



NATIONAL FRATERNAL ORDER OF POLICE

The Law Enforcement Officer's Right to Free Speech After the U.S. Supreme Court Decision in *Garcetti v. Ceballos*

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Does a public employee retain the right to exercise free speech? The US Supreme Court has placed limitations on free speech when public employees exercise such rights pursuant to their official duties. In other words, public employees can be punished and/or reprimanded for comments made during their duties as a public employee. Public employees' communications are only protected if they are acting as citizens on a matter of public concern.

First Amendment protections may not be available when public employees make statements in the course and performance of their employment. If the public employee was acting as a citizen, the employer may still limit the public employee's statements if the employer can adequately justify treating the employee differently from any other member of the general public. Adequate justification would constitute a showing that the statements of the public employee, acting outside of his or her official capacity, adversely affected the employer's ability to operate efficiently and effectively. An employer cannot create excessively broad definitions of employee duties in an attempt to restrict employee speech, and the job description need not be inclusive of every duty that may be deemed to be an official duty.

The general rule is that a public employee has no right to object to conditions placed upon their terms of employment—including those which restrict the exercise of constitutional rights. However, this rule is qualified in two important respects: (1) public employees do not surrender all of their First Amendment rights by reason of their employment; and (2) in certain circumstances the First Amendment can be employed to protect government employees' rights, to speak as a citizen addressing matters of public concern.

In order to determine whether public employees' speech is protected under the constitution, they must ask themselves: "Did I speak as a citizen on a matter of public concern?" If the answer is no, then the employees are not protected from punishment and/or reprimand from their employers. If the answer is yes, then they may be protected from punishment and/or reprimand from their employer by the constitution. The government employer must justify treating the employee differently from any other member of the general public. The power of the government to act is increased when assuming the role of the employer, but the restrictions imposed must be directed at speech that has some potential effect on the entity's operations. A balance must be struck between the interest of the public employee as a citizen commenting on a matter of public concern, and the interest of the state as an employer in promoting the efficiency of the public service it performs through its employers.

The Garcetti decision offers an excellent example of a government employee not acting as a citizen. Mr. Ceballos was a supervising deputy district attorney who felt that an affidavit used by police made serious misrepresentations. Mr. Ceballos expressed his opinion with his supervisors. Mr. Ceballos' supervisors did not agree with Mr. Ceballos' interpretation. Mr. Ceballos pressed the issue by submitting a disposition memorandum which further advocated his position. Mr. Ceballos then alleged that he was punished for his memorandum.

The question was posed, "Did Mr. Ceballos, a government employee, speak as a citizen on a matter of public concern?" Indeed Mr. Ceballos spoke on a matter of public concern, but because the memorandum was written in the course and performance of his duties as a government employee, he was not acting as a citizen. Therefore, Mr. Ceballos was denied protections that would otherwise be provided if he were not acting in the course and scope of his employment. The rationale for limiting Mr. Ceballos' rights are: (1) government employees can have a greater propensity to adversely affect government operations because public employees often occupy trusted positions in society; and (2) government offices could not function if every employment decision became a constitutional matter.

The Supreme Court does not provide a definition of "official duties." However, the Supreme Court points out that job descriptions need not be assigned in order for an act to be considered an official duty. On the other hand, the Supreme Court also rejects the notion that employers can create excessively broad job descriptions as a way to limit the speech of its employees. What was important in the Garcetti case was not the place or the subject matter of Mr. Ceballos' comment, but the manner in which it was expressed. Mr. Ceballos expressed his opinion in an official communication, and the U.S. Supreme Court commented that "official communications have official consequences." It should be remembered, though, that there are still numerous protections in place for public employees such as the whistle-blower protection laws and labor codes.

A public employee retains the right to exercise free speech when acting as a citizen who is speaking on a matter of public concern. However, as a result of the Garcetti decision, limitations may be placed on free speech when public employees exercise their free speech pursuant to their official duties. In other words, public employees can be punished and/or reprimanded for comments they make while in the commission of their duties as a public employee. Public employees' communications are only protected if they are acting as citizens on a matter of public concern.

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