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United States Supreme Court addresses employee free speech . . . again

By Harry R. Pringle

Thirty-eight years ago, in the fall of 1968, Marvin Pickering's case was finally decided by the United States Supreme Court.[1] Marvin was a teacher in Will County, Illinois. He wrote a letter to the newspaper which was sharply critical of the Board of Education, essentially charging that the Board had spent too much money on athletics and not enough on academics, and was wasting taxpayer funds. He was then terminated by the school board in short order, for impugning the professional reputations of the school board and the superintendent, and because his statements would be likely to result in "controversy, conflict and dissention" among teachers, administrators, and the Board.

The Illinois courts upheld the school board's decision, holding that Mr. Pickering's letter satisfied the requirement in the Illinois termination statute that his conduct be "detrimental to the best interests of the schools." When his first amendment claim reached the United States Supreme Court, however, Marvin Pickering prevailed.

In a landmark decision, the Court held that public employers may not penalize their employees for exercising their free speech rights under the First Amendment and that in considering these cases courts are required to balance the interests of a teacher "as a citizen" in commenting upon matters of public concern against the interest of the government as an employer in effectively providing public services.[2]

In the years since 1968, the federal courts have considered thousands of First Amendment claims brought by public employees. Over time, the Supreme Court has refined what has become known as the "Pickering balancing test." When government employees speak out as employees upon matters of personal interest only, the First Amendment offers no protection.[3] When as in *Pickering* the employee speaks as a citizen upon matters of public concern, however, the balancing test applies. Thus, even when employee speech is on matters of public concern it is not necessarily protected if it is disruptive or interferes with an employee's job performance.[4]

What happens, however, when a government employee speaks out on a matter of public concern but does so in the course of his ordinary duties as a government employee? What test should courts apply in that situation? This was precisely the issue in *Garcetti v. Ceballos,*[5] decided by the Supreme Court at the end of its last term.

Richard Ceballos was a Deputy District Attorney for the Los Angeles County District Attorney's office. A defense attorney asked him to look at an affidavit used to obtain a critical search warrant. Ceballos

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decided that the affidavit contained serious misrepresentations, and wrote a memo to his supervisors recommending that the case be dismissed. A subsequent meeting with the sheriff's department not surprisingly became "heated," with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, the District Attorney decided to proceed with the prosecution. Ceballos then claimed that he was subjected to retaliatory employment actions including denial of a promotion and transferred to another court house, all in violation of his constitutional free speech rights. His lawsuit ensued.

The Court of Appeals for the Ninth Circuit upheld Ceballos' claims. Relying on the *Pickering* analysis, the Court concluded that Ceballos' memo was inherently a matter of public concern because it raised the issue of wrongdoing in the Sheriff's Department. Based on nearly 20 years of prior precedent in the Ninth Circuit, the Court ignored whether or not the speech was made in Ceballos' official capacity or as a citizen, and concluded that under the *Pickering* balancing test the fact that there was no disruption or inefficiency in the District Attorney's office required the balance to be struck in favor of Ceballos' right to speak out against the affidavit.

In a 5-4 decision, the Supreme Court reversed the Ninth Circuit.[6] The majority's analysis was straightforward: under *Pickering,* the first issue to be decided is whether an employee is speaking out "as a citizen" on a matter of public concern. If the answer is "no", said the majority, then the employee has no First Amendment rights because government employers, like public employers, need a significant degree of control over their employees' words and action. Here, said the Court, the controlling factor was that Ceballos' speech was made "pursuant to his duties" as a Deputy Assistant Attorney. That distinguished his case from those in which the First Amendment provides protection against discipline. The Court thus held "that once public employees make statements pursuant to their official duties, the employees are not speaking as citizen for First Amendment Purposes, and the Constitution does not insulate their communications from employer discipline."[7] When he went to work and performed the tasks he was paid to perform, the majority explained, Ceballos was acting as a government employee. Therefore, what he wrote or said could not stop his supervisors from evaluating his performance based on his speech.

The theoretical underpinning of the majority's decision is clear: employees who make public statements outside the course of performing their official duties are entitled to First Amendment protection, because that is the same kind of activity protected when citizens do not work for government. When a public employee engages in speech pursuant to his or her employment responsibilities, however, there is no relevant analogy to citizens who are not government employees – and therefore the government employees should not be protected.

Not surprisingly, the dissenting opinions were quite biting in their criticism of the majority decision. First, pointed out the dissenters, determining when an employee's speech is made "pursuant to the employee's official duties" will always be a factually specific determination, and is likely to lead to substantial litigation. More importantly, as Justice Stevens pointed out, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors. It was for this reason that Justice Souter argued that the *Pickering* balancing test ought to be applied even when a public employee speaks out pursuant to his or her official duties, and only when such statements are too damaging for the government to be able to conduct public business should an employee lose constitutional protection for that speech.

Ultimately, the *Ceballos* case can be seen as a classic example of a court struggling to draw a line in an area where line drawing is almost impossible. For the majority, the key issue is equating public employers with private employers where speech is made pursuant to an employment duty. For the dissenters, the issue is whether the speech is damaging to government, not whether it is made pursuant to an official duty. What does this all mean for Maine schools? Clearly, some claims that might have been asserted in the past will no longer be recognized by the courts.[8] On the other hand, deciding when

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speech is made "pursuant to" an employee's official duties is not an easy task in any given situation, and it will take litigation to decide when or if that test has been satisfied. All that can be said with any certainty is that federal courts will continue to struggle with the difficult task of deciding when public employees can, and cannot, be disciplined for what they say or write.

Endnotes

1. *Pickering v. Board of Education*, 88 S. Ct. 1731 (1968).

2. 88 S. Ct. at 1734-1735.

3. *Connick v. Myers,* 103 Ct. 1684 (1983).

4. For example, a school nurse's public criticism of a school medication policy – although a matter of public concern – is not protected if it disrupts the school's health program. J*ohnsen v. Independence School District No. 3 of Tulsa County, Oklahoma*, 891 F.2d 1485 (10th Cir. 1989).

5. 126 S. Ct. 1951 (2006).

6. Justices Kennedy, Roberts, Scalia, Thomas and Alito joined in the majority decision, while Justices Souter, Stevens, Ginsberg and Breyer dissented.

7. 126 S. Ct. at 1959.

8. See for example, *Shattuck v. Potter,* 2006 U.S. Dist. LEXIS 51656 (D. Me. July 27, 2006), granting summary judgment based on Ceballos to the United States Postal Service on a series of claims by a former employee that she was retaliated against for her free speech rights.

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