First Amendment Speech Rights of Teachers and Other Public University Personnel: Down But Apparently Not Out

by Ralph Gerstein and Lois Gerstein

Universities are a marketplace for ideas, and teachers, student affairs professionals, and other university personnel are often dealing with controversial subjects. Sometimes, their expression of views antagonizes management personnel who have decision-making authority regarding tenure or promotion. Do they have protection against adverse personnel actions if their viewpoint clashes with that of management?

The answer is that they have some protection, but not nearly as much protection as they might have hoped for. A recent U.S. Supreme Court case, **Lane v. Franks,** 2014 WL 2765285, discussed later in this article, provides supporters of First Amendment rights some room for optimism. Although the cases discussed below do not relate specifically to student affairs professionals, this article shows that the cases have important implications for the readers of this publication.

Just as the Supreme Court said that students have at least some First Amendment rights (**Tinker v. Des Moines Indep. Sch. Dist.,** 393 U.S. 503 (1969), which upheld the right of students to wear black armbands to protest the Vietnam war), teachers do not surrender all their First Amendment rights when they enter the school building. In **Keyishian v. Bd. of Regents of the State of New York,** 385 US 589 (1967), the court struck down a loyalty oath for teachers on First Amendment grounds.

The Pickering-Connick Line of Cases

Regarding free-speech rights of public employees, the Supreme Court created two distinct lines of cases:

1. **Pickering v. Bd. of Education of Township High School No. 205, Will County, Illinois,** 391 U.S. 563 (1968); and
2. **Connick v. Myers,** 461 U.S. 138 (1983).

In **Pickering,** a teacher wrote a note to a newspaper in connection with a proposed school tax increase and criticized the way that the school board and the district superintendent had handled past proposals to raise revenue for schools. The teacher was fired, allegedly because administrators deemed the letter to be detrimental to the best interests of the district. However, the Supreme Court overturned the dismissal. It first held that the comments on fiscal policy were matters of public concern. The Court then engaged in a balancing test, to determine whether the teacher's right of free speech outweighed the need of the school to function in an efficient manner. The Court found that the balance was in favor of the teacher's right to speak. There was no disruption of the working relationships between people involved in the operation of the school system, and the only people who were disturbed by the letter were the members of the school board and the school superintendent. Pickering's job did not involve daily contact with these people. Under the **Pickering** rationale, a teacher would be protected if he or she publicly stated, for example, that schools were spending too much on athletics and not enough on academic subjects.

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Connick involved the operation of the New Orleans district attorney's office. (*Interesting note:* The district attorney was the father of noted singer Harry Connick Jr.) In contrast to Pickering, Myers (an assistant district attorney) spoke on matters of concern within the district attorney's office rather than public policy. Myers, who was unhappy with a planned transfer, distributed to other assistant district attorneys a survey regarding morale, office transfer policy, the need for a grievance committee, the alleged lack of confidence in supervisory personnel, and the pressures placed on assistant district attorneys to participate in political campaigns. The Supreme Court held that, except for the political campaign issue, the subjects addressed issues of internal management rather than of public concern, and that Myers' statements were not protected by the First Amendment. The complaints regarding pressures to participate in political campaigns, arguably, were a matter of public concern, but Myers lost out on that point because she aired her complaints only internally within the district attorney's office rather than out in a public forum. Thus, Myers' transfer was upheld.

Garcetti v. Ceballos Greatly Limits the First Amendment Rights of Public Employees

The **Pickering** and **Connick** lines of case provided a workable framework for analysis of First Amendment cases involving public university personnel and other public employees. If the subject of the speech was something that ought to be of interest to members of the public (such as school finance), the speech was protected so long as there was no substantial disruption to the basic operation of the institution. However, in **Garcetti v. Ceballos,** 126 S.Ct. 1951 (2006), the Supreme Court came down with a decision that appeared to cut away much of the First Amendment protections given to public employees. As in the **Connick** case, the controversy arose in a district attorney's office, but this time the subject of the controversy related to a matter of concern to the public.

The question in **Garcetti** was whether the First Amendment protected a government employee from discipline based on a speech made within the scope of the person's official duties. Ceballos was an assistant district attorney (his official title was "calendar deputy") whose job responsibilities included advising his superiors regarding pending cases. Ceballos was contacted by a defense attorney regarding a pending case. The defense attorney said that there were inaccuracies in an affidavit used by law

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enforcement personnel to obtain a critical search warrant. The defense attorney asked Ceballos to review the case. After examining the affidavit and visiting the location that it described, Ceballos determined that the affidavit contained serious misrepresentations. He relayed his findings to his supervisors and followed up with a memo to them recommending dismissal of the case. Ceballos stood his ground during a meeting at which one of the attendees was the officer who had executed the questionable affidavit. According to Ceballos, he was subsequently subject to retaliation, including a transfer to a less desirable position and the denial of a promotion.

In **Garcetti v. Ceballos,** the court held that the calendar deputy's speech was not protected by the First Amendment, because his expressions were made pursuant to his official duties. He spoke as a prosecutor advising his superiors as to how best to handle a pending case. The **Garcetti** case held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the First Amendment does not insulate them against disciplinary action arising out of their speech.

Garcetti v. Ceballos clearly had a chilling effect on university personnel who sought to speak out on matters of important public concern. One Seventh Circuit case held that a professor whose job responsibilities involved administration of a particular program did not have a First Amendment right to criticize the use of grant funds in that program. **Renken v. Gregory,** 541 F.3d 769 (7th Cir. [Wis.] 2008). However, a few cases decided in the last three years indicate that the First Amendment is far from dead in the university context.

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Ninth Circuit Recognizes an "Academic Freedom" Exception to the Garcetti Rule

Garcetti expressly left open the question of whether the decision restricted professors' academic freedom to any degree. That issue came right to the forefront in a Ninth Circuit (Washington) case decided earlier this year. **Demers v. Austin,** 746 F.3d 402 (9th Cir. 2014) involved a professor who allegedly was subject to retaliation by university administrators as a result of positions that he took in a dispute over accreditation of one of the university's programs.

Demers was a tenured professor at Washington State University (WSU). He claimed that he was subject to retaliation in violation of the First Amendment for distributing a pamphlet. The alleged retaliation took the form of a negative performance review and a written notice of discipline. The court held that **Garcetti v. Ceballos** did not apply to speech related to scholarship or teaching and that such speech is governed by **Pickering**. The court also held that the pamphlet related to a matter of concern.

Demers was a Professor of Communications, as well as the owner of his own book publishing company, known as Marquette Books. His department was about to become a free-standing school of communications, known as the Edward R. Murrow School. (Murrow was one of the outstanding journalists of the twentieth century. The editors highly recommend that anyone interested in the subject see David Straithairn's portrayal of Murrow in George Clooney's film *Good Night and Good Luck*.) The Communications Department had two distinct types of faculty members at the school. One was Mass Communications, which had a professional and a practical orientation. The other faculty line was Communications Studies, which had a more traditional academic orientation. There was serious disagreement as to whether the two faculty lines were to be split in the new school. Demers, who was a member of the Mass Communications group, supported the splitting of the two faculties. He advocated giving a major role to a director with a strong professional background. (Demers himself had been a journalist.)

To air his views, Demers sent communications to fellow faculty members, as well as to the provost and president of WSU, outlining a "7-step" plan that he had developed for reorganizing the school to improve the quality of programs and attract more development funds. Demers' plan recommended that:

- The Communication Studies program be separated from the four professional programs (Print Journalism, Broadcasting, Advertising, and Public Relations);
- The school hire more professionals and give them more authority;
- The school seek accreditation for the professional programs; and
- The school develop stronger partnerships with the business community.

Demers widely distributed the plan not only internally within the university, but also to alumni, friends, newspapers, and his publishing business website.

In finding in favor of First Amendment rights for teachers speaking on academic issues, the Ninth Circuit quoted some language from **Keyishian**, as follows:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall or orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

The **Demers** court held that **Garcetti** does not apply to teaching and academic writing that are performed pursuant to the official duties of a teacher or professor. The court said that academic speech that is not protected under **Garcetti** is protected under the First Amendment, using the analysis provided in **Pickering.** In other words, the professor must be able to show that the speech is on a matter of public concern and that his or her interest in commenting on matters of public concern outweighs the interest of the State, as employer, in promoting the efficiency of the public service that it performs through its employees.

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The court recognized that university professors speak of many subjects, not all of which constitute matters of public concern. Had Demers been speaking primarily about personal grievances, or had he advocated the hiring of particular persons for faculty positions, WSU would have had a better argument that Demers was not speaking on matters of public concern. However, Demers was speaking about much broader issues regarding the direction of the school as a whole and its relationship to the business community and was not advocating the hiring of any particular person. Primarily, he was saying in effect that the school should be run by people having real-world experience. Moreover, unlike the assistant district attorney in **Connick,** who limited the distribution of her survey to people in the district attorney's office, Demers distributed the 7-step plan to anyone outside or inside the university who was interested in the direction that the new Communications school was going to take.

The decision that Demers' speech was protected by the First Amendment meant that he had won a key battle, but not necessarily the war. The Ninth Circuit remanded the case for further proceedings. First, the defendants denied that they had retaliated against Demers for his speech, so that issue had to be tried. Second, there was serious doubt as to whether, even if they had retaliated against Demers for his speech, the defendants would be liable in damages under 42 U.S. Code Section 1983, because the law regarding academic speech following **Garcetti v. Ceballos** had not been clearly established. Possibly, Demers will obtain an injunction prohibiting any further retaliation, on a prospective basis, now that the law is established, at least in the Ninth Circuit.

Comment: *Demers* appears to create some protection for university professors. Does it also apply to student affairs professionals? That is a tougher question. If a student affairs professional is also a faculty member (i.e., some deans of student affairs also teach classes) and can show that the speech was in connection with an academic issue, the speech might be protectable. However, if a student affairs professional does not also teach, he or she probably is governed by the *Garcetti* rule and will have to be very careful about speech on any subject that arguably comes within the range of his or her official duties. On the other hand, if a student affairs professional handles a relatively narrow area, it might be possible for him or her to be deemed a private citizen when speaking on subjects outside the scope of the job. For example, a student affairs professional who concentrates on counseling might be able to obtain citizen status (under *Pickering*) when talking about, say, the university budget.

Fourth Circuit Holds That *Garcetti* Does Not Apply Where Speech Occurs Outside of Employee's Regular Responsibilities

In **Adams v. Trustees of the University of North Carolina–Wilmington**, 640 F.3d 500 (4th Cir. 2011), the relatively conservative Fourth Circuit found a way to protect a professor's speech without expressly creating an "academic freedom" exception to **Garcetti**.

Professor Adams had initially done well at the University of North Carolina–Wilmington (UNCW), starting as an Assistant Professor of Criminology, winning several awards, and rising to Associate Professor. According to Adams, his problem began when he became a "Christian," developed a strongly conservative philosophy, and began publicizing his views on a variety of social issues by way of a column, as well as radio and television appearances. Initially, UNCW officials asked him to tone down his rhetoric, to become less "caustic" and "more cerebral" like William F. Buckley (the late publisher of the *National Review*, who was considered by many to be the intellectual leader of the conservative movement).

A full professorship then opened up, and Adams applied for the position, providing a portfolio of work inside and outside the university. He cited many of his outside speeches, radio and television appearances, and publications in support of his position that he was well qualified academically for the full professorship. When he did not get the full professorship, he sued UNCW on the theory that the school had retaliated against him by reason of his exercise of First Amendment rights. UNCW contended that Adams did not get the full professorship because the writings that he submitted in support of his application were not peer reviewed or traditional academic writing related to his academic discipline.

Adams sued UNCW, based, among other points, on an alleged violation of the First Amendment. Initially, the Fourth Circuit said that the Supreme Court has not affirmatively recognized a right of academic freedom that belongs to a professor as an individual but has recognized only an institutional right of self-governance in academic affairs. Under that view, the university would have a wide discretion in determining which candidate has or does not have the best academic qualifications for a coveted professorship.

Comment: The court was not entirely accurate here. Prior cases have given universities wide discretion in, for example, deciding student grades or deciding whether a student's dissertation is of sufficient quality to merit the award of a doctorate. In that sense, there is an institutional right of self-determination, where the academic expertise of university officials will be respected by the court, absent some other type of illegal conduct such as racial or gender discrimination. However, the *Ceballos* court *did not* reject the concept of academic freedom for professors but left the point open.

The **Adams** court then began its analysis by starting with **Pickering.** Even under **Pickering** and **Connick,** universities and other public employers can restrict the free-speech rights of teachers and other public employees in ways that would be unconstitutional if applied to a member of the general public. Thus, employees seeking to invoke the First Amendment to stop adverse personnel action arising out of speech would have to establish not only that the speech was on a matter of public concern but also that the employee's right to speak outweighs the interest of the employer in promoting efficiency in government.

UNCW actually conceded that Adams' outside speeches, books (through his publishing company), and commentaries were protected speech (i.e., not part of his job duties) when they were initially made but claimed that the speech lost its character as outside speech once Adams submitted this material as part of his application for the full professorship. The court disagreed and said that the materials in question did not lose their "protected speech" character when he submitted them to the persons who were considering him for the full professorship. Moreover, the court found that

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Adams' outside speech on social issues was not part of his official duties. None of the speeches, books, or commentaries were undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to Adams' teaching of Criminology.

UNCW unsuccessfully argued that because Adams was employed as an Associate Professor, his position required him to engage in scholarship, research, and service to the community. The university's position, if it were upheld, would have prevented professors from speaking freely on virtually any subject, a result not intended by the Supreme Court in **Garcetti.** In other words, a professor's general obligation to engage in scholarship, writing, and research does not preclude him or her from speaking freely on subjects that go beyond the university duties.

The **Adams** court concluded that the professor was speaking as a citizen on matters of public concern. His columns discussed academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality. Therefore, the court held that Adams had met the first prong of the **Pickering** test and remanded the case to the trial court for a determination as to whether Adams met the other **Pickering** tests.

Supreme Court Rules That in Most Cases, Employees Who Testify Truthfully in Court Regarding Information They Learned as Public Employees Are Protected by the First Amendment

In one of its last 2013–2014 term cases, the Supreme Court dealt again with speech rights of public employees. **Lane v. Franks,** 2014 WL 2765285. Central Alabama Community College (CACC) employed Lane as the Director of Community Intensive Training for Youth (CITY), a statewide program for underprivileged youth. Lane was responsible for overseeing CITY's day-to-day operations, hiring and firing employees, and making decisions with respect to the program's finances. At the time of Lane's appointment, the program was having substantial financial difficulties, which prompted Lane to conduct a comprehensive audit of the program's expenses. The audit revealed that Suzanne Schmitz, an Alabama state representative who was also on CITY's payroll, had not been reporting to her CITY office. After unsuccessfully attempting to get Schmitz to show up at her job, Lane shared his finding with CACC's president and its counsel. They warned him that firing Schmitz would have negative repercussions for him and CACC. Lane then made one more attempt to get Schmitz to show up at her job and fired her when she refused to do so.

Schmitz's termination drew the attention of many persons, including agents of the Federal Bureau of Investigation (FBI), which began an investigation into Schmitz's employment with CITY. Lane then testified before a grand jury about his reasons for firing Schmitz. Ultimately, Schmitz was indicted for mail fraud and four counts of theft involving a program receiving federal funds.

Lane testified at the trial, which ended in a hung jury. The government retried the case, and Lane again testified. This time, Schmitz was convicted and sentenced to a prison term.

The CITY program continued to experience financial difficulties. Defendant Frank, who was then president of CACC, eliminated the whole CITY program, which resulted in the layoff of Lane and numerous other people. Lane then sued under 42 U.S.C. Section 1983, claiming that his dismissal was in retaliation for his exercise of First Amendment rights in testifying before the grand jury and at the two trials.

The **Lane** court began its analysis by stating that public employees do not renounce their citizenship when they accept employment and public employers may not condition employment upon employees' relinquishment of all of their constitutional rights. The court said:

> There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work. 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 then turned to **Garcetti** and pointed out that **Garcetti** distinguished between employee speech and citizen speech. Whereas speech as a citizen may trigger protection, the **Garcetti** 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.

In **Lane,** the issue was whether the First Amendment protects a public employee who provides truthful testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. Since CACC conceded that testimony in court was not a part of Lane's official duties, the court did not have to decide whether the First Amendment protects employees who testify in court (truthfully) as part of their regular duties

The Supreme Court held that truthful testimony under oath by a public employee outside the scope of his or her ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment. Sworn testimony in judicial proceedings is the quintessential example of speech as a citizen, because anyone who testifies in court bears an obligation to tell the truth. Moreover, in many cases, the only way that law enforcement personnel can learn about and prosecute persons who defraud the government or the public is if other government employees are willing and able to come forward and tell what they have learned in the course of their employment. Furthermore, Lane's speech, which exposed misconduct by a state official, clearly related to matters of public concern.

Comment: The Supreme Court reached the only possible logical result. Few situations could be worse than forcing an employee to commit perjury in order to prevent the loss of his or her employment. If it had not been for Lane, the Alabama legislator who had a no-show public sector job most likely would have continued to cheat the taxpayers of Alabama.

Lane clearly passed the first **Pickering** test (i.e., that the speech relate to matters of public concern). On the second prong of **Pickering,** the "balancing of interests" test, the balance clearly was in Lane's favor. CACC did not claim that the testimony was false, nor did it claim that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying. The bottom line is that the First Amendment applies to Lane's speech.

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Implications for Student Affairs Professionals and Other Public University Employees

Unfortunately, Lane achieved only a moral victory. He was unable to recover damages. Most of the defendants had qualified immunity from damages, because the First Amendment rights of employees testifying under oath were not clearly established until the Supreme Court came out with its opinion. Lane's other problem was that he could not necessarily prove that he was laid off because of his testimony; the program was in financial trouble regardless of Schmitz's misconduct, and the defendants claimed that Lane was fired for fiscal reasons and not because of his testimony.

However, for the future, the **Lane** case has vitally important implications for student affairs professionals, professors, and anyone else who is employed by a public university. If an employee sees evidence of misconduct and reports it and then testifies truthfully before a grand jury, court, or investigative body (such as a state legislative committee), that testimony is most likely protected by the First Amendment. Although the court still left some loose ends relating to university officials who testify in legal proceedings as a regular part of their employment, it is likely that the same First Amendment protections would apply to them. No rational court would force any employee to commit perjury in court in order to avoid adverse personnel actions by an employer. ■