U.S. Supreme Court Curtails Right to Work-related Speech

A recent decision of the U.S. Supreme Court limits government employees' First Amendment right to free speech. Generally, municipal employers cannot take adverse action against employees for exercising their constitutionally protected right to free speech on matters of public concern. This protection, however, does not extend to all statements made by employees. This past month the U.S. Supreme Court in *Garcetti v. Ceballos*, 547 U.S. ___ (2006), ruled that statements made by employees *pursuant to their work duties* are not protected by the First Amendment.

This case involved Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office. In the spring of 2000, Ceballos received a call from a defense attorney who insisted that an affidavit that was used to secure a critical search warrant contained significant inaccuracies. After Ceballos investigated the claim, he concluded that the affidavit contained "serious misrepresentations." He voiced his concerns to supervisors, and prepared a follow-up memo explaining his concerns and recommending dismissal of the case.

Following the memo, Ceballos claimed the County District Attorney's Office retaliated against him by reassigning him from his current position to trial work, transferring him to another office, and denying him a promotion. Ceballos sued the county and his supervisors under 42 U.S.C. § 1983, asserting a violation of his First Amendment right to free speech.

The question presented to the Court was whether the First Amendment protects a government employee from discipline based on speech pursuant to the employee's official duties. The Court, in a 5-4 decision, held that there was no First Amendment protection for this type of speech. In holding that Ceballos' speech was not protected, the Court distinguished between expressions made *pursuant to an employee's work duties* and expressions made by an employee *in her capacity as a private citizen.* The Court reasoned that public employers need a degree of control over employees' words and actions to effectively provide public services.

Ironically, the Court's decision may actually provide an incentive for government employees to voice criticisms publicly. Under the dichotomy the Court establishes, government employees may have more protection if they voice criticisms publicly than they do if they voice them privately to supervisors. The Court, recognizing the potential problems created by this framework, suggests in its opinion that "[a] public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public."

Vermont municipalities have the option to institute these types of internal procedures by adopting personnel policies pursuant to 24 V.S.A. § 1121(a). Such procedures can set up an avenue for employees to air complaints and grievances through internal channels. A municipal employer may also use the personnel policy to articulate a philosophy of candid and open communication between employees and supervisors. In this way, the employer will, in effect,

protect its employees' right to work-related speech, while maintaining internal controls that ensure it will have a positive impact on the municipality.

One question left unanswered by the opinion is how government employers are to determine whether a statement is made pursuant to an official work duty. This determination will necessarily be made on a case-by-case basis. A good starting point for municipalities is the employee's job description, which should provide an outline of his or her responsibilities and duties. Additionally, the municipal personnel policy should provide guidance regarding the roles and obligations of employees. The municipal employer should then consider whether the employee's statement was related to duties, roles or obligations clearly outlined in the employee's job description or the personnel policies of the municipality.

If the statements were clearly made pursuant to an official duty, like the memo in *Ceballos*, the municipal employer may take appropriate corrective actions, including discipline and/or dismissal pursuant to the personnel policy. If, however, the statements were made outside of the employee's official duties, the municipality could not take any adverse actions against the employee if the speech was on a matter of public concern. For more information on this issue, see the VLCT Municipal Assistance Center's *Municipal Employment Law Handbook* (2004). Municipalities should always contact counsel or the VLCT Municipal Assistance Center for additional guidance.

While the *Ceballos* opinion provides more leeway for municipal employers, extreme caution is still necessary when disciplining or dismissing an employee in matters involving speech.

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