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Blow to Whistleblowers?

U.S. Supreme Court Rules That Workplace Reports Not Protected Free Speech

By Christine Martin

Public employees who report what they believe is workplace misconduct to their supervisors cannot necessarily invoke their constitutional right to free speech if their employer retaliates, the U.S. Supreme Court ruled late last month. The decision stemmed from a 2000 incident in which Richard Ceballos, a deputy district attorney working in the office of Los Angeles County District Attorney Gil Garcetti, claimed that he was transferred and demoted after he reported what he believed were misrepresentations used to obtain a search warrant. Critics said the 5–4 decision in Garcetti v. Ceballos will have a chilling effect on whistleblowers and others who attempt to expose government wrongdoing.

The case has been of particular interest to ALA-Allied Professional Association (ALA-APA) supporters. The American Library Association adopted a policy at its annual conference in 2005 that "libraries should encourage discussion among library workers, including library administrators, of non-confidential professional and policy matters about the operation of the library and matters of public concern within the framework of applicable laws."[1] The ALA Committee on Professional Ethics (COPE) issued an "explanatory statement" on the issue of workplace speech as early as July 2001 (www.ala.org/ala/oif/ifgroups/cope/copeinaction/explanatory/questionsanswers.htm), and the Garcetti case has been discussed more recently on the ALA-APA "MoneyTalks" online discussion group. Perhaps anticipating the Garcetti decision (or at least displaying a strong knowledge of First Amendment law), the 2001 "explanatory statement" warns that "the freedom of expression guaranteed by the First Amendment, however, has traditionally not been thought to apply to employee speech in the workplace." Certainly that tenet was reflected in the majority opinion in Garcetti written by Justice Anthony Kennedy and released on May 30.

"Controlling factor" Is That Expressions Were Made "Pursuant to Duties"

Joined by Justices Samuel Alito, Antonin Scalia, Clarence Thomas, and Chief Justice John Roberts, Kennedy wrote that "The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy . . . We hold that 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. . . Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."

But Justice David Souter wrote in his dissent that the public interest in hearing about alleged wrongdoing from potential whistleblowers outweighs the government's interest in workplace efficiency. "Private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection." Justices Ruth Bader Ginsburg and John Paul Stevens joined Souter in his dissent. Justice Stephen Breyer wrote a separate dissent, as did Stevens, even though he also joined Souter.

Kennedy in the majority opinion wrote that government employees who fear or experience retaliation may avail themselves of other avenues of redress, such as whistleblower statutes, labor laws, and even professional codes of conduct, such as those that govern attorneys.

Kennedy also wrote that allowing First Amendment cases stemming from workplace disputes would constitute an unwarranted extension of federal judicial authority into the sovereign powers of the states and the prerogative of the federal executive branch. "When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.

When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers," Kennedy wrote.

"Perverse" Ruling Protects Comments Made Publicly, But Not Those Kept Private

But Stevens wrote in his dissent that the ruling seemed "perverse" because it prohibits government employees from bringing free speech claims for reports made directly to supervisors, yet allows such claims if the speech or written expression is made in a public forum, such as a letter to the editor, school board meeting, or even a press conference. Souter wrote in his dissent that he feared employers may react to Garcetti by broadening job descriptions to rule out a broader range of employee speech. For example, he wrote, employers may revise job descriptions to include "a general obligation to ensure sound administration." Litigating the meaning of these vague phrases, Souter said, may lead to the flood of new litigation that the majority says it seeks to avoid.

Majority Opinion Sidesteps Question of Academic Freedom

Souter also said that the majority's ruling that the government has the right to control speech that it has "commissioned" may prove especially unsettling for academics. "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties, '" Souter wrote in his opinion. The majority opinion acknowledged the issue of academic freedom, but did not address it directly.

The Garcetti v. Ceballos case came before the Supreme Court after Ceballos claimed he was demoted, reassigned to another court house, and denied a promotion for writing a memo to his supervisors reporting what he believed were misrepresentations in an affidavit that the Los Angeles County Sheriff had used to obtain a search warrant. His supervisors declined to drop the case. Ceballos also testified in court as to his findings when he was called as a witness for the defense. The court rejected the challenge to the warrant.

Ceballos filed a federal lawsuit after his workplace grievance was dismissed. The lawsuit originally was dismissed, but was reinstated upon appeal. The Los Angeles County District Attorney's Office then appealed the case to the U.S. Supreme Court. An attorney from Public Citizen, an organization founded by consumer advocate and former presidential candidate Ralph Nader, defended Ceballos before the Supreme Court. The American Civil Liberties Union filed a friend-of-the-court, or amicus, brief on behalf of Ceballos.

"A public employee who speaks up in the public's interest by reporting suspected police misconduct to his superiors should not lose his First Amendment protection against retaliation by his employer," the ACLU of Southern California said in a press release issued about the case in October, when the current Supreme Court term began. "Instead, he should be praised and held up as a positive example of a whistleblower."

According to a *Washington Post* article published May 31, 2006 ("High Court's Free-Speech Ruling Favors Government"), the Los Angeles County District Attorney's office denies that it retaliated against Ceballos.[2]

Other organizations filing friend-of-the-court briefs in the case include the National School Boards Association, the National Education Association, the National Association of Counties, and the U.S. Department of Justice.

Reference

1. "Resolution on Workplace Speech," 2004-2005 CD #38.1, adopted June 26, 2005
2. Lane, Charles. "High Court's Free-Speech Ruling Favors Government; Public Workers on Duty Not Protected." *Washington Post*, May 31, 2006.

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