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First Amendment: *Government Defense of Employee Speech Cases*

Fred Dawkins

ATTORNEYS AT LAW
100 Galleria Parkway, 16th Floor
Atlanta, Georgia 30339
Telephone (770) 818-0000
Facsimile (770) 937-9960
fdawkins@fmglaw.com

Labor and Employment Law

Overview

- Historical Development of 1st Amend. Law
- HR Policy Lessons
- What Speech Protected
- What Actions Adverse
- Patronage/Qualified Immunity
- Availability of Summary Judgment

Historical Development of First Amendment Law

Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205, 391 U.S. 563 (1968):

- Pickering terminated after sending letter to newspaper criticizing Board's handling of proposals to raise revenue for schools

- Question: Could he be required to surrender First Amendment rights as a condition of employment?

Pickering:

- Weighed Pickering's interests, as citizen, in commenting upon matters of public concern, against Board's interest, as employer in promoting efficiency of public services it performed through employees
- Court assessed whether certain public employees, because of their job duties, could be limited in speech that otherwise is constitutionally protected

Pickering:

- Board asserted that Pickering's statements damaged the professional reputations of the Board and school administrators, and would be disruptive and foment conflict
  - Adduced no evidence to support these contentions

Pickering:

- No question of maintaining discipline by immediate superiors, or harmony among coworkers, was presented:
  - Pickering's statements not directed towards any person he would normally be in contact with in the course of his daily work as a teacher

Pickering:

- Court rejected the position that “comments on matters of public concern that are substantially correct … may furnish grounds for dismissal if they are sufficiently critical in tone”

Pickering:

- Falsity of Pickering's statements: Board could easily have rebutted his factual errors
  - case did not present "situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts"

Pickering:

- Absent proof that Pickering's statements impeded his performance or the Board's operations, or proof that Pickering made false statements knowingly or recklessly,
  - exercise of First Amendment rights could not lawfully serve as the basis for dismissal. Pickering, 391 U.S. at 574-75

Pickering:

- Pickering balancing test

- Unsupported claim of disruptive influence not persuasive

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977):

- Court refined Pickering analysis
- Doyle made obscene gesture to two students, later called radio station to complain about memorandum sent to teachers concerning new dress code

Mt. Healthy

- Superintendent recommended that Doyle's employment contract not be renewed because of "a notable lack of tact in handling professional matters"
  - Referred to radio station and obscene-gesture incidents

Mt. Healthy

- Doyle claimed contract not renewed because he exercised First Amendment rights
- Because obscene gestures may have been independent reason for termination, Court remanded case
  - If Doyle would have been fired based on gestures alone, termination could stand

Mt. Healthy

- Significant principles from Mt. Healthy:
  (1) public employee claiming First Amendment retaliation had to demonstrate that protected speech was substantial or motivating factor for adverse action
  (2) impact of imprecision in responding to Doyle's behavior

Mt. Healthy

- Board did not delineate between impact of obscene gesture and call to radio station
  - Was gesture independent terminable offense?
  - How was gesture viewed under code of conduct?
  - How had any similar prior incidents been treated?

Connick v. Myers, 461 U.S. 138 (1983):

- Focused on what speech addresses matter "of public concern"
- After learning that, over her objection, she was being transferred, employee circulated questionnaire concerning office affairs
  - Questionnaire asked if employees had recently transferred, whether transfer had been discussed prior to it happening, whether employee thought it should have been discussed, whether transfer policy was fair, whether there was rumor mill in office, how it affected morale

Connick

Employee claimed that subsequent discharge violated First Amendment

Connick

- Court noted that government officials should enjoy wide latitude in managing their offices when employee speech does not relate "to any matter of political, social, or other concern to the community”
- Public employee who speaks upon matters only of personal interest rather than as a citizen upon matters of public concern has no First Amendment claim

Connick

- Employer concluded that questionnaire was act of insubordination which interfered with working relationships. Court: "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate"
- Employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"

Connick

- Court viewed questionnaire inquiries as mere extensions of dispute over, and reflection of dissatisfaction with, transfer
- Stronger showing of workplace disruption might have been necessary if speech had more substantially (instead of only one inquiry) involved matters of public concern

Connick

- Reiterated that First Amendment does not apply when public employee speaks upon matters only of personal interest
- Clarified that matter of public concern is one that relates “to any matter of political, social, or other concern to the community"

Connick

- If speech addresses matter of public concern, determine:
  (1) whether nature of employer's public responsibilities such that close working relationship essential;
  (2) whether speech at issue impedes government's ability to perform duties efficiently;
  (3) manner, time, and place of speech; and
  (4) context within which speech made

Connick

- More employee's speech touches on matters of significant public concern, greater the level of disruption to the government that must be shown
- Note: no indication that employer provided evidence of disruptive impact
- Overwhelmingly personal nature of questionnaire inquiries may have been decisive

Rankin v. McPherson, 483 U.S. 378, 380 (1987):

- Disruptive nature of employee conduct in focus
- Court considered whether clerical employee in county Constable's office was properly discharged for remarking, after hearing of an attempt on the life of then-President Reagan, "If they go for him again, I hope they get him"

Rankin

- Court concluded that speech dealt with matter of public concern, emphasized “[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern"

Rankin

- Weighed employee's interest in making statement against employer's interest "in promoting the efficiency of the public services it performs through its employees"
- Employer claimed employee's statement undermined its mission
- Court: in assessing such a claim "attention must be paid to the responsibilities of the employee"

Rankin

- Further, “burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails“

- Employee’s job was purely clerical

Rankin

- No evidence that statement "interfered with the efficient functioning of the office"
  - Decision-maker testified that the possibility of interference with the functions of the government office had *not* been a consideration in the discharge decision
    - Official did not even inquire whether remark had disrupted the work of the office

Rankin

- Because employee "serve[d] no confidential, policymaking, or public contact role," danger to agency's successful functioning from her private speech was minimal and government's interest in discharging her did not outweigh her First Amendment rights

Rankin

- Keys:
  - Courts look at employee's actual job duties to determine whether employee's speech has detrimental impact, impedes employee's performance, or interferes with employer's ability to carry out mission
  - Consider what policies may be implicated by employee's behavior
  - Prepare supervisors to testify

Garcetti v. Ceballos, 547 U.S. 410 (2006):

- Deputy D.A. transferred and denied promotion because of memorandum he authored criticizing credibility of statements made in affidavit prepared by deputy sheriff

- Court: First Amendment does not protect public employees for "statements made pursuant to their official duties"

Garcetti

- Fact that Ceballos "spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case" distinguished his situation from First Amendment retaliation claims

  – controlling factor was that expressions were made pursuant to duties as a calendar deputy

Garcetti

Employers have heightened interests in controlling speech made by employee in professional capacity

When public employees speak pursuant to official duties, not speaking as citizens for First Amendment purposes

HR Practices in Focus

- Importance of accurate job descriptions
- Discipline when characterizing employee's conduct
- If claiming disruptive impact, be able to support
- Utility of analyzing conduct in context of policies

Current State of the Law: What Speech Is Protected?

- Cases seem to place employee speech into one of three general categories:
  - Speech which exposes government corruption and misconduct usually viewed as addressing matter of public concern
    - Valentino v. Vill. of S. Chi. Heights, 575 F.3d 664 (7th Cir. 2009) Municipal employee protesting policy of nepotism and paying employees for hours not worked
    - Huppert v. City of Pittsburg, 574 F.3d 696 (9th Cir. 2009) Police officer exposing department corruption and waste

What Speech Protected?

- Speech pertaining to unlawful discrimination directed towards others also viewed as touching on matter of public concern
  - Alaska v. EEOC, 564 F.3d 1062 (9th Cir. 2009) Complaints of sexual harassment directed toward co-worker

- Speech relating to specific circumstances of individual's employment remains outside parameters of "matters of public concern"
  - Ruotolo v. City of New York, 514 F.3d 184 (2d Cir. 2008) Lawsuit based on circumstances of employment including reassignment, transfer, time off, and discipline

What Speech Protected?

- Post-Garcetti analysis to determine whether speech protected:
  - (1) whether speech made pursuant to official duties; and
  - (2) whether speech addresses matter of public concern

Post-Garcetti

- 9th, 6th Circuits: limited application to situations where employee's official duties require that employee to make the specific speech
  - Alaska, 564 F.3d at 1070-71 (employee in governor's office was not required to complain about a co-worker's alleged sexual harassment)
  - Davenport, 553 F.3d at 1113 (public safety officer had no duty to report superior's wrongdoing or a lack of resources)

Post-Garcetti

- Fourth Circuit: Garcetti inapplicable when police commander distributed to newspaper internal memorandum criticizing internal investigation Andrew v. Clark, 561 F.3d 261 (4th Cir. 2009)
- Tenth Circuit: public employee's complaints no longer pursuant to official duties once made outside employee's chain of command Thomas v. City of Blanchard, 548 F.3d 1317, 1325 (10th Cir. 2008)

Post-Garcetti

- Other Circuit courts given Garcetti broader application
- Seventh Circuit: Garcetti applies to job requirements that limit and require speech Fairley v. Andrews, 2009 WL 2525564 (Aug. 20, 2009)

Post-Garcetti

Courts of Appeals for D.C. and Eleventh circuits: Garcetti applies when speech is job-related

- Winder v. Erste, 566 F.3d 209, 215 (D.C. Cir. 2009) Testimony by manager of transportation department at a council meeting

- Battle v. Bd. of Regents, 468 F.3d 755 (11th Cir. 2006) Employee in state university's financial aid office was speaking as employee, not citizen, when voiced concerns about suspected fraud

Post-Garcetti

- Third Circuit: Garcetti applicable because plaintiff's speech related to special knowledge or experience acquired through job Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009)

What Actions Are Adverse?

No universal agreement as to what actions sufficiently adverse to support First Amendment retaliation claim

- Shockency v. Ramsey County, 493 F.3d 941 (8th Cir. 2007): "Changes in employment duties or conditions that cause material disadvantage to the employee constitute adverse employment actions, but tangential changes do not"
- Court held employer retaliated against plaintiffs by transferring them from supervisory positions into ones with significantly less responsibility

What Actions Are Adverse?

Shockency (cont.):

- Court rejected employer's argument that interest in efficiency outweighed employees' interest in protected activities
  - employer argued it "need not show ‘actual disruption,’ but only that ‘the ordinary or foreseeable effect of the conduct’ would be to disrupt department efficiency"
  - Court: "[a]lthough law enforcement predictions of disruption are due some deference, the Pickering balancing test only need be conducted if a government employer has produced evidence of workplace disruption"

What Actions Are Adverse?

- Dillon v. Morano, 497 F.3d 247, 254 (2d Cir. 2007): Test in determining whether employment action is adverse is whether alleged acts "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights"
  - plaintiff's subjective assessment that unit he was transferred into was less desirable, and failure to show how he was disadvantaged by being excluded from staff meetings, insufficient

What Actions Are Adverse?

- Deprado v. City of Miami, 264 Fed. Appx. 769, 770 (11th Cir. 2008): Retaliation occurs when employer takes adverse employment action "that is likely to chill the exercise of constitutionally protected speech"
  - Court rejected employee's claim that assignment to another unit he viewed as less prestigious, and being denied unspecified educational and travel opportunities, constituted retaliation

What Actions Are Adverse?

- Harris v. Butler County, 2009 WL 2628501, at *3 (6th Cir. Aug. 27, 2009): Court rejected plaintiff's claim that 2-3 month delay in receiving special commission which allowed him to perform work for outside companies constituted adverse action

What Actions Are Adverse?

- Couch v. Bd. of Trs. of the Mem'l Hosp. of Carbon County, 587 F.3d 1223, 1228 (10th Cir. 2009):
  - Physician sued over "campaign of retaliation" in response to him speaking out about substance abuse at hospital

What Actions Are Adverse?

Couch (cont.):

Framework court would apply:

- Determine whether employee speaks pursuant to official duties. If yes, no constitutional protection
- If no, and employee speaks as citizen, determine whether subject of speech is matter of public concern. If no, speech unprotected
- If yes, does employee's interest in commenting on issue outweigh interest of employer
- If yes, can employee show that speech was substantial or motivating factor in employment decision
- If yes, can employer demonstrate it would have taken same action even in absence of protected speech

What Actions Are Adverse?

Couch (con't):

- Forms of retaliation insufficient to support Title VII claim might be actionable under First Amendment:
  - actions which would deter a reasonable person from exercising First Amendment rights sufficient
- Neither physician being target of hospital investigation nor being sent letter outlining expected changes in physician's conduct constituted adverse employment actions
  - hospital took the same actions towards physician who had not engaged in constitutionally-protected conduct

What Actions Are Adverse?

- Smith v. Central Dauphin Sch. Dist., 2009 WL 4730399 (Dec. 11, 2009): Test for determining whether alleged act of retaliation gives rise to claim is whether act sufficient to deter person of ordinary firmness from exercising First Amendment rights:
  - Low threshold: all that employee must show is that acts attributed to defendant are more than *de minimis*
  - plaintiff may still satisfy test by showing campaign of harassment that, although *de minimis* in its isolated details, is substantial due to cumulative impact

What Actions Are Adverse?

Massey v. Johnson, 457 F.3d 711, 720 (7th Cir. 2006): To give rise to liability, retaliatory harassment need not be extreme. "Unless the harassment is so trivial that a person of ordinary firmness would not be deterred from ... expressing those beliefs," harassment violates First Amendment

- isolated criticisms may not suffice
- "campaign of petty harassments that included reprimands and ridicule could be enough"

What Actions Are Adverse?

Massey (cont.):

- Campaign “though trivial in detail may have been substantial in gross." Id. at 720-21 n.3
- “No rational jury” could find that employee being told she could no longer bring beverages into a computer area, being assigned additional tasks, being told to increase her productivity, and being reprimanded for failing to order certain supplies "amounted to campaign of retaliation designed to deter free speech”

Current State of the Law: Political Retaliation and Qualified Immunity

Bergeron v. Cabral, 560 F.3d 1 (1st Cir. 2009): Plaintiff jail officers' commissions as county deputy sheriffs rescinded by newly-elected sheriff, allegedly in retaliation for their support of sheriff's opponent in election. Sheriff: decommissioning not adverse action and she was entitled to qualified immunity

- To state "political retaliation" claim, employee had to show:
  (1) he did not hold a policy-making position;
  (2) he was subjected to an adverse employment action;
  (3) his politics were a substantial or motivating factor for that action

Political Retaliation and Qualified Immunity

Bergeron (cont.):

- No dispute these plaintiffs did not occupy policymaking positions
- Key question – did stripping plaintiffs of commissions as deputy sheriffs constituted adverse employment action

Political Retaliation and Qualified Immunity

Bergeron (cont.):

- Court specified that adverse employment action inquiry focused on whether employer's acts, viewed objectively, placed substantial pressure on employees' political views
  - actions by employer which "place[d] substantial pressure on even one of thick skin to conform to the prevailing political view" sufficed

Political Retaliation and Qualified Immunity

Bergeron (cont.):

- Employer actions which:
  - resulted in work situation "'unreasonably inferior' to the norm for the position,"
  - resulted in a diminution of employee's job responsibilities, or
  - precluded employee from being eligible for "'special benefits and assignments' arising in the normal course of an employment

Could comprise adverse employment actions

Political Retaliation and Qualified Immunity

Bergeron (cont.):

- Court: when sheriff stripped plaintiffs of commissions and excluded them from working paid security details only available to officers commissioned as deputy sheriffs, she "effectively reduced the plaintiffs' earning capacity"
  - "constriction of job responsibilities and the concomitant reduction in earning capacity combined to constitute an adverse employment action"

Political Retaliation and Qualified Immunity

Bergeron (cont.):

- Did sheriff have qualified immunity claim?
  - did plaintiff's version of facts, if true, make out violation of constitutionally protected right?
  - was that right clearly established at time of the violation?
  - should reasonable public official have understood that actions violated that right?
- If answer to any of these is in negative, qualified immunity prevails

Political Retaliation and Qualified Immunity

Bergeron (cont.):

- Was clearly established that public officials could not significantly impact employee's compensation on basis of political affiliation
- Reasonably competent public official should know law governing his conduct
- Sheriff not entitled to qualified immunity

Political Retaliation and Qualified Immunity

Gann v. Cline, 519 F.3d 1090 (10th Circuit 2008):

- Employee alleged that she was replaced as manager by employee who had supported county commissioner's campaign
- No dispute that party affiliation was not required for position in question

Political Retaliation and Qualified Immunity

Gann (cont.):

- Employer argued that qualified immunity barred political patronage claim because commissioner's conduct did not violate employee's constitutional rights
- Even if it did, rights were not clearly established at time of conduct

Political Retaliation and Qualified Immunity

Gann (cont.):

- Political patronage: "the practice whereby 'public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party'"
- Violates First Amendment when public employee fired because of political beliefs, affiliation, or non-affiliation unless work requires political allegiance

Political Retaliation and Qualified Immunity

Gann (cont.):

- Once terminated public employee proves political patronage was substantial or motivating factor, burden of persuasion shifts to employer to prove that action would have occurred regardless of any discriminatory political motivation
- Court rejected employer's argument that he did not engage in political patronage
  - discrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation

Political Retaliation and Qualified Immunity

Gann cont.):

- Court also rejected argument that when employee terminated, First Amendment right to "non-affiliation" was not clearly established
- Precedent placed employer on reasonable notice that his conduct was unlawful
  - no immunity

Political Retaliation and Qualified Immunity

Robinson v. York, 566 F.3d 817 (9th Cir. 2008):

- Employee alleged he was denied promotion because reported misconduct within his department. Employer: reports were not protected speech because were made as part of employee's professional duties
  - also: employee failed to present reports through chain of command as required by written department policy
- Court denied MSJ because of issues of fact regarding scope of employee's job duties
- Violation of chain of command policy not dispositive, but merely one factor to be considered as part of Pickering balancing test

Political Retaliation and Qualified Immunity

Robinson (cont.):

- Court: competency of police force is matter of public concern
- Whether reports were made in the course of employee's job responsibilities unclear because scope of job duties was a question of fact
  - genuine and material disputes as to scope and content of plaintiff's job responsibilities must be resolved by fact-finder

Political Retaliation and Qualified Immunity

Robinson (cont.):

- Pickering test: public's interest in learning about illegal conduct by public officials outweighs employer's interest in avoiding potential disturbance to workplace
- In order for government's interest in smoothly-running office outweighed employee's First Amendment rights, employer had to "demonstrate actual, material and substantial disruption," or "reasonable predictions of disruption" in the workplace

Political Retaliation and Qualified Immunity

Robinson (cont.):

- Had to do so more convincingly "in cases, like this one, where the speech involved unlawful activities rather than policy differences"
- Government urged that exception to established law applied because, pursuant to Sanchez v. City of Santa Ana, 936 F.2d 1027, 1039 (9th Cir. 1990), no constitutional violation in requiring officers to communicate through established chain of command

Political Retaliation and Qualified Immunity

Robinson (cont.):

- Court disagreed: “[E]ven in a police department, the complained-of disruption must be ‘real, [and] not imagined’ ” and the “disruption exception cannot ‘serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views.’”

  Under some factual circumstances, therefore, the Pickering balancing test can favor protected speech even where the speech violates the employer's written policy requiring speech to occur through specified channels.

  Given the evidence that Defendants may have been more concerned with the nature and frequency of Robinson's reports of misconduct than his adherence to the formal chain of command, a fact-finder could conclude that Defendants' application of the chain of command policy was pretextual and not based on Defendants' interest in avoiding workplace disruption.

Political Retaliation and Qualified Immunity

Robinson (cont.):

- Court held that government could avoid liability by showing that employee's protected speech was not but-for cause of adverse employment action
  - court noted but-for causation inquiry was "purely a question of fact" because employee had adequately alleged that chain of command policy was pretext

Political Retaliation and Qualified Immunity

Matrisciano v. Randle, 569 F.3d 723 (7th Cir. 2009):

- Court rejected public employer's "policy maker" corollary defense to employee's First Amendment retaliation claim
- Employee claimed First Amendment rights violated when he was reassigned and locked out of new position after appeared before parole board advocating parole for notorious inmate
- Court rejected employer's arguments that transfer was not adverse employment action and that speech was pursuant to employee's official duties

Political Retaliation and Qualified Immunity

Matrisciano (cont.):

- Assessed employer's "policy-maker corollary" justification
  - could discharge employee for having engaged in speech on matter of public concern in manner that was critical of superiors or their stated policies

Political Retaliation and Qualified Immunity

Matrisciano (cont.):

- In order for corollary to apply:
  (1) employee must have occupied policy-making position; and
  (2) speech must have been of kind that falls within scope of corollary
- Court concluded employee held policy-making position
  - responsibilities listed in job description included review and development of policies and procedures

Political Retaliation and Qualified Immunity

- Court found that because employee's speech did not implicate employer's substantive policy viewpoints, speech did not fall within the scope of the policy-maker corollary

Political Retaliation and Qualified Immunity

Matrisciano (cont.):

- Court then applied Pickering test
  - noted that employee's testifying on behalf of notorious prisoner could have called his judgment into question
  - employer had legitimate interest in ensuring that high-level employees exercised good judgment
- Also significant that employee was high-level official
  - "When public employees offer their opinions in roles as representatives or employees of the government, the government's interest as an employer is greater than if the speech comes divorced from the employment context"

Political Retaliation and Qualified Immunity

Matrisciano (cont.):

- When employee spoke on inmate's behalf, "said that in his 'professional opinion,' he did not believe further incarceration would yield any penological purpose"
- Because of significant considerations on both sides of Pickering scale, court concluded that no clearly established right was violated at the time employee was transferred
- Employer was entitled to qualified immunity

Summary Judgment After Garcetti?

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123 (9th Cir. 2008):

- After Garcetti, inquiry into whether public employee's speech protected by First Amendment no longer purely legal
  - presents a mixed question of fact and law
  - denied summary judgment where there were questions about scope and content of plaintiff's employment duties

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123 (9th Cir. 2008):

- Court noted that, before Garcetti, determining whether public employee engaged in constitutionally protected speech involved two-stage inquiry (whether speech touched on matter of public concern, whether employee's interest as citizen in commenting upon matters of public concern outweighed government employer's in promoting efficiency of services it performs through employees) was purely legal inquiry

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123 (9th Cir. 2008):

- Garcetti added third stage to the first element of test, requiring determination whether plaintiff spoke as public employee or private citizen
- No dispute in Garcetti that public employee's speech was made while he was executing official employment responsibilities
  - Garcetti court did not articulate framework for defining scope of employee's duties in cases where there is room for debate

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123 (9th Cir. 2008):

- In Posey, however, there was dispute as to whether public employee's speech was made in execution of his official employment duties
- Because of that dispute, court sought to determine whether inquiry into protected status of speech remained purely of law (Connick) or if Garcetti transformed it into a mixed question of fact and law.

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123 (9th Cir. 2008):

- Noted that other circuits had split on this question.
  - Fifth, Tenth and D.C. Circuits: post-Garcetti, question whether plaintiff has spoken as citizen on a matter of public concern is question of law for the court to resolve rather than question of fact for jury
  - Third, Seventh, and Eighth Circuits: determination as to whether public employee's speech made within job duties mixed question of fact and law

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123 (9th Cir. 2008):

- Posey court agreed with Third, Seventh, and Eighth Circuits: after Garcetti, inquiry into protected status of speech presents mixed question of fact and law
  - question of the scope and content of plaintiff's job responsibilities is question of fact
- Applying this framework, Posey court held that factual disputes about plaintiff's job responsibilities made summary judgment inappropriate

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123 (9th Cir. 2008):

- Posey court also noted split within circuits as to whether balancing of interests between individual and state was issue of law or fact
  - Johnson v. Ganim, 342 F.3d 105, 114-15 (2d Cir.2003): factual disputes pertaining to potential for disruption and employer's motivations in suspending and terminating plaintiff questions of fact to be answered by jury
  - Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir.1987) (balancing inquiry presented questions which were not factual issues for jury, but involved questions of constitutional law for court; therefore, jury had no role to play

Application of the First Amendment to government employee speech will remain fluid for the foreseeable future

Questions
Or
Comments