Garcetti v. Ceballos

The Supreme Court further limits First Amendment protection for public employees

In *Garcetti v. Ceballos*, the Supreme Court held 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." The intent of the holding is to draw a 'bright line' around job-related speech, declaring it not protected by the First Amendment. In theory, this holding allows a government employer to sanction job-related speech without having to fear judici intervention or second-guessing. But the decision has left four justices–and much of the legal community–scratching its collective head, wondering why five justices chose to drav a line in this particular place, on these particular facts.

At the time relevant to the case, Ceballos, a deputy district attorney, was employed as a calendar deputy in the Pomona branch of the Los Angeles County District Attorney's Office. As calendar deputy, Ceballos occasionally investigated aspects of pending cases, a on the request of a defense attorney, investigated discrepancies in an affidavit used to obta a search warrant. He concluded that a sheriff had misrepresented facts in the affidavit and wrote a memorandum to his superiors recommending that the case be dismissed. His superiors called a meeting with Ceballos and the sheriff's department, which strongly criticized Ceballos for his handling of the matter. The District Attorney decided to pursue the case despite Ceballos's recommendation. The defense called Ceballos to testify about the validity of the affidavit and submitted Ceballos's memorandum as evidence, but the court rejected the challenge to the warrant.

After these events, Ceballos claims that he was subjected to several retaliatory employmer actions, including reassignment from calendar deputy to trial deputy, transfer to another courthouse, and denial of a promotion. Ceballos filed an employee grievance, which was denied. He then filed a claim under 42 U.S.C. § 1983, alleging that the District Attorney h violated his rights under the First and Fourteenth Amendments. The District Attorney prevailed on the First Amendment claim in district court, but was reversed by the Ninth Circuit Court of Appeals, which found that the allegations of wrongdoing in Ceballos's memorandum were protected First Amendment speech.

Justice Kennedy, writing for a majority of the Supreme Court, sided with the District Attorney, ruling that a government employer can discipline an employee for his job-relate speech without offending the First Amendment. In so holding, the Court carefully distinguished its prior employee-speech cases, leaving fundamentally intact the doctrine established by *Pickering v. Board of Education of Township High School District* and *Connick v. Myers* , cases that establish limited circumstances in which employee speech is protected. The *Pickering/Connick* inquiry asks first whether the employee spoke as a citiz on a matter of public concern, and if so, whether the government employer has an adequat justification–i.e., efficiency and efficacy–for treating the employee differently from any other citizen. If the government does not have adequate justification, the speech is protecte The test has been applied to protect, for example, the speech of a teacher who wrote a lette to the newspaper about school funding issues (*Pickering*), a teacher who complained to he principal about racist hiring policies (*Givhan v. Western Line Consol. School Dist.*), and a police dispatcher who expressed a negative opinion about the president to co-workers whi on the job (*Rankin v. McPherson*). In *Connick*, the test did not protect an attorney who wa fired for circulating a questionnaire about personnel matters, which either posed questions not of public concern (e.g., the department's transfer policy), or was sufficiently disruptive to office morale to justify a disciplinary response.

The critical fact in this case, the Court emphasized, was that Ceballos admittedly wrote the memorandum pursuant to his duties as a calendar deputy, and not as a citizen–as in *Pickering*, when a teacher wrote a letter to the newspaper–nor as an employee concerned about an issue not expressly within the scope of her job–as in *Givhan*, when a teacher spok to her principal about racist hiring practices at the school, or in *Rankin*, when a police dispatcher voiced her opinion of the president.

In his dissent, Justice Souter noted that the majority opinion chose an "odd place" to draw its line. The categorical rule announced by the majority means that a teacher who complai about racist hiring practices at school is protected from retaliation, but a school personnel officer–whose job it is to implement hiring practices–would not be protected for making th same complaint. Thus, Ceballos might have been protected from retaliation based on the memorandum if his job did not require him to investigate the dubious affidavit. Or, he mig have been protected had he chosen to send–or leak–his conclusions about the sheriff's behavior to the press. The majority addressed this potential "anomaly" by noting that the government, as employer, can regulate to protect employee speech, but that the courts should not interfere to negotiate the boundaries of speech protection between the government and its employees, at least when they are speaking as part of the job they were hired to do.

The on-line legal community is divided in its evaluation of the opinion. Commentators not that, even as the Court took a bold step in announcing a new rule that excludes job-related speech from First Amendment protection, it also declined to overrule its previous cases, ar so the effect of the case may be less significant than at first glance. Others have praised the Court for declining to meddle in employer-employee relationships, arguing that it is only fair that employees whose job descriptions include the production of speech be evaluated c the content and quality of that speech. Some regret the policy choice that employee speech such as in *Rankin*–an off-hand comment about a sitting president–is protected, whereas complaints about possible police misconduct are not, and that employees who are *less* informed about a particular issue (i.e., the ones whose duty it *isn't* to investigate police misconduct) are *more* protected if they speak about it. Others have ventured that the holdi in this case was driven by the facts, and that Ceballos was an annoying and insubordinate employee in need of discipline.

At this point, the clearest message of the *Ceballos* decision is that employees who want to complain or express controversial opinions that are related to their job duties should do so citizens–i.e., by writing (or leaking) to the press–if they want to retain their jobs. This message may be a particularly unwelcome one to supervisors in government agencies that are struggling to stem the tide of leaks, which, if they catch the attention of the media and the public, can also be highly disruptive to the efficacy of an agency. Government agencie are well advised to heed Justice Kennedy and implement speech protections for their employees, providing a safe forum for employees to express their concerns internally befo going public.

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