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Supreme Court rules that public employees may be disciplined for statements made in the course of their performance of official duties, as such statements do not constitute protected speech.

Public Employers Gain Measure of Protection for Employment Decisions Based on Statements Made as Part of Job Duties

By J. Greg Coulter and Michael W. Davey

The United States Supreme Court's decision in *Garcetti, et al. v. Ceballos* (Case No. 04-473, May 30, 2006) offers some protection to public employers regarding employment decisions based on statements made as part of an employee's official duties. In a 5-4 decision, the Court held that statements made in the course of an employee's performance of duties do not constitute protected speech, and employees can be subjected to discipline for such statements.

The Facts

Richard Ceballos is a deputy district attorney for Los Angeles County. In 2000, a defense attorney contacted Ceballos about some alleged inaccuracies in an affidavit used to obtain an important search warrant. Ceballos investigated the allegation and determined that the affidavit contained misrepresentations. Ceballos presented his findings to his superiors in memoranda. A meeting also was held concerning the memos. Despite Ceballos' misgivings, his supervisors decided to go ahead with the prosecution. Ceballos later testified at a hearing concerning the validity of the warrant. The warrant was upheld by the trial court.

Ceballos was subsequently transferred from his calendar deputy position to a trial deputy position, transferred to another courthouse and denied a promotion. Ceballos filed a grievance, alleging that the employment actions were made in retaliation for his memos. The grievance

was denied on the grounds that Ceballos had not suffered any retaliation. Ceballos then filed a lawsuit in U.S. District Court, asserting a claim under Rev. Stat. §1979, 42 U.S.C. §1983. Ceballos alleged that his employer had retaliated against him for his memoranda, thereby violating the First and Fourteenth Amendments to the U.S. Constitution.

The Los Angeles County District Attorney argued that the employment actions taken were made for legitimate reasons, including staffing needs, and that, regardless of the intent of their actions, Ceballos' statements were not protected speech under the First Amendment. The employer moved for summary judgment, which was granted. The District Court held that because Ceballos had written the memoranda as part of his employment duties, he was not entitled to First Amendment protection. In the alternative, the court held that even if Ceballos' speech was protected, the employer had a qualified immunity because the rights asserted by Ceballos were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that Ceballos' memoranda concerning supposed wrongdoing constituted speech protected by the First Amendment. The Ninth Circuit looked to the U.S. Supreme Court's decisions in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), for guidance, holding

that, based on the earlier cases, the issue hinges on whether the statements made by Ceballos were made “as a citizen upon matters of a public concern.” The Ninth Circuit found that his statements had been made as a citizen upon matters of a public concern, and rejected circuit precedent that a public employee’s statements are not protected under the First Amendment when they are made in connection with the employee’s job responsibilities. The Ninth Circuit also balanced Ceballos’ interest in free speech against the interests of his employer and found that the balance fell in favor of Ceballos because the District Attorney failed to show that his statements had had any disruptive effect on the office’s operations. The Ninth Circuit also found that Ceballos’ rights under the First Amendment were clearly established and his employer’s actions were not objectively reasonable. The matter was then appealed to the U.S. Supreme Court. Arguments were heard on October 12, 2005, and again on March 21, 2006, after the retirement of Justice O’Connor and the appointment of Justice Alito.

The Court’s Ruling

Justice Kennedy delivered the Court’s opinion. The question presented was whether the First Amendment may protect a public employee from discipline based on statements made as part of the employee’s official duties. The Court held that “[w]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” The Court also determined that, “while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance procedure.’”

The Court found that while employees have the right to participate in public discourse, the protection of free speech does

not allow them to perform their duties however they see fit. Public employers must be afforded “sufficient discretion to manage their operations.” Ceballos, as a deputy district attorney, was not acting as a private citizen when he conducted his professional duties. His memoranda concerning the warrant was not written as a citizen, but in conjunction with his duty to evaluate the proper disposition of a pending criminal matter. His employer made its employment decisions based on his job performance. The Court maintained that there was no support in its precedent for the displacement of managerial discretion. The Court further held that, although an employee’s right to speak freely about matters of public concern requires a delicate balance of the competing interests of the speech and its consequences, that situation was not present in *Ceballos*. In this case, the employee was simply performing his job duties, and his speech and his employer’s subsequent reaction were not to be afforded such scrutiny.

The Court distinguished the facts in *Ceballos* from those presented in *Pickering*, a case on which the Ninth Circuit relied. The Court noted that, in *Pickering*, the employee, a teacher, was disciplined for a letter to a newspaper, something that was not within the duties of a teacher. In that case, the Court held that there was no connection between the teacher’s speech and the performance of duties and, thus, the school district’s interest in limiting the teacher’s contribution to a public debate was not substantially greater than its interest in limiting the same type of contribution from the general public. Thus, the speech was afforded protection. In contrast, Ceballos’ statements were made entirely within the performance of his duties and were thus properly subject to his supervisor’s review and discipline.

Justice Souter issued the lead dissent. Justice Souter acknowledged that

employers have a substantial interest in maintaining their policies and procedures and evaluating their employees by their performance, including their speech. But the Justice warned that the private and public interest in avoiding and curtailing official wrongdoing can outweigh the public employer’s right to effectuate its policies and procedures, and public employees who speak out on such matters are entitled to the protection of the First Amendment.

Justice Souter also pointed out that the Court’s decision failed to clarify the demarcation point at which speech should be protected. He maintained that the *Pickering* test, balancing individual interests in free speech and the employer’s interests in efficient operations, should be the one used by the courts in making determinations as to whether or not speech should be protected. Souter warned that the Court’s decision created uncertainties for employees who would now be forced to rely on the inconsistent protection of whistleblower laws for the protection of their speech.

Also in dissent, Justice Stevens warned that the answer to the question of whether the First Amendment protects a government employee from discipline for speech made in the performance of official duties is sometimes, not never. While acknowledging that an employer must be able to take disciplinary action where an employee’s words are “inflammatory or misguided,” Justice Stevens pointed out there are certainly situations in which a public employee’s speech should be protected, as when it is speech that is unwelcome only because the supervisor wishes that its subject matter not be brought to light.

Analysis of the Court’s Ruling

The Supreme Court’s decision in *Ceballos* provides public employers with a modicum of protection with respect to

employment decisions based in part or in whole on statements of employees made in the performance of the employees' official duties. However, that protection should be not be viewed as denying employees any right to voice concerns within their employment.

In its ruling, the Court established that although public employees are afforded protection when acting as private citizens, their speech as government workers is wholly and properly subject to supervisory review and discipline. *Ceballos* allows public employers to feel more secure in making employment and disciplinary decisions based on employee statements made during the performance of official duties. Although the question remains as to whether an employee's statement is made in the performance of his or her duties, that issue may be clarified simply by clearly delineating the official duties and functions of employees.

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