by Ruth Major

The Battle Between a Public Employee's Right to Free Speech and a Public Employer's Interest in Protecting Its Operations Returns to the Supreme Court for Another Round

"[F]or many years 'the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment including those which restricted the exercise of constitutional rights.'"[1] In 1968, that changed. The Supreme Court, in *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205, Will County, Illinois,*[2] recognized that public employees do not "surrender all their First Amendment rights by reason of their employment." The plaintiff in *Pickering* was a public school teacher whose employment was terminated after he spoke out on school funding issues. The *Pickering* court set forth an analysis for determining whether an employee's speech was protected.[3] Under the "*Pickering* balancing test," two inquiries were made. The first was whether the employee spoke as a citizen on a matter of public concern. If not, the inquiry ended and there was no First Amendment protection for the speech. If the employee did speak on a matter of public concern, then the second inquiry, whether the relevant government entity had an adequate justification for treating the employee differently than any other member of the general public, was considered. As long as an employee was speaking as a citizen about matters of public concern, only those restrictions that were necessary for the employer to operate efficiently and effectively were allowed.

For the almost 40 years following the *Pickering* decision, the *Pickering* balancing test was faithfully applied by courts throughout the country. However, this changed in 2006 when a sharply divided Supreme Court added a new, and quite significant, wrinkle to the analysis through its decision in *Garcetti v. Ceballos.*[4] The *Garcetti* decision narrowed the scope of protection for employees by holding that if the speech is made pursuant to the employee's official duties, then it is not protected even if the employee can satisfy the *Pickering* balancing test.[5] Thus, even if the speech was an expression of concern the employee held as a private citizen, so long as it is expressed pursuant to the employee's official duties there is no protection. This has been referred to as the "official duties" doctrine.[6] The rationale behind the doctrine is that speech which owed its existence to the public employee's job duties is not recognized as infringing on any liberties the employee might have enjoyed as a private citizen. In determining whether the speech was made pursuant to the plaintiff's official responsibilities, the Court identified as the "controlling factor" whether the statements were actually made pursuant to his official duties, and not whether the speech merely concerned the subject matter of plaintiff's employment, was made in the workplace, or occurred during activities that were or were not included in the employee's formal job description, which the Court recognized "often bear little resemblance to the duties an employee is actually expected to perform."[7]

The majority opinion was met with dissenting opinions by four justices. The opinion filed by Justice John Paul Stevens contended that the majority's holding went too far in protecting the employer's interests, stating that that the "proper" answer to the question, "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties" is "Sometimes," not "Never."[8] Justice Stevens' opinion primarily focused on the fact that the majority's opinion would not protect speech in circumstances where the speech is only unwelcome by the supervisor because "it reveals facts that the supervisor would rather not have anyone else discover."[9] Justice David Souter's opinion challenged the majority "categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him."[10] Justice Souter found that protecting the speech of a teacher who complains of race discrimination in hiring because her job is not to choose personnel, while not protecting the very same speech by a school personnel officer creates an "odd place to draw a distinction."[11] Justice

Ruth Major is the principal at the Law Offices of Ruth I. Major, PC, in Chicago. She has been practicing law for more than 20 years, more than 15 of which have focused on employment law, including the representation of both employers and employees in employment matters. She currently exclusively represents employees, including providing counseling and representing individuals in litigated matters on a wide variety of employment-related issues. She is a member of the Chicago Chapter of the Federal Bar Association, a member of the Federal Bar Association's Membership Committee (national), and regularly reports on labor and employment law decisions made by the Seventh Circuit. This article was submitted on behalf of the FBA Labor and Employment Section; for more information about this section, please visit www.fedbar.org.

Stephen Breyer similarly found the majority's opinion to have gone too far in protecting the interests of the employer.[12]

In the six years following the *Garcetti* decision, courts have tackled the issue of determining which speech falls within an employee's duties versus which speech is protected by the First Amendment. One activity that has proven problematic is a public employee's court testimony. On this issue, the circuit courts have parted ways. The Third Circuit has taken the position that any testimony offered in court, even if it relates to an investigation conducted as part of an employee's official duties, is protected speech under the official duties doctrine because, "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties'; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence."[13]

The Seventh Circuit has taken a similar view of testimony under oath by a public employee. In *Chrzanowski v. Bianchi,*[14] the Seventh Circuit held that the testimony of a public employee against his supervisor is protected First Amendment speech. In this case, the Court first analyzed the issue by applying the official duties doctrine and the *Pickering* balancing. In finding that the employee's speech was protected by the First Amendment, the Court explained that, "appearing as an 'investigating witness' is a far cry from giving eyewitness testimony under subpoena regarding potential criminal wrongdoing that Chrzanowski happened to observe while on the job. The McHenry County State's Attorney's Office does not pay Chrzanowski to witness crimes and then testify about them; it pays him to prosecute crimes."[15] The Court also found that testimony given pursuant to a subpoena is nevertheless protected under the First Amendment even if it is part of an employee's duties. The Court reasoned that the rationale behind the *Garcetti* official duties doctrine would never be served by allowing an employer to affect the testimony of an employee under oath and, accordingly, there is no legitimate interest of an employer at issue when an employee testifies. The views of the Third and Seventh Circuits on the issue of court testimony as protected speech are in line with the view offered by Justice Stevens in his dissent in *Garcetti*. Specifically, Justice Stevens wrote, "[u]pon remand, it will be open to the Court of Appeals to consider the application of Pickering to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process."[16]

Other circuits have considered whether the courtroom testimony of a public employee is protected under the First Amendment have analyzed the issue only under the official duties doctrine and the *Pickering* balancing. The Ninth Circuit held the testimony of a domestic violence counsel was protected under the First Amendment because the counselor was not directed to testify by its employer but rather was subpoenaed, the counselor was testifying about someone other than a patient he treated, and the only evidence in the record of the counselor's job duties was his job description, which did not include testifying in court.[17] The Second Circuit held that testimony offered in court by a Department of Social Services (DSS) employee was not protected speech because the employee was not subpoenaed but voluntarily testified in court and identified herself as a DSS employee, testified concerning information that she learned through performing her official duties for DSS, and during testimony did not distinguish her views from the views of DSS.[18] In another case,[19] the

Second Circuit also found the testimony of a public employee was not protected First Amendment speech because the employee's testimony concerned her job performance and was "motivated by personal interest in responding to criticism of her job performance and not motivated by a desire to 'advance a public purpose.'" The Court also found that the "absence of a citizen analogue" to a forum in which the employee testified, which was only available to employees of the city, further supported the Court's finding that the speech fell within the employee's official duties.[20]

The Supreme Court scheduled oral arguments for April 2014 in a case that raises the issue of when court testimony by a public employee is protected First Amendment speech. The case, *Lane v. Franks,* concerns a plaintiff who served as the director of Central Alabama Community College's Intensive Training for Youth Program.[21] After accepting the position, the plaintiff learned that a Senate representative was on the program's payroll but was not reporting for work and did not appear to be performing work for the program. Plaintiff attempted to rectify the situation despite receiving numerous warnings from the president of the college and the school's lawyer that doing so could have negative repercussions for the plaintiff and the college. The plaintiff nevertheless terminated the Senate representative's employment after she refused the plaintiff's request to report to work. Soon after, the FBI began investigating the state representative and contacted the plaintiff for information. Pursuant to a subpoena, the plaintiff testified against the state representative before a grand jury and then at a federal criminal trial for mail fraud and fraud involving a program receiving federal funds. The plaintiff's employment was subsequently terminated, and he sued alleging, *inter alia,* that he was retaliated against in violation of 42 U.S.C. § 1983 based on his testimony before the grand jury, which he contended constituted speech protected by the First Amendment. The trial court and Eleventh Circuit held that the fact "[t]hat 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."[22]

The Supreme Court's review of the *Lane* case will likely provide guidance on how to determine whether or when court testimony is protected under the First Amendment. The Court will likely answer

the question of whether compelled testimony under oath by a public employee should be protected First Amendment speech even if the testimony arises from or is actually part of the employee's official job duties. The Court also will likely address how broad a public employee's official duties should be construed when it evaluates whether the official duties of the director of a youth training program included testifying before a grand jury against someone who had been on the program's payroll. No doubt, the decision in *Lane* will provide further guidance to courts and litigants to help address these challenging issues and bring much needed uniformity on these issues. ⊙

Endnotes

[1]*See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (citing *Connick v. Myers,* 461 U.S. 138, 143 (1983)).

[2]391 U.S. 563 (1968).

[3]*Id.* at 568.

[4]547 U.S. 410 (2006).

[5]*Id.* at 421.

[6]*See Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008).

[7]*Id.* at 227.

[8]*Garcetti,* 547 U.S. at 426.

[9]*Id.*

[10]*Id.* at 429.

[11]*Id.* at 430.

[12]*Id.* at 444.

[13]*Reilly,* 532 F.3d at 231 or 232 (citing *Garcetti*, 547 U.S. at 423).

[14]725 F.3d 734 (7th Cir. 2013).

[15]*Id.* at 740.

[16]*Garcetti*, 547 U.S. at 444.

[17]*See Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011).

[18]*See Kiehle v. County of Cortland*, 486 Fed. Appx. 222, 224 (2d Cir. 2012).

[19]*See Bearss v. Wilton*, 445 Fed. Appx. 400, 404 (2d Cir. 2011).

[20]*Id.*

[21]No. 13-483.

[22]*See Lane v. Central Alabama Community College,* 523 Fed. Appx. 709, 712 (11th Cir. 2013).

PUBLIC BENEFIT continued from page 11

the various corporate stakeholders get a little more complicated, and it will be interesting to see how the courts sort this out.

Endnotes

[1]*Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919)("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986)("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders.").

[2]John H. Richardson, *Saving Capitalism from Itself: Inside the B Corp Revolution* (Esquire Magazine, Aug. 23, 2010).

[3]*See generally* William H. Clark, Jr. and Elizabeth K. Babson, *How Benefit Corporations Are Redefining The Purpose Of Business Corporations*, 38 Wm. Mitchell L. Rev. 817 (2012); *see also* Gary Schildhorn and Brya Keilson, *The Unresolved Dilemma of Creditors' vs. Stakeholders' Rights*, 32-4 ABIJ 58 (May 2013).

[4]8 Del. C. § 361.

[5]8 Del. C. § 362(a).

[6]8 Del. C. § 362(a); see also 8 Del. C. § 365(a) for similar language).

[7]8 Del. C. § 362(c).

[8]8 Del. C. § 362(a).

[9]*Id.*

[10]8 Del. C. § 362(b).

[11]*Id.*

[12]8 Del. C. § 366(c).

[13]8 Del. C. § 365(a).

[14]8 Del. C. § 365(b).

[15]8 Del. C. § 367.

[16]*Id.*

[17]See Clark and Babson at 849 (discussing the concept of an injunctive "benefit enforcement proceeding").

[18]8 Del. C. § 365(b).

[19]8 Del. C. § 365(c).

[20]*N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007).

[21]*Id.*

[22]*In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986).