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COMMENTARY

High Court: Federal Employees Lack Protection for Official Duties

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Special to the Legal

In the course of his official duties, an inspector general for a public agency uncovers widespread and high-level corruption. The inspector general reports the misconduct to his supervisor, who tells him to bury the information. As is required by his job description and consistent with his actual job duties, the inspector general nonetheless authors and issues a report describing the investigation and his findings. Immediately upon submission of the report, the inspector general is terminated.

Can the inspector general successfully bring a claim against his former employer for First Amendment retaliation?

Based upon an opinion recently issued by the U.S. Supreme Court, the answer is almost certainly no. In a 5-4 decision in *Garcetti v. Ceballos*, a splintered Supreme Court held that the protections of the First Amendment do not extend to the speech of a public employee where such speech was made pursuant to the employee's official duties. This decision has the potential for significantly expanding the ability of public employers to discipline and take action against public employees in response to employment-related speech or activities.

The plaintiff in the case, Richard Ceballos, was a deputy district attorney in Los Angeles County who alleged that, after he wrote a memorandum identifying serious misrepresentations in an affidavit made by a local sheriff to obtain a search warrant and recommending dismissal of the underlying criminal case, he was verbally chastised, reassigned to a different position, transferred to another courthouse, and denied a promotion. The district court had granted defendants' motion for summary judgment, concluding that the speech was not entitled to First Amendment protection because Ceballos wrote the memorandum as part of his official employment duties.

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The 9th U.S. Circuit Court of Appeals subsequently reversed, holding that the content of the memorandum was entitled to constitutional protection because it clearly addressed a matter of public concern and because defendants failed to establish that the memorandum had caused disruption or inefficiency in the government office.

On appeal, the Supreme Court reversed the 9th Circuit and affirmed the trial court's grant of summary judgment, holding that when public employees engage in speech pursuant to their official duties, they are not speaking as citizens for purposes of the First Amendment and, thus, the Constitution does not prevent public employers from taking adverse actions against them in response to such speech.

Writing for the majority, Justice Anthony Kennedy began by examining the *Pickering* test — the traditional framework used by courts to evaluate a claim of First Amendment retaliation — which looks to whether the public employee's speech involved a matter of public concern and, if so, then seeks to balance the employee's right to speak out against the government's need as employer to operate an effective and efficient workplace.

Analyzing the policy considerations behind the *Pickering* decision and subsequent case law, Kennedy reasoned that the court's First Amendment jurisprudence sought to promote the individual and societal interests served when a public employee joins the public discourse and speaks "as a citizen" on a matter of public concern, while also recognizing the government's need as employer to manage its work force to accomplish its important public tasks.

Applying those considerations to the facts before it, the majority held that Ceballos' memorandum was not deserving of First Amendment protection. While the majority acknowledged that the court, in several prior decisions, had held that public employees may enjoy First Amendment protection for statements made in the workplace concerning their jobs, it nonetheless held as a matter of law that because Ceballos' statements were made pursuant to his official supervisory duties as deputy district attorney, and not in his capacity as a "citizen," they did not qualify for protection under the First Amendment.

The court noted that public employers have "heightened interests in controlling speech made by an employee in his or her

professional capacity" because official communications may generate "official consequences," which creates the need for consistency, clarity and promotion of the employer's mission in all such communications.

Based upon the undisputed facts, the court concluded that Ceballos was clearly acting in his capacity as employee rather than as a citizen: "Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings … [and] [i]n the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case."

Because he was speaking as a public employee performing his official duties rather than in his capacity as a private citizen, the majority concluded as a matter of law that the Constitution did not restrict the government employer's ability to respond to Ceballos' speech — including the right to discipline or demote him as it saw fit.

The four dissenting justices, in three separate opinions, each took issue with the bright line standard espoused by the majority and argued that although the capacity in which a public employee spoke may be an important factor to consider in balancing the parties' respective interests, it should not be dispositive. The dissenters noted that the court's prior First Amendment jurisprudence did not support the majority's "employee versus citizen" dichotomy and reasoned that public employees do not lose their "citizenship" simply because they are performing their job functions at the time. Justice John Paul Stevens strongly argued that it is "senseless" to let the constitutional protection of speech turn on whether it happens to falls within the scope of a job description.

The dissenting justices also emphasized the practical difficulties in determining whether the speech at issue was in fact made pursuant to an employee's official duties. Is a prosecutor who holds a press conference on the courthouse steps engaging in "official job duties?" Is a public employee who responds to a press inquiry speaking in an official employment capacity or as a citizen? The dissent reasoned that determining the answers to these types of difficult questions would necessarily require the parties to engage in extensive discovery which itself could disrupt the functioning of important government agencies.

The better answer, according to the dissenting justices, would be to continue to apply the traditional *Pickering* analysis but with recognition that the capacity in which the employee was speaking is an important — albeit nonconclusive — factor for a court to consider in balancing the parties' interests and in deciding whether the statement is entitled to constitutional protection.

In light of the court's decision, public employers looking to limit potential exposure from First Amendment retaliation claims would be wise to review carefully written job descriptions. Because speech made pursuant to official job responsibilities is not entitled to constitutional protection, a public employer should consider whether certain job descriptions can reasonably be expanded in scope to include responsibilities for internal and external communications.

While the *Garcetti* majority noted that determining whether speech falls within one's official job duties is a "practical" consideration that is not dictated by the terms of a written job description, an employer's case can only be bolstered by documentation that expressly describes the speech or conduct in which the plaintiff actually engaged as part of the official duties of the job.

The potential confusion surrounding the capacity in which a public employee was speaking at any given time may also bolster a public employer's ability to rely upon the doctrine of qualified immunity. Under federal law jurisprudence, an individual who is accused of having violated a plaintiff's constitutional rights is entitled to qualified immunity from liability — and, indeed, often from even engaging in discovery — if the constitutional right that the defendant is accused of violating was not "clearly established" at the time.

The requisite inquiry is not whether a reasonable public official would have known of the generalized constitutional right in the abstract but, rather, whether a reasonable official, faced with the particular facts before him or her, would have understood that acting as he or she did would result in the violation of the plaintiff's clearly established constitutional rights. Given the fact-intensive inquiry involved in determining the capacity in which an employee was speaking at any given time – which quite often may be anything but clear — individual public-employer defendants may gain significant support for a qualified immunity defense.

Finally, the decision may be most strongly felt by those public employees whose very job responsibilities are to uncover and expose instances of fraud, corruption and other unlawful behavior — for example, inspectors general, public auditors, law enforcement officers, and the like. Under the rule established in *Garcetti*, these public employees would be without any First Amendment protection in the event their employers retaliated against them because of the contents of their employment-related speech or activities.

While these employees may be entitled to assert claims under other federal or state statutes under such circumstances, the court's decision nonetheless represents a significant contraction of the expansive constitutional protections these employees formerly enjoyed.

Assuming the *Garcetti* decision stands the test of time, it represents a significant and important shift in the delicate balance between the rights of public employees to speak on matters of public concern and the right of the government as employer to manage and discipline its workforce. Public employers now have significantly greater leeway in how they discipline and respond to employees who have engaged in employment-related speech and activities.

While public employees may not surrender all of their First Amendment rights by virtue of their employment, after *Garcetti* it appears they are without First Amendment protection for any speech that falls within their official job duties. •