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NAVIGATING THE FIRST AMENDMENT MINEFIELD:

An Analysis of Developments in Public Employee Speech and Points to Remember

by
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This article examines the Ninth Circuit Court of Appeals' most recent application of the law concerning public employees' rights of expression under the First Amendment.

It is well settled that a state cannot condition public employment upon a total relinquishment of constitutional rights, such as freedom of expression. At the same time, public employees do not enjoy absolute freedom when it comes to their employment.

First Amendment Rights

The seminal case on the issue of public employees' First Amendment rights is *Pickering v. Board of Education of Township High School District* (1968) 391 U.S. 563. *Pickering* held that a public employee's speech or expression is constitutionally protected if it deals with a matter of public concern, and the public employer may liable for taking adverse action against the employee in retaliation for the employee's constitutionally protected expression. *Pickering* created a balancing test, which requires courts to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

Nearly 40 years later, the present Supreme Court gutted public employees' rights established by *Pickering* and its progeny. *Garcetti v. Ceballos* (2006) 547 U.S. 410, dealt a severe blow to public employees' First Amendment rights, by holding that a public employee's speech is not protected if it is made pursuant to the employee's official duties. Using the "as a citizen" language from

Pickering, *Garcetti* drew a line between cases where the speech is made outside an employee's duties, in his capacity as a private citizen (such as the plaintiff in *Pickering*, a teacher who wrote a letter to the editor of a newspaper expressing his disagreement with the school board), and cases where the employee's speech is made through the performance of his official duties or job description (such as the plaintiff in *Garcetti*, a prosecutor who voiced concerns to his supervisor about whether to prosecute a case).

Our previous articles have examined recent Ninth Circuit decisions that have applied the *Garcetti* holding in cases where employees' speech or expression was made pursuant to official duties. The most recent Ninth Circuit decision on this issue, *Nichols v. Dancer* (9th Cir. 2011) No. 10-15359, --- F.3d ----, 2011 WL 4090676, concerns a public employee's expression *not* made in the performance of her official duties, and thus still constitutionally protected. The specific issue in *Nichols* is the evidence of workplace disruption required in order to tip the *Pickering* balancing test in favor of the employer.

Kathleen Nichols was employed by the Washoe County School District as an administrative assistant to the District's General Counsel, Larry Blanck. Nichols and Blanck were friends and sometimes socialized outside the office. Blanck was suspended after a dispute with the District Superintendent, and Nichols was temporarily transferred to the Human Resources department, pending the decision on Blanck's employment. Slip op. at 17587-17588.

Nichols attended a public Board of Trustees meeting where a variety of matters were scheduled for discussion, including the issue of Blanck's employment. Prior to the meeting, head of Human Resources Laura Dancer had told Nichols she would be returned to her position in the General Counsel's office regardless of whether Blanck was fired. At the Board of Trustees meeting, Nichols sat next to Blanck but did not speak to him. Blanck's termination was announced at the meeting. Slip op. at 17588.

The next day, Dancer informed Nichols that she would not be returned to the General Counsel's office because there were concerns about her loyalty to the District, as a result of her attendance at the Board meeting and her choice to sit next to Blanck. Nichols was told she could remain in Human Resources, where her salary would be frozen, or she could take early retirement. Nichols chose early retirement and filed a lawsuit in federal court against the District for demoting her in retaliation for exercising her First Amendment rights. Slip op. at 17588-17589.

At the trial level, the District moved for summary judgment, arguing that Nichols' conduct was not constitutionally protected because it was not related to a matter of public concern and because Nichols' First Amendment interests were outweighed by the District's interests in an efficient workplace. The trial court held that the conduct did touch on a matter of public concern but agreed with the District that the *Pickering* balancing test tipped in favor of the District. The trial court granted summary judgment for the District, and Nichols appealed to the Ninth Circuit. Slip op. at 17589.

The question for the Ninth Circuit was whether, under the *Pickering* balancing test, the District's interests in an efficient workplace outweighed Nichols' interest in

freedom of expression as a matter of law. Citing a number of cases that further explained the factors involved in the balancing test, the Court pointed out that in order for the District's interests to outweigh Nichols' First Amendment interests, the District must be able to show evidence of *actual* disruption of workplace operations or "*reasonable* predictions of disruption." Slip op. at 17589-17591.

The Court stated, "Although we accord significant weight to an employer's reasonable judgments about the workplace, an employer cannot prevail under *Pickering* based on mere speculation that an employee's conduct will cause disruption...[A] disruption claim must be supported by some evidence, not rank speculation or bald allegation." Slip op. at 17591.

In this case, the Court held that the District provided no evidence to support the claim that Nichols' conduct disrupted workplace operations, interfered with Nichols' job performance, or negatively affected her relationships with other employees. The District's predictions of workplace disruption were pure speculation. The District further argued that Nichols' association with Blanck created a conflict with her position in the General Counsel's office because she would have had access to information about Blanck's wrongful termination suit, but the Court rejected this argument, stating there was no evidence of disloyalty on the part of Nichols. Slip op. at 17592-17594.

Speech or expression by public employees, made in their capacity as private individuals and not pursuant to their official duties, is still constitutionally protected, subject to a balancing test. *Nichols v. Dancer* offers support for public employees' First Amendment rights, by clarifying that a public employer may not prevail on the *Pickering* balancing test through mere speculation. Actual disruption of workplace operations or reasonable predictions of disruption must be shown before the employer will be allowed to restrict the employee's First Amendment rights.

<u>What does this mean for you?</u>

We have discussed previously that law enforcement officers must be wary when it comes to speech made pursuant to their official duties, which is not constitutionally protected, particularly because it is a peace officer's duty to be truthful and to report violations of law or department rules, so a great deal of a peace officer's speech may be considered "pursuant to official duties" under *Garcetti* and the cases following that decision. When it comes to speech made outside of your official duties, however, *Nichols v. Dancer* is a step towards solidifying your constitutional protections. An employer cannot restrict speech made outside of your official duties on the basis that it simply "might" lead to a disruption in the workplace, or any of the other usual employer assertions about *potential* harm that *might result* from an employee's protected expression, such as "loss of public confidence" and "loss of *esprit d'corps*" or employee morale.

Here are some other tips to keep in mind when contemplating the exercise of free expression:

1. Be sure the *content* of your speech is really a matter of public interest or concern. Remember that public employee speech is "protected" only if it is important for the

citizenry to hear or know.

2. Remember that personal gripes, complaints, and grievances have no First Amendment protection.

3. Be mindful of the "time and place factors." Speech made on-duty and/or on the premises of the employer is entitled to less protection.

4. Be careful about the *manner and nature* of the speech; that is, vulgar, profane, threatening, or unduly harsh or argumentative and insulting speech may not be protected. Be respectful and professional. Avoid disrespectful commentary that adds no value to the content of the speech.

5. If you have an opportunity to discuss your proposed speech with a lawyer who is familiar with the law of public employee expression, do so, and follow the advice you get.

6. Before you talk, be able to articulate why the content of your speech affects the public interest. *Force yourself to do this.* If *you* can't articulate why the public might care, consider abandoning the idea.

7. In your speech, be sure to include some explanation of why you think this is important for the public to hear or read. Here again, if you can't do this easily, it is a good bet that your speech won't be protected.

8. Make sure you have some record of exactly what you say. You'd be surprised to know how often "speech misconduct" cases turn on differing recollections of exactly what was said. Expect that your employer will credit its own interpretation of what you said, rather than what you "meant to say."

9. Speech about *facts* are different from speeches about *opinion*. Public speeches that contain *misrepresentations of fact* might be misconduct standing alone. It is usually no defense to respond, "Gee, I *thought* what I said was true or factual. I made a mistake." Recognize that even protected speech which is offensive or harmful to your agency or its officials will cause your employer to scrutinize every word. Employers will seize upon even slight misrepresentations to allege that "false statements" were made.

10. On the other hand, statements of *opinion* may be very valuable to the public - especially if the speaker is someone who, as result of his or her employment, has special knowledge not available to the public. Statements of honestly-held beliefs are much "safer" than unequivocal statements of fact.

11. Be sure to "qualify" your speech. You are speaking "as a citizen," not as an official or public employee. You are not authorized to speak for the agency, and you are not doing so. Be very clear about this. Caution your audience that your remarks represent your understanding of the facts, and that they are *your opinions* based on your understanding of the facts. Be willing to say if asked, that your opinions might well change if your understanding of the facts turns out to be incorrect.

12. Be very circumspect about the decision to wear your uniform or otherwise appear to be connected with the agency. It's best to leave the uniform in your locker.

STAY SAFE!

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