Connecticut Law Tribune
May 28, 2013
An ALM Publication

When Is Employee Speech Constitutionally Protected?

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Both the U.S. Supreme Court and the Connecticut Supreme Court have determined that speech made by public and private employees that occurs within the scope of their official job duties is not constitutionally protected under the U.S. Constitution. However, until recently, no Connecticut state court had decided whether the Connecticut Constitution provided greater speech rights to employees such that the same speech could be protected. In *Cabrera v. The American School for the Deaf,* Docket N. HHD-CV-12-6035273-S (Conn. Super. Feb. 26, 2013), Judge Carl Schuman found that the Connecticut Constitution did not afford employees any greater rights than the First Amendment in this context. This article will explain Judge Schuman's decision and its implications for both employees and employers.

Speaking As An Employee

In 2006, the U.S. Supreme Court first determined that public employees who made statements within the scope of their official job duties were not engaging in constitutionally protected speech. In that case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a deputy district attorney wrote a memorandum to his supervisors about inaccuracies in a search warrant, but his supervisors disregarded his concerns.

When he was subsequently denied a promotion, the attorney alleged retaliation due to the exercise of his First Amendment rights. The Supreme Court disagreed, holding that when public employees make statements pursuant to their official job duties, the employees are not speaking as citizens under the First Amendment and their speech is therefore not protected. The rationale was basically that the public employer had hired the employee to engage in the speech at issue by making it a part of the employee's job duties. Therefore, the employee was speaking as an employee, not as a citizen, and the speech thus did not have First Amendment protection.

The Connecticut Supreme Court followed suit in 2012 in the case of *Schumann v. Dianon Systems,* 304 Conn. 585 (2012), holding that the reasoning in *Garcetti* applied equally to a private employee's speech pursuant to Connecticut General Statutes § 31-51q. That law provides protection from discipline or discharge to private employees for exercising their rights guaranteed by the First Amendment or Article First of the Connecticut Constitution, at least


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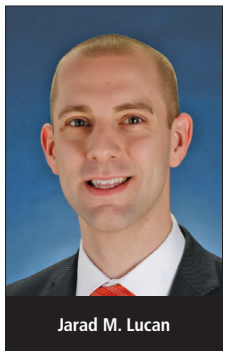
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with respect to an employee's claim that the his or her speech was protected by the First Amendment. However, the Connecticut Supreme Court did not reach the question of whether the same speech would be protected under the Connecticut Constitution. Therefore, the Connecticut constitutional question remained open, and no Connecticut state court reached this issue prior to the *Cabrera* case.

The facts of the *Cabrera* case seemingly fell directly within the parameters of both *Garcetti* and *Schumann*. The complaint alleged that the plaintiff was a payroll specialist and that she had reported payroll mistakes to her supervisors and to a private auditor. She claimed that she was retaliated against for those statements, and thus alleged a violation of C.G.S. § 31-51q.

The plaintiff was a payroll specialist who had reported payroll mistakes to her supervisors and to a private auditor. She claimed that she was retaliated against for those statements.

In an apparent attempt to find some protection for her speech, which clearly fell within her job duties, the plaintiff argued that Article First, Section 4 of the Connecticut Constitution afforded her greater rights than the U.S. Constitution such that her speech was protected even though it occurred within her job duties. Her argument was that the Connecticut Supreme Court had previously found that Article First was broader than the First Amendment in different contexts, and that the same rationale should apply to her case.

In addressing this argument, Judge Schuman reviewed the history of Article First, Section 4 and found that there was no indication that the framers contemplated freedom of speech in employment. The judge also looked to decisions in other states, and found that all decisions that had addressed the issue had applied *Garcetti* under their own constitutions.

Finally, Judge Schuman noted the policy considerations behind *Garcetti,* and found that it would be incongruous to grant private employees greater rights than public employees by accepting the plaintiff's arguments under the Connecticut Constitution. Judge Schuman thus concluded that the "speech of an employee pursuant to his official job duties is no more a matter of state constitutional dimension than it is under the federal Constitution."

Other Factors

The *Cabrera* decision provides some level of predictability with regard to employee speech in the workplace. However, despite the discretion afforded to employers to address employee speech, employers should use caution in doing so.

A factual question often exists as to whether the employee is actually speaking as a part of his or her official job duties, or is speaking as a citizen on a matter of public concern. For example, if an employee reports a safety violation at work, the question is whether the employee's job required such a report or whether the employee was motivated by a broader desire to address an unsafe condition. The answer to this question is not necessarily clear in all situations, and employers will need to look at the employees' duties carefully in order to avoid infringing upon free speech rights.

In addition, even if the *Garcetti/Schumann* rule applies such that the speech is not protected, employees have no lack of other protections for their speech. For example, several whistleblower statutes could apply, or the speech may be considered to be concerted protected activity that is protected under state or federal labor laws. Therefore, employers should be careful when making employment decisions based on the speech of employees and fully consider all of the potential protections that might apply.

As a final note, the *Cabrera* case has not necessarily resolved this question. Prior to *Cabrera,* one federal court suggested the opposite conclusion in *Ozols v. Town of Madison,* Docket No. 3:11-CV-01324 (D. Conn. Aug. 20, 2012). Although Judge Schuman found that this decision unpersuasive, it is apparent that different judges have different views on the issue. In addition, the *Cabrera* analysis may be nullified through legislative action. Raised Bill No. 6667 is currently pending, and would add the following sentence to C.G.S. § 31-51q: "It shall not be a defense to an action filed under this section that such activity by an employee was within the scope of the employee's employment." Like so many other legislative reactions to court decisions, this bill is clearly an attempt to undo reasoned legal analyses to reach a desired end result. ■

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