. Living Water Church of God v. Charter Tp. of Meridian, 258 Fed. Appx. 729, 737 (6th Cir. 2007).
45. *Id.*
46. *Id.*
47. Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846 (7th Cir. 2007).
48. City of Hope v. Sadsbury Tp. Zoning Hearing Bd., 890 A.2d 1137 (Pa. Commw. Ct. 2006).
49. *Id.* at 1140 n.1.
50. *Id.* at 1145. **ML**

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call the reporter back before his or her publication deadline. Refute the opposing party's spin, redefine the message, and, if necessary, consider holding a follow-up press conference.

During Trial, Monitor the Blogs

During trial, there may be second-guessing from many sources, including the public, the media, and even public officials. Litigation counsel for employers should avoid the temptation to get caught up in a media sideshow and, instead, should stick to focusing on a well-thought-out

game plan in anticipation of going to trial. If there are courtroom bloggers reporting on an entire trial, witness by witness, it makes sense to monitor those blog sites. Mr. O'Rourke believes they can provide a good indication of how the jury may be perceiving the testimony.[71] Paying less attention to the TV coverage is paramount, as these reports will typically focus on the most sensational testimony or information of the day, not necessarily the most important testimony. Ultimately, it is the jury's observations that matter most.

Conclusion

High-profile litigation is a peculiar animal in the arena of civil lawsuits in which an employer has been sued. Often, these cases come up under the worst of circumstances, with an array of uncontrollable variables in play. Having a well-thought-out plan in place for when a scenario explodes in the media can help government entities navigate these difficult cases, while minimizing bad press along the way.

Notes

1. Ward L. Churchill v. Univ. of Colorado, 2009 WL 1404898 (Colo. Dist. Ct. Apr. 02, 2009).
2. *Id.* ("The essay was largely ignored in publication online. However, in late January 2005, a New York college newspaper reported it in preparation for Churchill's forthcoming speaking engagement there.").
3. *Id.* (explaining that "little Eichmanns" was an allusion to the Nazi technocrat Adolph Eichmann, a key engineer of the Holocaust).
4. *Id.* ("Then-Gov. Bill Owens demanded Churchill's resignation, and the school's Board of Regents issued a condemnation of Churchill's essay and made a national apology.").
5. *Id.*
6. Allison Sherry, *Donors Applaud Churchill Decision*, Denver Post, July 26, 2007 ("One of the first things University of Colorado [P]resident Hank Brown did after its regents fired divisive professor Ward Churchill Tuesday was reach out to donors, some of whom had held back money until the process was resolved.").
7. David Montero, *Media horde followed case*, Rocky Mountain News, June 25, 2007 ("Churchill appeared on *The Hannity and Colmes Show* on Fox News for a heated debate, and Bill O'Reilly was one of the first to pound the Churchill topic regularly. Both hosts referenced Churchill repeatedly on their television and radio programs."); Valerie Richardson, *Ex-Professor blames firing on smears*, The Washington Times, Mar. 11, 2009 ("[Churchill's attorney cited the influence of] conservative radio talk-show host Rush Limbaugh and Fox News Channel political commentators Sean Hannity and Bill O'Reilly, who had criticized Mr. Churchill in the years before he was fired.").
8. David Montero, *Media horde followed case*, Rocky Mountain News, June 25, 2007 ("KHOW hosts Dan Caplis and Craig Silverman are fully invested in the story and broadcast today live from the University of Colorado. Caplis, in fact, cut short a vacation to be able to broadcast the firing of Churchill.").
9. Ward L. Churchill v. University of Colorado, 2009 WL 1404898 (Colo. Dist. Ct. Apr. 02, 2009) ("The investigation determined in March 2005 that [Churchill's essay] and other related statements did not exceed First Amendment protections.").
10. *Id.* ("[A]llegations began to surface that Churchill had committed research misconduct unrelated to this essay. The University initiated an investigation, and two faculty panels concluded that he had engaged in misconduct….").
11. *Id.*
12. *Id.* ("The University disputed Churchill's claim that it had terminated him in retaliation for his exercise of First Amendment rights. The school admitted that the allegations of research misconduct may have stemmed from publicity related to Churchill's controversial essay, but argued that the Board of Regents did not retaliate against him.").
13. *Id.*
14. John Aguilar, *Ward Churchill's Lawyer: 'It was an absolute mob mentality*,' Boulder Daily Camera, Mar. 10, 2009.
15. John Aguilar, *Ex-Gov. Owens denies pressuring CU to fire Ward Churchill*, Boulder Daily Camera, Mar. 11, 2009 ("[Churchill's attorney] showed the jury a transcript of a March 29, 2005, interview Owens gave Fox News talk-show host Bill O'Reilly, during which Owens said he didn't have the power to fire Churchill but did have oversight of the state budget.").
16. John Aguilar, *Betsy Hoffman testifies via video at Churchill trial*, Boulder Daily Camera, March 13, 2009 ("Hoffman testified that former Colorado Gov. Bill Owens … told her in a 'short, threatening' call to "fire Ward Churchill tomorrow.").
17. John Aguilar, *supra* note 15.
18. Michael Roberts, *Juror Bethany Newill Talks about the Ward Churchill trial*, Westward, Apr. 03, 2009 ("[H]e had gone on the Bill O'Reilly show and mentioned threatening the budget … [o]n the stand, he said that wasn't what he was doing, but that was clearly what I saw.").
19. Based on the authors' observations.
20. Felisa Cardona, *$1 win for Churchill*, Denver Post, Apr. 03, 2009.
21. Bruce Finley, *Churchill $1 award result of one juror: five on the six person jury wanted to give the fired professor more*, Denver Post, Apr. 04, 2009.
22. Ward Churchill v. Univ of Colorado, Order Granting Defendants' Motion for Judgment as a Matter of Law and Denying Plaintiff's Motion for Reinstatement of Employment *4, 26 (Denver Dist. Ct. July 7, 2009) (explaining that the claim of "First Amendment Retaliation in Terminating … Employment" never should have gone to the jury because CU's Board of Regents was protected by quasi-judicial immunity).
23. Interview with Seattle City Attorney Tom Carr (July 1, 2009).
24. Maureen O'Hagan, *Three* Times *reporters subpoenaed on sources*, The Seattle Times, Nov. 30, 2007.
25. Powers v. City of Seattle, No. C06-1727RSL, 2007 WL 1821020 (W.D. Wash. June 21, 2007).
26. Interview, *supra* note 23.
27. Maureen O' Hagan, *supra* note 24.
28. *Id.* ("Earlier this year, Washington joined the majority of states with a reporter-shield law. *Times* attorney Bruce Johnson said Washington's law is particularly strong and can be applied in federal court.").
29. Interview, *supra* note 23.
30. *Id.*
31. Maureen O'Hagan, *City attorney*

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drops subpoenas against 3 Seattle Times *reporters*, Seattle Tiimes, Dec. 05, 2007 ("Gov. Christine Gregoire was 'troubled' by the subpoenas and Republican gubernatorial candidate Dino Rossi called for Carr's removal from an open-government panel.").
32. Johnson v. Village of Rockton, No. 3:04-cv-50223, 2007 WL 5731932 (N.D. Ill. Dec.. 07, 2007).
33. *Id.*
34. Unspecified Author, *Soldier Sues After Police Fire Him*, Los Angeles Times, May 13, 2004 (quoting Lt. Gov. Patrick Quinn).
35. *Johnson*, 2007 WL 5731932 at 1.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Soldier Sues After Police Fire Him*, *supra* note 34 (quoting Lt. Gov. Patrick Quinn).
40. Sadie Gurman, *Jury awards former Rockton cop lost wages*, Rockford Register Star, Dec. 08, 2007.
41. Johnson v. Village of Rockton, No. 3:04-cv-50223, 2007 WL 5731932 (N.D. Ill. Dec. 07, 2007) (explaining Johnson's allegations that the Village violated the Uniform Services Employment and Reemployment Rights Act, the Local Government Employees Benefit Continuation Act, the Military Leave of Absence Act, the Service Men's Employment Tenure Act, and the Public Employee Armed Services Act).
42. *Id.*
43. *Id.*
44. *Id.* ("Jurors determined that Johnson's military status was a motivating factor in his termination.").
45. Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3001 (June 19, 2009) (No. 08-1571).
46. *Id.* at 1064.
47. Nicholas Riccardi, *D.A. Accused of Payback Prosecution*, Los Angeles Times, Feb. 28, 2003 (referring to the Belmont project as a "construction fiasco").
48. *Eng*, 552 F.3d at 1064 ("The task force was headed by Special Assistant Anthony Patchett, who emphasized from the beginning that the Task Force would deliver 'slam dunk' indictments against prominent individuals involved with the Belmont project.").
49. *Id.* ("Following an extensive seven-month investigation, the Task Force concluded that the building site was and had always been environmentally safe and that no indictments should issue.")
50. *Id.* at 1064.
51. *Id.* at 1065.
52. *Id.*
53. *Id.*
54. *Id.*
55. Nicholas Riccardi, *supra* note 47 ("Eng's attorney, Mark Geragos, says his client was set up for a sham prosecution because Eng urged Cooley to come clean with the public on Belmont more than a year ago.").
56. *Id.*
57. *Eng*, 552 F.3d at 1066.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 1075-76.
64. *Id.*
65. Garcetti v. Ceballos, 126 S.Ct. 1951 (2006).
66. John Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 A. J. Trail Advoc. 539, 561 (2007) ("[T]he *Garcetti* Court ruled that anything public employees say in the course of performing their assigned duties is not of public concern and is therefore not protected under the First Amendment").
67. Note, Raj Chohan, *Tenth Circuit Interpretations of Garcetti: Limits on First Amendment Protections for Whistle-Blowers*, 85 Denv. U. L. Rev. 573, 579 (2008) ("The *Garcetti* Razor: … If the speech of a government employee is found to be pursuant to official duties, then the rule in *Garcetti* acts as a razor, cutting off the possibility of constitutional protection and preventing the court from proceeding to the *Connick-Pickering* test.").
68. *Garcetti*, 126 S. Ct. at 1960.
69. Raj Chohan, *supra* note 67 at 588-90.
70. Interview with Patrick O'Rourke on July 1, 2009.
71. *Id.* ML

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10. *Poole*, 831 A.2d at 223; City of Anchorage v. Gentile, 922 P.2d 248, 256 (Alaska 1996).
11. Myers v. City of Schenectady, 244 A.D.2d 845, 847 (N.Y. App. Div. 1997).
12. *City of Anchorage*, 922 P.2d at 257.
13. 404 U.S. 157, 173 (1971).
14. *Id.*
15. *See, e.g.*, Roth v. City of Glendale, 614 N.W.2d 467, 473 (Wis. 2000).
16. U.S. Const. art I, § 10.
17. Illinois Const., Art. XIII, § 5; *see* California Constitution, art. 1, § 9 ("A bill of attainder, *ex post facto* law, or law impairing the obligation of contracts may not be passed.").
18. Porter v. City of Highland Park, No. 263470, 2006 WL 1479909, *3 (Mich. Ct. App. May 30, 2006) (citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).
19. Bernstein v. Pennsylvania, 617 A.2d 55, 61 (Pa. Commw. 1992); Davis v. Wilson County, 70 S.W.3d 724, 727-28 (Tenn. 2002) (no vesting pursuant to a county resolution).
20. Thorning v. Hollister Sch. Dist., 11 Cal. App. 4th 1598, 1609 (Cal. Ct. App. 1993).
21. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 25 (1977); McGrath v. R. I. Retirement Bd., 88 F.3d 12, 16 (1st Cir. 1996) (citing *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411-12 (1983)).
22. *U.S. Trust Co. of New York*, 431 U.S. at 26.
23. AFSCME v. City of Benton, Ark., 513 F. 3d 874, 882 (8th Cir. 2008).
24. Calabro v. City of Omaha, 531 N.W.2d 541, 552 (Neb. 1995); Ass'n of Surrogates and Supreme Court Reporters v. New York, 940 F.2d 766, 773 (2d Cir. 1991) (noting that a payroll lag was not justified because the State could have shifted money from another governmental program or raised taxes); *cf.* Baltimore Teachers Union, Am. Fed. of Teachers Local 340 v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1018-20 (4th Cir. 1993) (a one-percent pay reduction was justified due to a budgetary crisis requiring the City to balance its budget "midway through the fiscal year … [a]t the eleventh hour").