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Joseph F. Quinn, Editor

Joseph F. Quinn is legal counsel to more than 30 fire districts in Pierce, King and other counties throughout the State of Washington.

His office is located at:
5000 Steilacoom Blvd. SW
Lakewood, WA 98499
(in Lakewood's Station 2-1)

Telephone: 253.589.3226

Fax: 253.589.3772

Email Joe at:
quinnjoseph@qwest.net

Access this newsletter at:
www.Firehouselawyer.com

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Supreme Court Decides Major Public Employee Speech Case

On May 30, 2006, the Supreme Court of the United States, in a very close 5-4 decision, released its opinion in *Garcetti v. Ceballos,* which involved the discipline of a deputy district attorney, allegedly in retaliation for his protected speech in the ordinary course of his duties. Richard Ceballos, a supervising deputy district attorney, was asked by defense counsel to review a case in which the attorney said the affidavit police used to obtain a critical search warrant was inaccurate. Ceballos concluded that the affidavit did include serious misrepresentations. He told his supervisors and then followed that up with a disposition memorandum recommending dismissal of the criminal case. The prosecution continued despite his objections. He reiterated his observations during a defense motion to challenge the warrant, but the trial judge rejected the challenge.

Ceballos claimed that, after his actions, he was retaliated against by his public employer, including reassignment, transfer to another courthouse, and denial of a promotion. When his grievance was denied, he sued in U.S. District Court. The trial court concluded that Ceballos' "speech" was done pursuant to his employment duties, and therefore was not entitled to First Amendment protection. The Ninth Circuit Court of Appeals reversed, holding that Ceballos' allegations of wrongdoing in the memorandum constituted protected speech under the First Amendment. See 361 F.3d 1168, 1173 (2004). In reaching that conclusion, the Ninth Circuit looked to the First Amendment analysis in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563 (1968) and *Connick,* 461 U.S. 138. The latter case instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern."

The Supreme Court noted that the Ninth Circuit did determine that the alleged governmental misconduct discussed in the Ceballos memorandum was "inherently a matter of public concern". However, the High Court pointed out, the Court of Appeals did not consider whether Ceballos spoke in his capacity as a citizen. One of the Ninth Circuit Judges, Judge O'Scannlain did concur specially and state that perhaps circuit cases or precedents should be reconsidered. He noted that there

is a difference between speech offered by a public employee *as an employee* carrying out his or her ordinary job duties from that spoken *as a citizen* expressing his or her personal views on disputed matters of public import. It certainly appears that the Supreme Court in its decision and majority opinion has applied that distinction, holding in this case that Ceballos' speech was not protected.

In this article, we take an in-depth look at this new distinction, the reasoning of both the majority and the minority, and discuss how it may be applied to various fact situations in the future. Please remember that this was a 5-4 decision, so we may not have heard the last word on close cases involving public employee speech issues.

Over many years, the Court has made it clear that public employees do not surrender all of their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Pickering* provides a useful starting point in explaining the Court's doctrine. A teacher wrote a letter to a newspaper addressing issues including funding policies of his school board. The Court stressed the need to balance between the interests of the teacher/citizen and the interests of the State/employer, in promoting the efficiency of the public services it performs through its employees. The Court found the speech did not impede performance or interfere with the regular operation of the schools. Therefore, the Court found that the employer's interest in limiting the teacher's right to contribute to public debate was no greater than its interest in limiting a similar contribution by any member of the public.

Thus, the *Pickering* analysis is to ask first if the public employee spoke *as a citizen on a matter of public concern.* If the answer is no, the employee has no First Amendment claim, if the employer reacts to the speech in some way. If the answer is yes, the question becomes whether the employer had an adequate justification for the action, or treating the employee differently from any member of the public. We must ask, "Did the speech have some potential to affect the entity's operations?" One can well imagine the myriad factual scenarios that could occur in different types of public employers, such as fire or police departments, in which discipline and chain of command are paramount, at least in some situations.

The majority Justices, at least, clearly recognized a need to proceed with caution even when the employee spoke as a citizen. Justice Kennedy, for the majority, noted that citizens entering government service must of necessity accept certain limitations on their freedom,

citing *Waters v. Churchill,* 511 U.S. 661, 671 (1994). He also wrote, "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." It would be difficult to function for public employers, if all employment issues became constitutional issues, as pointed out in *Connick, supra.* The majority opinion balanced those thoughts with the idea that the Court has recognized that a citizen who works for the government is nonetheless a citizen. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their public employers to operate efficiently and effectively. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaged in civic discussion. After all, as pointed out for example in *Pickering, supra,* who is more likely than a teacher to be well informed about issues presented in our public schools?

The Court also noted in *San Diego v. Roe,* 543 U.S. 77, 82 (2004)(*per curiam)* that, "Were [public employees]not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues." The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it, the Court stated. Having stated those general principles, the Court then turned to the facts of the case at hand.

The Court majority found that the controlling factor in Ceballos' case is that his expressions or speech were made pursuant to his duties as a deputy district attorney. This simply reflects the exercise of employer control over what the employer itself has commissioned or created, i.e. the duties of the job. Comparing that to the facts in *Pickering*, the Court said that there the teacher's letter to the newspaper was more like the conduct of a citizen and was similar to other citizens' letters, as opposed to official work. The holding is also consistent with the Court's emphasis, in its precedents, with providing employers sufficient discretion to manage their operations without disruption. "Official communications have official consequences…", the Court majority said. They found the position of Ceballos, and by implication the stance of the minority of the Court, prone to committing the courts to a new, permanent, and intrusive role mandating judicial oversight of communications between and among government employees.

Four justices dissented, including Stevens, Souter, Ginsburg, and Breyer. (It is worthy of note that Chief Justice Roberts and Justice Alito—the new Bush appointees—joined the narrow 5-4 majority.) The dissenters agreed with the majority about a lot of basic principles, but could not agree that a public employee was *never* protected by the First Amendment when their speech was pursuant to their duties. The dissenting justices, or some of them, argued that there was inadequate justification for drawing the line in the place where the majority drew it. For example, they asked, should a teacher be protected when complaining to the principal about hiring policy at the school, while by contrast the personnel officer is not protected when complaining about the principal repeatedly rejecting minority job

applicants, just because personnel issues are part of that person's job description? Does that make sense?

Frankly, to this writer the minority seems to get the better of the argument. Various factual scenarios may arise when the public interest might suffer if the rule is as the majority states. We think the *Pickering* balancing test offers the best rule and it should not have been modified in this case. The good news is that most often the speech in question is not expressed in the ordinary course of the employee's duties, and so this fact pattern probably represents a very small percentage of the cases. I will continue to advise my clients that they should not attempt to restrict their employees from speaking on matters of public concern, except when the speech would disrupt operations.

A CLARIFICATION OR TWO

In the last edition of the *Firehouse Lawyer,* we mentioned the requirement that interlocal agreements executed pursuant to RCW 39.34 be filed with the county auditor. Bob Meinig of MRSC sent me an e-mail, pointing out that 2006 legislation amended that statute to allow, as an alternative, to have the agreement "listed by subject on a public agency's web site or other electronically retrievable public source." See HB 2676. Bob also advised me that the bill allowing MRSC to provide its services to fire districts and other special purpose districts (SSB 6555) was affected adversely when the governor vetoed the funding section of the legislation after we mentioned that in our March issue. So MRSC cannot provide those services yet, without a funding source. Thanks, Bob, for the update and correction.

It looks as though a service provider should create a statewide "public service" web site, where agencies could post their subject indexes of interlocal agreements. The site could also be the "clearinghouse" for all public works bid announcements or ads, to be available for piggybacking by other agencies pursuant to RCW 39.34.030 (5). It seems to me that there is an opportunity there for some entrepreneurial agency, who could provide those "web hosting" services for a minimal price per posting. It appears that the statutes would limit the eligible "host" to a public or quasi-public agency.

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