

MORRIS DUFFY ALONSO & FALEY

MUNICIPAL LAW UPDATE

In an effort to keep our municipal clients apprised of new case law we summarize the following two recent cases. One from the Supreme Court of the United States and one from the Appellate Division of the New York State Supreme Court, Second Department.

A Municipal Employee Has No First Amendment Protection Under the United States Constitution for Speech Made Pursuant to the Employee's Official Duties

Garcetti v. Ceballos, --- S.Ct. --- (2006) Decided May 30, 2006

Richard Ceballos, a deputy district attorney for the Los Angeles District Attorney's Office, held the position of calendar deputy. In his capacity he exercised supervisory responsibilities over other lawyers. A defense attorney contacted Ceballos about a pending criminal case stating that there were inaccuracies in an affidavit used to obtain a search warrant critical to the case. The attorney informed Ceballos that he had filed a motion to challenge the warrant, but he also wanted Ceballos to review the case.

Ceballos examined the affidavit in question and visited the location described in the affidavit. Agreeing with the defense attorney that there were inaccuracies in the affidavit, Ceballos contacted the warrant affiant, a deputy sheriff, relayed his findings to his supervisors, and prepared a memo explaining his concerns and recommending dismissal of the case.

Despite Ceballos' concerns, the district attorney's office proceeded with the prosecution of the matter. Ceballos was called as a **defense witness** in the hearing to challenge the warrant, but the trial court rejected the challenge. In the aftermath, Ceballos accused the DA's Office of retaliating against him for asserting his right to free speech. According to Ceballos, the retaliation included reassignment from his position, a transfer to another courthouse, and a denial of a promotion. The DA's Office moved for summary judgment which the federal district court granted. The Court of Appeals for the Ninth Circuit reversed the district court holding that Ceballos' speech was entitled to constitutional protection. The United States Supreme Court granted certiorari and reversed the Ninth Circuit's decision.

Discussion

When a government entity acts as an employer it is in a position unlike employers in the private sector. Under 42 U.S.C. 1983, federal law provides for civil remedies when an actor, under color of law, deprives someone of their civil rights. Accordingly, municipal employees can maintain an action against their employers for violating their right to freedom of speech.

The Court has held that government employers, like private employers, need a significant degree of control over the words and actions of their employees, without which there would be little chance for the efficient operation of public service. However, a person does not surrender his or her constitutional rights upon the acceptance of government employment. Therefore, a balance of the employer's control and the employees rights must be achieved.

In the seminal case of *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968), the Supreme Court balanced an employees right to free speech against a government employers need to maintain control over the workplace. The Court held that a government employee's First Amendment rights attached to his or her speech when that employee was **speaking as a citizen** upon matters of public concern. If the speech was determined to be protected under the First Amendment, then the courts would have to balance the value of the speech (or the interest of the employee in commenting on matters of public concern) verses the potential of the speech for disruption in the workplace.

In *Garcetti*, however, the Court did not have to conduct a *Pickering* "balance test." The Supreme Court held that Ceballos' statements were made **pursuant to his duties as a calender deputy and not as a citizen**. In other words, he spoke as a prosecutor fulfilling his responsibility to advise his supervisors on how best to proceed in a pending case. Because Ceballos was not speaking **as a citizen**, he was not afforded First Amendment protection against discipline. The Court in *Garcetti* states, "We hold 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."

Summary

As discussed above, meting out discipline to a municipal employee for any speech made by the employee can be a complex matter that is rife with exposure for violations of the employees civil rights. In addition to the Constitution, employees can be covered by P.E.R.B. for speech concerning union matters and by whistle blower statutes, including New York State Labor Law § 740. Accordingly, it is recommended that a municipal employer seek legal counsel prior to taking disciplinary action against an employee because of his or her speech.

A Municipality Has a Duty to Trim Growth of Foliage to Ensure Visibility of Stop Signs; However, a Motorist Also Has a Duty to Observe the Intersection Before Entering It

D'Onofrio-Ruden v. Town of Hempstead, - - - N.Y.S.2d - - -, (2nd Dept. 2006)

Plaintiff was driving westbound on Ray Street in the Town of Hempstead when she reached its intersection with Seaman's Neck Road. The intersection was controlled by a stop sign; however, the stop sign was obstructed by foliage, and Plaintiff testified that she did not see it. Plaintiff made a right turn into the intersection and collided with an auto that was three-quarters of the way into the intersection when the collision occurred. The jury found that any negligence by Plaintiff was not a substantial factor in causing the accident and found 100% liability against the Town.

The Town appealed to the Appellate Division which held that Plaintiff's failure to observe the other vehicle in the intersection before proceeding to make her turn constituted negligence. According to the appellate court, which ordered a new trial, " the jury's failure to apportion any fault to the Plaintiff is not supported by a fair interpretation of the evidence."

The court held that a driver has a duty to check an intersection before entering it, and even obscured road signs do not relieve a driver of this duty. The court also reemphasized that a municipality has a duty to maintain its roads in a reasonably safe condition, which includes trimming growth of foliage within a roadway's right-of-way, to ensure that signs are visible to motorists.