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A CLASSROOM LESSON IN FREE SPEECH RIGHTS

Rulings govern when teachers, other public employees can speak out

By THOMAS B. MOONEY

A school teacher tells her middle school class that the United States is committing war crimes in Iraq. A principal explains to parents that their son would not have been beaten up if the school board budget had provided for more security.

The court expressed concern that public employers must be free to supervise and, where necessary, discipline their employees without being subject to the expense and burden of constitutional claims.

In both cases, the telephone lines light up like a Christmas tree. Were these school employees out of line, or were they simply exercising their constitutional rights of free speech?

Two years ago, it would have been hard to answer that question. Recently, however, the U.S. Supreme Court provided some clarity as to the free speech rights of public employees. Given that these employees were exercising job responsibilities in both cases, their actions are not subject to review under the First Amendment.

The Supreme Court first dealt with the issue of public employee free speech rights 40 years ago. In *Pickering v. Board of Education* (1968), the court overturned the termination of a school teacher who had written a letter to the editor in which he intemperately (and in some cases inaccurately) criticized his employing board of education. The court ruled that the First Amendment prohibited termination in retaliation for the teacher's exercising his free speech rights. Interestingly, this ruling presaged the seminal decision the very next year in *Tinker v. Des Moines Independent School District* (1969). There, the court ruled that "it can hardly be argued that students or teachers shed their constitutional rights at the schoolhouse gate."

After *Pickering*, the courts struggled to balance the legitimate free speech rights of public employees against the need for public employers to maintain order in the workplace and to avoid disruption. In *Connick v. Myers* (1983), the court considered the case of an assistant district attorney who created a brouhaha in the office by circulating a petition. In rejecting her First Amendment claim, the court gave us the analytical framework that we still employ to assess whether a statement by a public employee is entitled to constitutional protection.

Public Concern?

First, we ask whether the employee is speaking on a matter of public concern or personal grievance. First Amendment protections apply only when the employee speaks on a matter of public concern. Of course, that term is not self-defining. For example, the court struggled to decide and eventually ruled 5-4 that the speech of a clerk in a police department related to a matter of public concern when she responded to news of President Reagan's being shot with, ". . . if they go for him again, I hope they get him." *Rankin v. McPherson* (1987). Clearly, the court has defined "public concern" broadly.

Second, once a statement is determined to be a comment on a matter of public concern, we ask whether the disruptive impact of the speech outweighs the importance of the speech. Only where it does is the employer permitted to restrict the speech and/or discipline the employee for the speech.

Sadly, the *Connick* rule left an important question unanswered – do public employees

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enjoy the same free speech protections when their statements are made in the course of their employment? The answer to this question is particularly important in the public schools. The act of teaching is largely speech, and what would otherwise be normal supervision can therefore become a constitutional issue.

Happily, the U.S. Supreme Court recently answered this question. In *Garcetti v. Ceballos* (2006), the court considered the case of another assistant district attorney. This one claimed that his First Amendment rights were violated when he was transferred after he wrote a report helpful to the defense. There, the court ruled that First Amendment protections should not be extended to speech arising out of job responsibilities. The court expressed concern that public employers must be free to supervise and, where necessary, discipline their employees without being subject to the expense and burden of constitutional claims.

Balancing Act

This decision fairly balances the interests of our public schools and other public agencies to operate efficiently against the important right public employees have to speak out on matters of public concern. The First Amendment continues to protect teachers who speak out at public forums or write letters to the editor, as Mr. Pickering did those many years ago. Moreover, the courts have conferred other protections on teachers and others who speak out against injustice. For example, a coach was fired after he criticized the inadequate facilities provided to the girls' basketball team. He filed a claim under Title IX, which prohibits gender-based discrimination in educational programs. The school district moved to dismiss on the basis that, as a man, he had no standing under Title IX. However, the court ruled that the Title IX protects not only the victims but also those who speak out against discrimination. *Jackson v. Birmingham Board of Education* (2005). In short, public employees continue to have significant protections in their speaking out on matters of public concern.

We are long past the days when, in the words of Oliver Wendell Holmes, "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor, City of New Bedford*, 155 Mass. 216 (1892). However, the government – local, state and federal – is among our largest employers. When serving in that capacity, our government officials should be able to direct and supervise their employees as do other employers. The *Garcetti* case strikes an appropriate balance between the free speech rights of individual public school teachers and other employees, on the one hand, and the right of public employers to oversee their employees, on the other. Public employers must be able to supervise their employees without the threat of constitutional litigation hanging over their heads. ■