

United States Supreme Court Recognizes Management's Rights in Denying First Amendment Protection to Complaining Employee

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The United States Supreme Court recently issued a decision of significant importance that removes a wide segment of public employee speech from the protection of the First Amendment where that speech is considered part of an employee's job duties. The Court recognized, perhaps for the first time, that government managers have important "management rights" which must be preserved even where an employee is speaking out about provocative issues that may otherwise be of concern to the public (for example, law enforcement misconduct).

In *Garcetti v. Ceballo*, 2006 U.S. Lexis 4341 (2006), the Supreme Court exempted speech that is part of the duties expected of an employee as a way to properly recognize and protect the rights of management to maintain effective and efficient governmental services. The Court held that when a public employee makes statements pursuant to that employee's official duties, the employee is not speaking as a citizen for First Amendment purposes, and the Constitution does not insulate the employee's communication from employer discipline. In effect, employees who report matters as part of the functioning of their jobs do not enjoy First Amendment protections for doing so. Since Personnel Managers are on the forefront of employee job-related complaints, understanding what this Supreme Court decision means is of particular significance.

Background

Richard Ceballos was employed by the Los Angeles County District Attorney's Office. At the time this litigation commenced, Ceballos was employed as a Calendar Deputy. Pursuant to his employment as a Calendar Deputy, Ceballos was responsible for supervising other attorneys, investigating criminal charges, preparing filings, and advising supervisors about strategies for prosecuting cases.

In 2000, a criminal defense attorney contacted Ceballos to investigate a search warrant used by a Deputy Sheriff, because the defense attorney planned to challenge the validity of the warrant. It was not unusual for defense attorneys to ask Calendar Deputies like Ceballos to investigate these issues. Ceballos conducted his investigation of the search warrant and determined that the Deputy Sheriff's affidavit contained several serious misrepresentations. Ceballos subsequently relayed his concerns about the affidavit to his supervisors in the District Attorney's Office and to the Sheriff's Department. Furthermore, Ceballos drafted two memoranda concerning the affidavit, and he asked his supervisors not to pursue prosecution of the case. A very heated meeting ensued between Ceballos, his supervisors, and employees from the Sheriff's Department, at which his supervisors chose to proceed with the prosecution. Ceballos was eventually called as a witness for the defense during the hearing involving the motion to challenge the warrant. However, the trial judge rejected the defendant's challenge to the warrant.

Thereafter, Ceballos was subjected to several changes in his working conditions. He filed a lawsuit alleging that his supervisors had violated his rights under the First and Fourteenth Amendment. Specifically, he contended that he was subjected to a series of retaliatory employment actions including: (1) reassignment from his Calendar Deputy position to a Trial Deputy position; (2) transfer to another courthouse; (3) denial of a promotion; and (4) denial of a grievance. For their part, his supervisors claim the employment actions were made due to staffing needs and other legitimate reasons. The district court rejected Ceballos' claim, finding that his speech was not entitled to First Amendment protection, because he wrote the memoranda and discussed his findings with his supervisors pursuant to his normal employment duties. The Ninth Circuit Court of Appeals reversed, stating that Ceballos' allegations of wrongdoing constituted protected speech under the First Amendment. In a close 5 – 4 vote spread along ideological lines, the Supreme Court reversed the Ninth Circuit finding management had a right to control Ceballos's speech made pursuant to his job duties.

Legal Analysis

Prior to *Garcetti*, public employees had a First Amendment right, albeit limited, to speak on matters of public concern. *Pickering v. Bd. of Ed.*, 391 U.S. 563 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983). In deciding whether the employee's speech was constitutionally protected, district courts were instructed to first consider whether the expression in question was made by the speaker as a citizen upon a matter of public concern. If the answer was negative, the employee had no First Amendment claim based on her employer's reaction to the speech. However, if the answer was affirmative, only restrictions that were necessary for the employer to operate efficiently and effectively were constitutionally permissible.

In *Garcetti*, the Supreme Court effectively carved out part of this First Amendment doctrine and grounded its decision in recognizing management's right to control the workplace over employee workrelated speech. Under the revised doctrine articulated in *Garcetti*, now the "controlling factor" is whether the speech was made pursuant to the employee's official duties. Thus, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline." Only when the employee makes statements outside the scope of her official employment responsibilities will it be necessary to address the issue of whether her speech is entitled to First Amendment protections.

The Court offered several explanations supporting its decision to favor management rights. First, *Garcetti* indicates the Court's reluctance to make employee grievances a constitutional dispute. Second, *Garcetti* upholds managerial discretion of government employers based on the theories of federalism and separation of power. The Court inferred it does not want to serve as a super personnel arbiter over personnel decisions. Finally, *Garcetti* recognizes the importance of management's supervisory authority over work that the employer itself has commissioned.

Discussion

While the *Garcetti* Court recognized management's right to exercise "sufficient discretion to manage [its] operations," Personnel Managers must recognize the cautionary elements of the Court's decision. There are a few primary issues that personnel professionals must keep in mind. First, in this case it was undisputed that the statements were made pursuant to Ceballos's official duties. Thus, the court did not address whether this was a matter of public concern, nor did they employ the Pickering test. Other cases will be less clear. Second, personnel professionals overseeing academia and teachers are not covered by this change in First Amendment doctrine. Future cases will determine the Court's new direction of free speech claims of educators. Third, management always must remember that other laws protect employee speech such as whistle-blower statutes.

While the *Garcetti* decision provides some guidance that personnel professionals must evaluate when analyzing employee speech and conduct, the decision is still ripe for serious interpretation and scrutiny. Following are several suggestions that Personnel Managers should consider in light of this decision.

Identify Each Employee's Routine Job Duties and Responsibilities

Personnel managers should remind each employee of their obligation to notify supervisors and report incidents of inefficiency, neglect, misconduct, and disregard for the public's interest. Personnel managers should also analyze routine job responsibilities and identify aspects of each employee's job where that job requires the employee to address specific issues of public importance. Job descriptions and personnel policies should unequivocally identify the employee's responsibility to report these issues to management and in particular to specific supervisors. Personnel managers must remember though that it is the employee's normal job duties and not the words in the job descriptions and personnel policies standing alone that dictate whether the employee's speech is part of the employee's duties.

Encourage Internal Reporting and Actively Follow-Up and Investigate Reports

Personnel Managers should have a sound and consistent practice of requiring and properly addressing employee reporting of issues of concern. Government employees are often in the best position to know what problems their departments face, and supervisors are more likely to respond to workplace problems if employees notify the supervisor of the issue. To further this objective, the Court stated "a public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. . . . [and such] forum[s] for their speech will discourage them from concluding the safest avenue of expression is to state their views in public." Moreover, such a practice may assist management in future disputes, because a court is more likely to credibly view an employee's job responsibility to report if the employer adequately adheres to the job requirement and requires the employee to follow a designated reporting requirement.

Characterize the Speech and Characterize It Early

Garcetti may encourage employees to talk publicly before resolving disputes with their employers. Therefore, when an employee makes an allegation, management should immediately characterize whether this speech is based on the employee's job duties or whether the employee is acting as a private citizen. The employer should get the employee immediately "on the record" and have the employee identify why this matter is being addressed and if it is the employee's job responsibility that caused the employee to address this issue with the supervisor.

Effectively Discipline Ineffective Reporting, Failure to Report and Untruthfulness

The *Garcetti* Court recognized management's right to impose high standards of honesty, accuracy, and judgment on employees who speak in doing their work. To further that end, the Court's opinion does not limit an employer's ability to take disciplinary action against an employee who, as part of the employee's job duties and responsibilities, fails to report such issues or who fails to provide all meaningful and relevant facts regarding the issue. Moreover, both the majority opinion and Justice Souter's dissent recognize management's right to reign in reckless, untruthful and deceptive conduct that may have the effect of unnecessarily disrupting the workplace.

Garcetti Will Spur Litigation

While *Garcetti* meaningfully recognizes the strength and necessity of management rights and effective government operation, the opinion simply does not limit or define which employment activities are protected and which responses by government supervisors are retaliatory. The decision opens government employers to a wave of litigation that will be necessary to define the direction of this revision of First Amendment doctrine. Even the Court recognized this case is only the tip of the iceberg when it stated, "We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate," and that the analysis is a "practical one." Therefore, Personnel Managers must tread with some caution, because different facts may generate law that more narrowly defines the scope of management rights that were recognized by the Supreme Court. Additionally, Personnel Managers must be cognizant of new case law emanating *Garcetti*, because those decisions will define the future responses to the protections afforded to employees alleging retaliation for engaging in protected speech or whistleblowing.

While *Garcetti* affords some guidance for addressing matters where employees engage in speech as part of their jobs, personnel professionals should make every attempt to cautiously handle employee speech. The dissenting justices prediction about the proliferation of litigation may very well come true, and we may see a similar case before this court yielding entirely different results.

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