PULLMAN &COMLEY

(Academic) Freedom Is Free(r)

Education Law Notes

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Samuel Johnson, the 18th-century English writer and lexicographer, observed that "words are but the signs of ideas." While not intended as such, Dr. Johnson's insight neatly summarizes one of the catalyzing principles for the First Amendment to the United States Constitution, specifically as it applies to freedom of speech. This insight has gained particular currency in the area of academic freedom, a fact that was reiterated in *Demers v. Austin*, --- F.3d ---, 2014 WL 306321 (9th Cir. Jan. 29, 2014), in which the United States Court of Appeals for the Ninth Circuit became the second federal appellate court to hold that teaching and academic writing are not subject to the limitations on public employee speech that the United States Supreme Court established in *Garcetti v Ceballos* 547 U.S. 410 (2006).

The underlying facts in Demers are not remarkable; to the contrary, the plaintiff's allegations limn the typical tale of woe found in employment-related First Amendment claims, namely that he was a public employee, that he engaged in some manner of speech with which his employer disagreed, and that his supervisors retaliated against him in the form of an adverse employment action. What *is* of note is that in Demers, the Ninth Circuit used the plaintiff's status as a tenured associate professor at Washington State University and the defendants' positions as university administrators to reach the question of whether Garcetti applies to scholarship and teaching.

In Garcetti, the Supreme Court significantly restricted the ability of public employees to mount successful free-speech claims, holding 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." 547 U.S. at 421. The Supreme Court, however, expressly reserved ruling on the applicability of its decision to "speech related to scholarship or teaching." Id., at 425. That door, then, having been left open, the Demers court decided to go through it, reasoning that although teaching and scholarly writing form the core of a teacher's or a professor's official duties, if Garcetti were applied to such pursuits, it "would directly conflict with the important First Amendment values previously articulated by the Supreme Court." 2014 WL at *6. Consequently, the Ninth Circuit held that "Garcetti does not – indeed, consistent with the First Amendment, cannot – apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." Id., at *7.

In so holding, the Ninth Circuit was not suggesting an unfettered, First Amendment *Academics Gone Wild*; rather, the court held that cases implicating academic freedom were subject to the less-stringent, pre-Garcetti analysis of public employee speech that the Supreme Court had established in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under Pickering, an employee was required to establish both that his speech

addressed matters of public concern and that his interest in commenting on such matters outweighed the public employer's interest in promoting the efficiency of the workplace. 391 U.S. at 568.

While one might try to dismiss Demers as the inevitable byproduct of what is widely regarded as the country's most liberal federal appellate court, three years earlier, the United States Court of Appeals for the Fourth Circuit, often considered to be among the more *conservative* federal circuit courts, reached the same conclusion. *Adams v. Trustees of the Univ. of North Carolina-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011). Thus, while neither the decisions of the Ninth Circuit, which is based in California, nor of the Fourth Circuit, which is located in Virginia, are binding on educational entities within other federal circuits -- including the Second Circuit, of which Connecticut is a part -- the fact that two of the country's most geographically and ideologically diverse circuit courts arrived at the same result is a strong indicator that other courts facing this issue will likely follow their lead.

Although Demers was decided in the context of a university, the legal principles upon which the Ninth Circuit predicated its holding are equally applicable to public school districts. It is, therefore, prudent for both post-secondary institutions and school districts to recognize that the latitude Garcetti provides public employers in responding to public employee speech will likely not be extended to commentary that a court views as constituting either teaching or scholarship.

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