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Abstract

The ideals set forth in the First Amendment of the Bill of Rights encapsulate what it means to be an American citizen: freedom. However, this freedom is not absolute. ince its inception, the judicial system has placed limits on this freedom in order to balance the freedom of speech of some against the freedoms of life, liberty, and happiness of others. One area in which these limits have been placed concerns the Freedom of Speech of public employees. The Supreme Court has issued rulings which have sought to find a balance between the rights of the employee and the rights of the employer. In attempting to find this balance, the Court has dissected the public employee into two distinct personas: employee and citizen. The Court has failed to recognize that there are specific times when employee speech cannot be separated from citizen speech, namely in giving sworn truthful testimony. The following analysis tracks the historical jurisprudence of the First Amendment free speech rights of public employees to determine the current constitutional protections for public employees who provide sworn truthful testimony as part of their official job duties. This analysis will also suggest a judicial and administrative rule that should be implemented to ensure that public employees are protected when giving testimony on behalf of their employers.

Introduction

The ideals set forth in the First Amendment of the Bill of Rights encapsulate what it means to be an American citizen: freedom. One of the most significant aspects of the First Amendment is the freedom of speech. This freedom is engrained into the psyche of the American public, and is sought by immigrants traveling across American borders. As with anything, however, freedom of speech is not an absolute. Since its inception, the judicial system has placed limits on this freedom in order to balance the freedom of speech of some against the freedoms of life, liberty, and happiness of others. "While the language of the amendment appears unambiguous, the United States Supreme Court has nevertheless grappled with numerous constitutional questions on

the breadth of the amendment. The court has been forced to balance the importance of protecting free speech, with ensuring that some limits on hateful, hurtful, or potentially dangerous speech exists" (Dallago, 2016, p. 240).

For public employees, the conflict that resides within the freedom of speech listed in the First Amendment is centered on the employee's identity as a citizen and as a public employee, as well as the employer's identity as a government agency and as an employer. Court cases involving freedom of speech have created different classes of speech. Each category is given a different level of scrutiny dependent upon the value society places on this speech (Farley, 2007, p. 608). "The least valuable speech, such as public employee speech, is protected by rational basis scrutiny, which requires the government to merely have a legitimate interest in suppressing the speech and that the restriction be reasonably related to that interest" (Farley, 2007, p. 609). It is based on this low level of scrutiny that public employees find their freedom of speech limited by the public agencies that employ them.

A little over fifty years ago, the Supreme Court began creating a complex system of analysis to determine which public employee speech is protected under the First Amendment. The Court sought to find a balance between the rights of the employee and the rights of the employer. In attempting to find this balance, the Court has dissected the public employee into two distinct personas: employee and citizen. The Court has failed to recognize that there are specific times when employee speech cannot be separated from citizen speech, namely in giving sworn truthful testimony. The Court has determined that citizen speech when spoken on a matter of public concern is protected by the First Amendment (Pickering, 1968; Connick, 1983; Garcetti, 2006). The Court, however, has refused to address employee speech when it is given as part of the employee's official duties. Although, the Court has stated that employees who give sworn testimony outside of normal duties, even if the testimony pertains to information the employee learned on the job, the testimonial speech is constitutionally protected (Lane, 2014). The Court has failed to protect employees who are required to testify as part of their ordinary duties, such as police officers, crime scene technicians, and child welfare workers. These employees have been placed in a precarious position when testifying on matters concerning their jobs and employers when the potential testimony is damaging to the employer: testify truthfully and face retaliation from the employer or commit perjury and face criminal repercussions from the judicial system. The following analysis tracks the historical jurisprudence of the First Amendment free speech rights of public employees to determine the current constitutional

commit perjury and face criminal repercussions from the judicial system. The following analysis tracks the historical jurisprudence of the First Amendment free speech rights of public employees to determine the current constitutional protections for public employees who provide sworn truthful testimony as part of their official job duties. This analysis will also suggest a judicial and administrative rule that should be implemented to ensure that public employees are protected when giving testimony on behalf of their employers.

Dichotomies of Public Employment

Public entities find themselves in a unique and precarious position. Unlike private companies, public agencies are bound to uphold the rights guaranteed within the Constitution, while simultaneously operating a business-like operation that provides services for the citizens of the United States. As with any employer, government agencies must be able to operate in the most efficient and effective way possible. This includes exerting control over the responsibilities and duties of their employees. "Government, like any employer, needs greater authority over its employees than it can exercise over is clients, customers, or the general public" (Rosenbloom, 2015, p. 48). The dichotomy of the government agency to act as both sovereign and employer can bring conflict between its need to function efficiently and the First Amendment freedoms of its employees.

Like their employers, public employees also find themselves in a unique position. Public employers depend on the expertise of their employees to implement and enforce the laws of the state or nation. The expertise of these employees is required for the agency or department to run efficiently and to provide services for the public. This expertise is also required for democracy to operate at its fullest extent in representing the whole of society. Public employees must utilize their knowledge and expertise in their respective fields to "…practice bureaucratic representation…" which "…involves the exercise of 'constructive discretion' by bureaucrats, which consists of conveying insights gained during the process of implementation to policy makers as a source of appropriately adjusted content" (Goodsell, 2005, p. 33). It is in this role of policy implementer that public employees are in the best position to have knowledge and a comprehensive understanding of the employer's operations. This position gives the employee insight as to behavior of the employer that, in terms of accountability to the public, is inefficient and potentially corrupt and damaging. It becomes the responsibility of these employees to bring these valuable and necessary pieces of information to the public. This responsibility, however, is

counteracted by fear that the employee will face retaliation for speaking on subjects that could be detrimental to the employer. This fear becomes apparent when the employee's responsibilities as an employee, collide with their responsibilities as a citizen.

As citizens, we have responsibilities to our states and nation. It is a citizen's responsibility to participate in the democratic process, obey the laws of the government, and participate in the judicial process when called upon. It is the responsibility of each citizen to aid in police investigations and provide sworn truthful testimony when required. Public employees do not relinquish these responsibilities when they accept public employment. These responsibilities are compounded with their responsibilities as an employee. The responsibility of a citizen is intrinsically linked to a public employee's responsibility to provide sworn testimony when subpoenaed as a citizen or as a public employee. "Every citizen-irrespective of employment status-bears the obligation to provide truthful testimony whenever he or she takes the stand. This is a legal duty and one not easily escaped. Because of this duty, it is necessary to recognize the concurrent roles the employee occupies when testifying before an adjudicatory body: government employee and citizen" (Deloney, 2016, p. 171).

Public Employee Speech: Precedent Setting Jurisprudence

Prior to the second half of the twentieth century, the Supreme Court issued decisions that stripped public employees of their Constitutional rights. They operated under what became known as the "privilege doctrine". "Simply, the doctrine held that because no public employee had a constitutional right to a public job, a public employer may impose upon the public employee any requirement it sees fit as conditional to employment" (Roberts, 2007, p. 173). It was not until the late 1960s that the Court began to recognize and respect the dichotomy of a public employee as both an employee, as well as a citizen. The Court began to balance the interest of the employee with the interest of the employer.

The government is an employer. As an employer, it must be able to run its business in a way that is both efficient and effective for its stakeholders while remaining accountable to the citizens it serves. "Government employers need some leeway when dealing with their employees. After all, the primary function of a government agency is to provide efficient services to the public, and if a government employer were second guessed every time it disciplined a public employee, services could grind to a halt" (Hudson, 2002, p. 2).

The right of the government, as employer, to maintain efficient operation of its business, however, does not give the government carte blanche over deciding what their employees can or cannot express. A public employee is also a citizen, and therefore entitled to certain First Amendment protections. A key turning point in the First Amendment Protection for public employees came in the 1968 ruling of *Pickering v. Board of Education.*

Pickering v. Board of Education

In 1968, the Supreme Court issued a landmark decision concerning the Freedom of Speech rights of public employees. Marvin L. Pickering was a teacher from Illinois. After writing a letter to his local newspaper expressing concern and criticism over the way in which the school board and superintendent allocated school funds, Pickering was terminated from his position (Pickering v. Board of Education, 1968). Pickering filed suit against the board of education citing infringement of his first amendment rights.

The majority opinion for the case established a new criterion for judging whether or not a public employees' speech could be protected on constitutional grounds. The Court rejected the concept that a public employee's freedom of speech was uniformly denied based solely on their chosen profession (Pickering v. Board of Ed., 1968). Citizens do not forgo their constitutional rights when they procure employment with a government employer. The Court ruled that although Pickering was a public employee, he was not speaking as a public employee when he wrote and submitted the letter. Instead, he was a citizen expressing an opinion on a matter of public concern, in this case school funding and spending.

> …It cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, 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" (Pickering v. Board of Ed., 1968).

With those words, the *Pickering* balancing test was born. In determining if speech made by a public employee is protected by the First Amendment, courts need to determine if the employee's interest as a citizen speaking about a matter

of public concern outweighed the interest of the employer to run an efficient organization (Deloney, 2016, p. 715).

In *Pickering* the Court made clear that public employees do not forfeit their First Amendment rights based solely upon their choice of employer (Cooper 2006, p. 74). Although, not the first case to address the freedom of speech of public employees, *Pickering* established the balance test against which other freedom of speech cases would be judged.

Based on the *Pickering* test, the needs of both the employee and employer are balanced. A government agency is able to protect its quality of services by limiting speech that is injurious and not useful to the public. At the same time, public employees, as citizens, are able to provide valuable and insightful information to protect the public when situations call for it. An appropriate balance has been met which protects "…the creation and dissemination of valuable and necessary information to the public- to protect matters of public concern…If public employees are not able to speak on these matters, the community will be deprived of informed opinions on important public issues" (Farley, 2007, p. 623).

Connick v. Myers

If *Pickering v. Board of Education* created a balance between the public employer's need to operate as an efficient business, and the public employee's right to speak freely as a citizen, *Connick v. Myers* was the tipping point on the balancing scale. The *Pickering* test created a balance between the interests of the employer and the employee. In *Connick*, an additional test was added to the battle over freedom of speech.

In 1980, Sheila Myers, an Assistant District Attorney in New Orleans was informed that she was being transferred to a different section of the District Attorney's office. Highly dissatisfied with the transfer, Myers composed a survey "…concerning office transfer policy, office morale, the need for grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns" (Connick v. Myers, 1983). Myers was terminated after distributing the questionnaire to her coworkers.

The majority opinion in *Connick* created a preliminary test that would now have to be applied to freedom of speech disputes concerning public employees. The Court found that only when an employee's speech involved a matter of public concern would it be subjected to the *Pickering* balancing test. "When employee expression cannot be fairly considered as relating to any matter of

political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" (Connick v. Myers, 1983). To determine if speech would pass the new public concern threshold, the Court indicated that the speech's content, form, and context must be examined (Robertson, 2016, p. 297). The *Connick* decision "…indicated that if the content involves a larger audience, possibly outside the workplace, the speech is more likely to be protected. If the speech appears more like a disgruntled employee complaining about personal employment issues, the less likely the speech will be protected" (Robertson, 2016, p. 297)

In *Connick*, the Court emphasized that a public employee's free speech rights only protect speech that regards matters of public concern. The new public concern test would have to be passed prior to the court weighing the speech in the *Pickering* test. By creating a new tier to the balancing test, the Court places stricter limits on public employees' right to speak freely by indicating that protection would only cover matters of public concern (Alter, 1984, p.173).

Unfortunately, the Court left open the definition of "public concern," and the decision of what should or should not be considered public concern remains a subjective matter that employers and the courts can use to arbitrarily restrict the speech rights of employees. "Equally disturbing is the Connick majority's willingness to rely upon the employer's view that the employee's actions will be detrimental to office functioning, rather than 'make their own appraisal of the effects of the speech in question.' In the absence of any tangible evidence of disruption, the Court will rely upon the employer's estimation of the harmful effects of the speech" (Alter, 1984, p. 195). A perceived disruption should not be grounds for disciplinary action. The *Connick* Court gave the employer greater grounds in limiting employee speech. Essentially, an employee's speech can be deemed unprotected if a direct connection to public concern is not made, and the employer believes a future disruption could occur.

Garcetti v. Ceballos

The unbalance created by *Connick v. Myers* was further exacerbated by the Supreme Court in *Garcetti v. Ceballos*. Richard Ceballos was an employee with the Los Angeles District Attorney's office. During the course of his normal duties, Ceballos was asked to review an affidavit that was used to obtain a search warrant for a criminal case. During his review of the case, Ceballos found inaccuracies in the affidavit. Ceballos informed his supervisors of his findings

and prepared a memorandum recommending that the involved case be dismissed. Despite his concerns and recommendations, the case preceded to trial, where Ceballos was called to testify about his observations (Garcetti v. Ceballos, 2006). "Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion" (Garcetti v. Ceballos, 2006).

In *Pickering*, the Court previously found that if a public employee spoke on a matter of public concern, as a citizen, the speech could be protected under the First Amendment (Pickering v. Board of Ed., 1968). The Court in *Garcetti* focused on whether or not the speech was made as a citizen. They found that if the speech was made as a public employee, the speech was then outside the scope of the First Amendment. "We hold 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" (Garcetti v. Ceballos, 2006). Under the *Garcetti* ruling, the content, form, and context of the speech established in the *Connick* public concern test (Connick v. Myers, 1983) is moot if the speech was made as part of the employee's official job duties.

In *Garcetti*, the Court drew the proverbial line in the sand between the public employee's job as a civil servant, and their role as a citizen. Public employees hold knowledge and information learned through their positions that are inherently a matter of public concern. Any speech made pursuant to their job duties would, therefore, seem to pass the public concern test, and the decision over whether the speech was protected would fall to the *Pickering* test. However, in *Garcetti*, another test was added which distinguished between speech made as a citizen and speech made as an employee. "The majority reasons that when a government employee goes to work and performs those tasks which he has been paid to perform, he is not acting 'as a citizen,' but as an employee of the government. As a government employee one is not vested with the right to perform a job as one sees fit" (Cooper, 2006, p. 87). The Court justified this stance by stating that there was no precedent for having judicial review of human resource matters (Garcetti v. Ceballos, 2006) and that it is within the employer's rights to review their employees work product and performance (Garcetti v. Ceballos, 2006).

The *Garcetti* Court further acknowledged that public employees are at the center of exposing governmental inefficiency and corruption. However, as this knowledge would be learned pursuant to an employee's job duties, the speech

falls outside the jurisdiction of the First Amendment. The Court stated that the legislature was the proper arena to address such issues by public employees, not the court system. "Exposing governmental inefficiency and misconduct is a matter of considerable significance…The dictates of sound judgement are reinforced by the powerful network of legislative enactments-such as whistleblower protection laws and labor codes-available to those who seek to expose wrongdoing" (Garcetti v. Ceballos, 2006). What the Court naively did not take into account when making such a broad and sweeping statement concerning employee speech is that while it is true that both state and federal governments have laws pertaining to whistleblowing, many of these laws, however, "…contain serious gaps and omissions. More often than not, an employee who engages in whistleblowing speech will quickly find herself in the unemployment line" (Krotoszynski, 2018, p.299). Furthermore, the Court put too much faith in the people responsible for writing these laws. The Court ignored the fact that those responsible for writing the laws are often motivated to keep the information learned by these public employees quiet (Kitrosser 2019, p. 1700).

Although the *Garcetti* decision may have been made to preserve and protect the governments autonomy in its function as an employer, the decision was far reaching and overly broad. It failed to consider that, by nature, the speech made by a public employee may be of the utmost importance and value to the public based on the employee's knowledge and role within the government. The ruling has allowed public employers to place further limitations on employee speech, even if that speech may be the most valuable of all.

Public Employee Testimony

The outcome of the *Garcetti* case has left public employees in a precarious position which may be detrimental to some of the core functions of democracy. If, according to *Garcetti*, any speech a public employee makes in the course of his or her job functions is unprotected speech, what happens when that employee is called to testify in court as an employee? What happens to the employee if the employer considers the sworn testimony to be averse to the efficiency of the government agency? Based on the decision that the *Garcetti* Court made, a public employee must decide between testifying truthfully under oath, risking discipline, including termination, or perjury. "In order for the judicial system to function properly, people must have confidence that the system is just. Failure to protect someone who has been called to testify may compromise the truthfulness of his or her testimony" (Dallago, 2016, p. 268).

Lane v. Franks

Edward Lane worked as the director of Community Intensive Training for Youth (CITY) with the Central Alabama Community College (CACC). During the course of a financial audit, Lane discovered that an Alabama state representative was on CITY's payroll, however, she had not been performing any duties with the organization. Lane fired the state representative, which drew the attention of the Federal Bureau of Investigation. After further investigation, the representative was charged with mail fraud and theft. During her trial, Lane was subpoenaed to testify concerning his audit and reasoning for terminating the representative from CITY (Lane v. Franks, 2014). Shortly after testifying, Lane's supervisor, Steve Franks, terminated 29 probationary employees, including Lane, due to financial difficulties of the organization. The terminations, however, were all rescinded expect for Lane and one other employee. Lane sued Franks citing infringement on his First Amendment Rights. He contended that the termination was retaliation for testifying in the trial of the state representative (Lane v. Franks, 2014).

In deciding whether or not Lane's testimony was protected speech, the Court aimed to clarify what the *Garcetti* Court had previously deemed outside the scope of Constitutional protection by stating that speech made "pursuant to" one's job was not protected. The *Lane* Court stated that the speech in the *Garcetti* case was fundamentally different from the speech in the *Lane* case (Lane v. Franks, 2014). In *Garcetti* the speech involved a memorandum that was written as part of Ceballos's ordinary job duties. In *Lane*, the testimony he provided was based on information he learned during his official duties, however, testifying was not a part of those duties. "In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee-rather than citizen-speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties" (Lane v. Franks, 2014). The Court thus limited the scope of *Garcetti*, by stating that speech about job duties does not automatically classify the speech as employee speech.

Although the Court in *Lane* narrowed the scope of what is considered employee speech, the Court failed to go far enough in its decision. In the majority opinion, Justice Sotomayor acknowledges that "Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: anyone who testifies in court bears an obligation, to the court and

society at large, to tell the truth" (Lane v. Franks, 2014). Testimonial speech is citizen speech regardless of who is providing the testimony. Public employees are citizens and their testimonial speech should be protected under the First Amendment. The Court recognized this fact, however, specifically made a ruling that would only include public employees who were providing testimony outside of their ordinary duties (Lane v. Franks, 2014). The Court chose to limit their decision to only these employees. Justice Thomas acknowledges this in his concurring opinion:

> We accordingly have no occasion to address the quite different question whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities… For some public employees-such as police officers, crime scene technicians and laboratory analysts- testifying is a routine and critical part of their employment duties. Others may be called to testify in the context of particular litigation as the designated representatives of their employers… The Court properly leaves the constitutional questions raised by these scenarios for another day (Lane v. Franks, 2014).

By refusing to address all employee testimony, the Court only extended constitutional protection to a limited number of employees called to testify, and essentially ignored employees who are required to put their faith into the justice system on a constant and consistent basis. "…Public employees who testify as a critical part of their employment duties should not be fearful that they could be terminated or retaliated against for providing truthful sworn testimony" (Roberts 2007, p. 309).

First Amendment Constitutional protection should be afforded to all public employees concerning sworn testimony regardless if the employee is providing the testimony outside of the normal duties, or as part of their typical duties. The Court should adopt a rule that states all testimonial speech is considered citizen speech. Based on this undeniable categorization that all testimony is citizen speech, each time a public employee takes the oath to tell the whole truth during the course of a court proceeding, whether given as part of their official duties, or outside their normal job functions, or as a representative of the employer, the speech should unequivocally be considered citizen speech. This is not to say that employers will have no recourse in terms of holding employees responsible for the jobs they perform while providing the testimony. Based on a Court ruling in favor of First Amendment protections for public employees who testify as part of their job duties or on behalf of their employers, the public employer needs to educate itself, as well as its employees on the legal precedent and on what speech

can and will be called into question by the employer in order to maintain efficient and effective operations. Public managers at all levels of administration need to have a reasonable knowledge of Constitutional law in order to make decisions that do not harm the Constitutional rights of public employees and citizens. Public managers need to be able to utilize this knowledge to appropriately train and inform their employees of what the employee's rights and responsibilities are in relation to their employment duties. By having a basic understanding of Constitutional law, public employers will have direction on how to address employee speech that the employer feels may be detrimental to its operations. Employer's will need to follow the guidelines set forth by the *Connick* court in determining if the speech is a matter of public concern. Employers will need to focus on the content, form, and context (Connick v. Myers, 1983) of the speech to determine the public's interest in the speech. If it is determined that the speech is of public concern, the employer will then need to establish that their interest as the employer in prohibiting the speech outweighs the employee's interest in speaking. Public employers have a right to run effective organizations, however, employees, also have a right to be treated in a fair and transparent manner. By declaring all testimonial speech to be citizen speech, one hurdle can be removed in the employee/employer relationship concerning freedom of speech rights of public employees.

As it stands now, the line between citizen and employee is blunt. "Future employees who speak as citizens about a matter of public concern, but concurrently speak pursuant to their official duties as employees will be beyond the protection of the First Amendment" (Farley, 2007, p. 605). The Court has failed to recognize that making a distinction between speech made as an employee and speech made as a citizen is sometimes impossible, because they are one in the same. Public employees do not give up their citizenship when they enter into employment with the government. Public employees are, therefore, also citizens that the government is accountable to. For the good of the democracy, their speech made on matters of public concern should be protected above all else.

Conclusion

Freedom of speech is not an absolute. The Supreme Court has made rulings concerning the harmful nature of some types of speech. In the course of these decisions, the Court has addressed the freedom of speech of public employees in order to balance these rights with the needs of the government to

operate as an employer. These decisions have attempted to balance the needs and rights of the public employee and the public entity.

Pickering v. Board of Education created a test that, if left alone, would have created a balance between employer and employee. However, in the subsequent cases of *Connick v. Myers* and *Garcetti v. Ceballos*, the balance found in *Pickering* was lost. Public employees now face retribution for speaking on matters of public concern when they speak as employees, rather than citizens. "The First Amendment, above all else, rejects laws that favor some ideas or viewpoints while excluding others. Such laws limit the scope of the 'marketplace of ideas'" (Hudson, 2002, p. 3). The Supreme Court has ruled that despite the knowledge and expertise public employees are equipped with, speech made as an employee is unprotected under the First Amendment, and thus, they have created an unbalanced system that will harm not only the public employee, but also the general public and the rule of law.

Current case law continues to separate the public employee into two categories: employee and citizen. It is time for the Court to recognize that this dichotomy is not absolute. All citizens are required to provide truthful sworn testimony. If providing testimony is the responsibility of all citizens, speech made during the testimony must be afforded First Amendment protection regardless of the employment position of the citizen giving the testimony. In order to protect the integrity of the judicial system, and the accountability of the government, public employees need to be able to provide sworn testimony without fear of retaliation from their employers when the testimony is being provided as a part of the official duties or simply as a citizen.

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Katherine is a proud mom to two amazing children. When she is not working or spending time with her family, she can be found reading the hours away. Katherine would like to thank her family for all of their love and support.