



Employee Grievance is Not Protected Speech

In Weintraub v. Board of Education (2nd Cir. Jan. 27, 2010, No. 07-2376) ___ F.3d ___ [2010 WL 292663], a public school teacher claimed that he was retaliated against and ultimately terminated in violation of his First Amendment right to free speech. The speech at issue included the teacher's complaints regarding the vice principal's refusal to discipline a student who had thrown books at the teacher. The Second Circuit Court of Appeals in New York was called upon to review the teacher's informal complaints to his vice principal about not disciplining the student, and also the teacher's formal union grievance when the site administrator did not relent. The Court held that both the teacher's complaints to his supervisor and his grievance were not protected under the First Amendment.

In evaluating the teacher's claim, the Court looked to the United States Supreme Court's decision in Garcetti v. Ceballos (2005) 547 U.S. 410. In Garcetti, the Supreme Court held that a memorandum written by a public employee in the regular course of his duties was not protected speech. In that case, the Supreme Court found that the first inquiry is "whether the employee spoke as a citizen on a matter of public concern," or simply as an employee. In this case, the teacher argued that, under Garcetti, speech must be *required* as part of one's employment duties in order to be considered employee speech. The teacher contended that his speech was not employee speech because he was not required to file a grievance.

The Court was unpersuaded by the teacher's argument, and held that an employee's job duties should not be construed too narrowly: "speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." The Court further held that an employee grievance has "no relevant citizen analogue," and that the teacher's complaints to his supervisor and his grievance were internal communications made pursuant to an existing dispute resolution policy. Because the Court found that the teacher's speech could only have been made in his role as an employee, the teacher was not entitled to protection under the First Amendment.

The Court's ruling in this case makes clear that complaints made by an employee as part of an established internal dispute resolution process are not protected by the First Amendment. We believe the New York Appellate Court's decision in this case, holding that grievances pursuant to a collective bargaining agreement will not enjoy free-speech protection, would also be the conclusion reached in the Ninth Circuit here in California. The more difficult question involves employees who publicize complaints about matters of public concern, whether to the school board, a local newspaper or the media. In those instances, a careful analysis must still be performed to determine whether the speech enjoys protection under the First Amendment. So please do not hesitate to contact one of our five offices when dealing with these free speech issues.

F3 NewsFlash prepared by Doug Freifeld and Emily Sugrue.

Doug is a partner in the F3 Oakland office.

Emily is an associate in the F3 Oakland office.

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2525 Alluvial Avenue, Suite 271, Clovis, California 93611 Tel. 323.330.6300 Fax 323.330.6311
6300 Wilshire Blvd., Suite 1700, Los Angeles, California 90048 Tel. 323.330.6300 Fax 323.330.6311
70 Washington St., Suite 205, Oakland, California 94607 Tel. 510.550.8200 Fax 510.550.8211
520 Capitol Mall, Suite 400, Sacramento, California 95814 Tel. 916.443.0030 Fax 916.443.0030
1 Civic Center Dr., Suite 300, San Marcos, California 92069 Tel. 760.304.6000 Fax 760.304.6011

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