

STATE OF TENNESSEE
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Opinion No. 08-37

Public Employees First Amendment Rights

QUESTION

Whether public employees enjoy free speech rights enforceable under the First Amendment when communicating with an elected official concerning matters relating to the operation of their governmental entity?

OPINION

When public employees make statements to elected officials pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the speech does not enjoy First Amendment protection.

However, public employees who make statements to elected officials outside the course of their official duties are not engaged in an official employment activity and thus retain First Amendment protection.

Further, pursuant to Tennessee statutory law, public employees have a statutory right to communicate with elected officials without fear of retaliation.

ANALYSIS

The United States Supreme Court has recently held that, when public employees make statements as part of their official duties, they do not speak with the same First Amendment protections as private citizens, even if the subject is of public concern. In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006),¹ a deputy district attorney was disciplined because he wrote in a disposition memorandum and testified in court that he believed an affidavit from the police used to obtain a critical search warrant contained serious misrepresentations. The United States Supreme Court held that the attorney's speech was not protected by the First Amendment because, when a public employee makes statements pursuant to his official duties, he is speaking not as a citizen but for his employer, even if his speech relates to a matter of public concern. The

¹The request referred this Office to the Eighth Circuit's decision in *Percy Green v. City of St. Louis, Missouri*, No. 06-3349, 2007 U.S. AltLaw 194339 (8th Cir. Nov. 2, 2007). *Percy Green* applies the *Garcetti* decision to the facts of that case.

“controlling factor” in the Court's decision was that the deputy's "expressions were made pursuant to his duties as a calendar deputy."²

Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. . . . [W]hen 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.³

Thus, the Court concluded that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."⁴ Nevertheless, the Court commented that government employees who make public statements outside the course of performing their duties retain First Amendment protection because that is the kind of activity engaged in by persons who do not work for the government. Thus, a letter to a local newspaper is protected as is a discussion of politics with a co-worker.

The Supreme Court found that First Amendment protection is not necessary for those employees seeking to expose "governmental inefficiency and misconduct" due to "the powerful network of legislative enactments — such as whistle-blower protection laws and labor codes — available to those who seek to expose wrongdoing." These enactments "protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."⁵

In Tennessee, public employees have a statutory right to communicate with elected officials. The PUBLIC EMPLOYEE POLITICAL FREEDOM ACT, codified at Tenn. Code Ann. §8-50-601 *et seq.*, makes it “unlawful for any public employer to discipline, threaten to discipline or otherwise discriminate against an employee because such employee exercised that employee's right to communicate with an elected public official.”

Further, Tenn. Code Ann. §8-50-116(b)(1), provides that no state employee shall discriminate against a state employee because the employee reports “violat[i]ons of state or federal law, rule or regulation,” fraud, willful misappropriation, acts dangerous to the health or safety of the public or employees, or gross mismanagement, waste, or abuse of authority.

²*Garcetti*, 547 U.S. at ____, 126 S.Ct. at 1959-60.

³*Id.*, 547 U.S. at ____, 126 S.Ct. at 1960.

⁴*Id.*

⁵*Id.*, 547 U.S. at ____, 126 S.Ct. at 1962.

Consequently, these state statutes provide protection for public employees who communicate with elected officials on matters both within the scope of their official duties and on matters outside the course of performing their duties.

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