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**GARCETTI V. CEBALLOS (2006): LIMITS OF PUBLIC EMPLOYEE SPEECH****Overview**

In recent months the media have reported several incidents across this country involving disciplinary actions taken against college professors on public campuses and teachers in public school systems for speaking out in the community on a variety of emotionally and sometimes politically charged issues. At the same time several court cases have emerged involving employees (often referred to as “whistleblowers”) claiming that they lost their jobs in retaliation for going public with complaints about internal matters at their place of employment. Cunningham v. Chapel Hill I.S.D. (E.D. Tex. 2006)

The purpose of this commentary is to address the following question: When and to what extent are the First Amendment’s free speech rights and protections applicable to public (governmental) employees (specifically public school teachers and administrators), in light of the United States Supreme Court’s decision in Garcetti v. Ceballos (2006)? In my opinion, even though Garcetti is narrowly focused and does not involve public school system personnel, it nevertheless occupies an important place in the Supreme Court’s long line of First Amendment decisions, and presents policy implications for local public school boards.

**Employee Free Speech**

Of the basic civil rights afforded all citizens, the First Amendment’s right to speak remains one of our most cherished freedoms. While the freedom to “speak out” always has held an important place in the world of public employment (especially in public universities, colleges, and public school systems), there is little doubt that public employee speech rights are nonetheless restrictive. As legal experts tell us, “...practical reality requires that government, at certain times and under certain conditions, be able to restrict employees’ speech in order to fulfill its responsibilities to operate effectively and efficiently.” Alexander and Alexander (2005) At the same time, however, the courts consistently have held that public employees do not totally jettison their First Amendment rights and protections when they enter the work place.

Charles Fried in his treatise reminds us that “[g]overnment is not a person; it can only speak or act through persons.” Fried (2004) It therefore follows that in today’s public work place a balance must be struck between

the employer's legal prerogatives to effectively govern and efficiently carry out all official duties and responsibilities, and an employee's individual rights (constitutional and contractual) in that same work place. Vacca and Boshier (2003)

*Historical Antecedents.* Four decades ago, the United States Supreme Court made it clear in Pickering v. Board of Education (1968), that public employees speaking out on matters of public concern, particularly when such matters involve their own profession, are protected by the First Amendment. Stated another way, public employees (in this case a teacher) do not lose their constitutional right to freely speak out on matters of "public concern" solely because they are employed by a governmental entity.

Deciding in the employee's favor, the Supreme Court in Pickering (1968) established the following standard of analysis: To uphold a public school board's actions, evidence would need to establish that the employee's exercise of speech was detrimental to the efficient operation and administration of the school, or the employee knowingly and recklessly made false statements about the school board and administration. Also significant is the Supreme Court's assertion that public employees (in this case a teacher) should be free to speak out in the work place "without fear of retaliatory dismissal."

One year later, the United States Supreme Court took the opportunity in Tinker v. Des Moines (1969), a benchmark First Amendment case involving student expression, to emphatically state that within the special characteristics of the school environment, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, the Court cautioned that speech and expression in a public school setting is not without limits, especially where said exercise "substantially interferes with" the operation of the school or "materially and substantially disrupts" the school's educational environment.

*The Post Pickering-Tinker Era.* As public employment law moved through the decade of the 1970's, employee free speech issues took another path of litigation. During this time period courts of law dealt with the extent and reach of employee free speech. Givhan v. Western Line Consolidated School District (1979), for example, presented the high court with the following question: Does the First Amendment extend to a teacher who speaks to his/her superior on work-related matters not in public but in the privacy of the superior's office? Mainly relying on Pickering v. Board of Education (1969) and Mt. Healthy v. Doyle (1977), the Court held that public employees (here a public junior high school English teacher) do not lose their First Amendment protections solely because their speech or expression (even where the employee's remarks are critical of the superior) is privately communicated. Givhan (1979) In the words of Justice Rehnquist, "Neither the (First) Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." Givhan (1979) It is important to note that at no time did the Court characterize the teacher's remarks as a "personal grievance."

*Connick v. Meyers (1983): The Search for Motive.* As public employment law moved into the decade of the 1980's the rule remained in place requiring courts to initially seek out the underlying *motive* behind an employee's exercise of speech or expression. If the employee communicated matters of "private (*i.e.*, personal) concern" and not matters of "public concern," the First Amendment's protections did not apply. This point was firmly established by the Supreme Court in Connick v. Meyers (1983), a non-school case out of Louisiana.

In Connick a public employee, who had been transferred by her boss to other duties, circulated a questionnaire to colleague workers asking for information regarding office morale, and other intra-office matters. Because the questionnaire was viewed as disruptive of office administration, she was dismissed from employment.

Subsequently the Supreme Court held that her First Amendment speech rights had not been violated, since her inner-office questionnaire dealt solely with matters of a “private, personal nature,” and not with matters of “public concern.”

As Russo has summarized, the Supreme Court in Connick v Meyers (1983) developed a two-pronged standard to apply when analyzing First Amendment employee speech issues. First, a court “must ascertain whether the speech involved an issue of public concern by examining its content and form along with the context within which it was expressed.” Second, “if the speech does address a matter of public concern, a court must balance an employee’s interest as a citizen in commenting on matters of public concern against that of the employer in promoting effective and efficient public service.” Russo (2004)

### **Garcetti v. Ceballos (2006): The Office Memorandum**

*The Facts.* At the time this case began, Ceballos was serving as supervising deputy district attorney in the Los Angeles County, California, District Attorney’s Office, where Garcetti served as District Attorney. In February 2000, a defense attorney contacted Ceballos. The attorney asked Ceballos to review a case in which the attorney claimed inaccuracies and misrepresentations existed in an affidavit used by police to obtain a search warrant. The attorney also informed Ceballos of his intention to challenge the warrant. Because the search warrant was of critical importance in a pending criminal case, Ceballos initiated his own investigation of the matter.

Dissatisfied with the results of his investigation, including visiting the location of the incident involved in the warrant, and contacting and discussing the matter with the deputy sheriff who submitted the affidavit, Ceballos sent a memorandum to his superiors recommending that the case be dismissed. Subsequently, a meeting was held involving Ceballos, his superiors, and representatives from the sheriff’s office. Following that meeting Ceballos’ superiors decided to move ahead and prosecute the case. Ultimately a court hearing was held in which Ceballos was called by defense counsel to testify regarding his concerns with the affidavit in question. The court dismissed the challenges to the warrant.

*Ceballos Goes to Court.* After unsuccessful filing an employment grievance, Ceballos filed suit in a federal district court where he alleged that his superiors violated his First and Fourteenth Amendment rights. More specifically, he claimed that his reassignment to a different position, transfer to another courthouse, and denial of a promotion all were in retaliation for his memorandum critical of the affidavit. In Judge Matz view, however, because the office memorandum was written and communicated as a part of Ceballos’ duties as a deputy assistant district attorney, the First Amendment did not apply. In the alternative the court held that his superiors had qualified immunity because the rights asserted in this case were not clearly established. Summary judgment was granted to defendants.

On appeal to the United States Court of Appeals for the Ninth Circuit, the trial court was reversed. Ceballos v. Garcetti (9th Cir. 2004) Relying on Pickering (1968) and Connick (1983), the Court held that the First Amendment is applicable in this case, because the memorandum addressed what can be characterized as governmental misconduct; inherently a matter of public concern. What is more, Ceballos’ First Amendment rights were clearly established and the actions of his superiors were “not objectively reasonable.” In addition, said the Court, the memorandum neither caused disruption in nor interfered with the efficient operation of the District Attorney’s Office. It is important to note, however, that the question of whether Ceballos’ memorandum statements were made as an employee or as a private citizen was not addressed. *Certiorari* to the Supreme Court was granted, at 543 U.S. 1186 (2005)

## The Robert's Court Speaks

*The Decision and Holding.* On May 1, 2006, by a vote of 5-to-4, the United States Supreme Court reversed the Ninth Circuit. In a decision written by Justice Anthony Kennedy (joined by Chief Justice John Roberts, and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito), the Court held that public employees who make statements as a part of their official job-related duties (*i.e.*, professional responsibilities) are “not speaking as private citizens.” Garcetti v. Ceballos (2006) The Ninth Circuit Court was reversed and the case remanded.

*The Court's Rationale.* In applying First Amendment speech protections in this situation, the Court drew a very important and controlling distinction. A difference exists, said the majority, between Ceballos' *public employee* role, as a supervising deputy district attorney, and his personal role as a *private citizen*. This distinction served as the basis of the majority opinion.

In reversing the Ninth Circuit, Justice Kennedy made it clear that:

- Public (governmental) employers exercise a significant degree of control over employee job-related performance.
- An important link exists between a speaker's expressions and his/her employment.
- First Amendment rights of public (governmental) employees are limited in the work place.
- Public employees speaking in their official capacity as employees (*i.e.*, when carrying out official, job-related responsibilities), are not speaking as private citizens.
- The Constitution does not apply when employees are not speaking as private citizens
- Employee communications made as employees are not insulated from employer discipline
- Public employees, as citizens, are not prevented from engaging in public debate on matters of public concern, solely because they work for a governmental entity. However, limits on public employee speech out in the community may still exist because of the work they do.
- Exposing government inefficiency and misconduct are matters of considerable importance, and employers should be open to and receptive of constructive criticisms
- Public employers that wish to encourage employees to voice their concerns privately have an option of creating an internal forum in which such concerns can be addressed

*Dissenting Opinions.* Justice Stevens in his dissent relies on Givhan (1979). He does not agree with the majority that a distinction exists between employee speaking as an employee in the course of his duties, and that same employee speaking the same words as a citizen. If this is so, he states, employees will be given an incentive not to take their concerns to their employer, but rather to take them directly to the public.

Justice Souter in his dissent (joined by Justices Stevens and Ginsburg) applied both Pickering (1968) and Givhan (1979). He too does not see a distinction existing between an employee speaking as “employee,” and same employee speaking as “citizen.” Employees still are citizens. Open speech by private citizens on matters of public concern lies at the heart of expression and must be subject to First Amendment protections. The majority opinion, he suggests, sets up barriers to speech that an employee cannot overcome. In addition, the balance that should exist between the employer's interest in efficient operation and the employee's interest in speaking out on issues should not disappear simply because the subject of speech involves issues related to employee's job. He also cautions that the majority opinion has ramifications for academic freedom at public colleges and universities.

Justice Breyer in his dissent cites the Pickering (1968) standard that an employee's speech as a citizen, on matters of public concern, is protected by the First Amendment, so long as it does not unduly interfere with governmental interests. He also suggests that because the employee in this case was a lawyer it was "professional speech," where he might be required, by an ethical obligation, to speak out on certain matters. The ethical canons of a profession, he said, help diminish the risk that courts will improperly interfere with the necessary authority of government to manage its work. In such situations as the one in the case before the Court, the employer's interest is diminished and the employee's professional speech activities should have received special protection.

### **Policy Implications**

While reminding the reader that Garcetti v. Ceballos (2006) narrowly focuses on First Amendment speech issues involving professional employees (in this case an deputy district attorney employed and working within the special environment of a public law office), the Supreme Court's rationale and decision nevertheless have implications for public employees in other governmental settings (e.g., public school administrators and teachers); especially where retaliatory dismissal from employment is alleged. See, for example, Mayer v. Monroe County Community School Corp. (7th Cir. 2007)

In my opinion it behooves local public school boards to revisit and audit personnel policies in light of Garcetti. What follow are suggestions to consider as personnel policies are looked at.

School system policies must make it clear that:

- The School Board (the Board) is legally responsible for and duty bound to protect the efficient and effective management of the school system's management and operations, so that teachers can teach and students can learn in a safe, secure, and disruption-free educational environment.
- The Board respects the First Amendment speech and expression rights of all employees in the work place.
- School system employees are encouraged to exercise their rights as private citizens in the community to engage in public discourse involving all matters impacting on the general welfare, progress, and safety of their community.
- Statements (oral or written) made by any employee, as a school system employee discharging his/her job-related duties, are not considered private speech.
- Employee job-related concerns and issues (including but not limited to official misconduct, violations of law, and violations of school system policy) shall be brought to the immediate attention of the employee's direct administrator, using the school system's formal communications/complaints procedure.
- Where public disclosure of school system official business is determined to be necessary and appropriate, such matters shall be communicated (verbally or in writing) to the general public by individuals formally designated (by the Board) as the school system's official representative.

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Note: The views expressed in this commentary are those of the author.