Connecticut Law Tribune
July 23, 2012
An ALM Publication

EMPLOYMENT & IMMIGRATION LAW

Free Speech Rights Limited For Private Sector Workers

Court says employees can be fired for sounding off about official duties

By DAVID S. POPPICK

In a significant decision favorable to employers, *Schumann v. Dianon* (SC 18655, May 1, 2012), the Connecticut Supreme Court ruled in an appellate issue of first impression that private sector employees are not entitled to First Amendment free speech protection when speaking about job-related matters in the course of their employment duties resulting in adverse employment actions or termination of their employment – a rule previously applied to public sector employees in Connecticut.

The defendant, Dianon Systems Inc., is a medical testing laboratory performing biological diagnostic tests ordered by physicians to detect forms of cancer and other abnormalities, and it generates reports with the test results and diagnosis. The plaintiff, Dr. G. Berry Schumann, a laboratory doctor and pathologist, told his supervisor that he thought certain diagnostic language used in the reports would confuse physicians and thereby harm patients.

Dr. Schumann's speech was not entitled to constitutional protection because it took place in the work environment, not on his own time.

Therefore, he refused to use the diagnostic terms. He was terminated for his refusal to use the diagnostic terms and for disciplinary issues related to his unexcused absences from work. He sued, alleging wrongful termination in violation of Connecticut General Statutes § 31-51q, which protects private sector and public sector employees against discipline or discharge for exercising their First Amendment free speech rights in the workplace speaking about matters of public concern and motivated by the employee's desire to speak out as a citizen, and not as an employee.


David S. Poppick

A jury awarded Schumann more than $4 million, and judgment was rendered for more than $10 million after adding attorney fees, punitive damages and interest. On appeal, the Connecticut Supreme Court reversed the judgment under C.G.S. § 31-51q, and ordered a new trial limited to common-law wrongful termination, relying on application of the U.S. Supreme Court ruling in *Garcetti v. Ceballos,* (547 U.S. 410 (2006)), discussed below.

As is widely known, employment may be terminated at will unless there is a statutory, contractual or decisional exception. See *Sheets v. Teddy's Frosted Foods Inc.,* 179 Conn. 471 (1980). For First Amendment background pre–*Garcetti*, the case law concerning an employee's free speech rights largely addresses claims against governmental employees, holding that there can be no First Amendment violation without state action. The leading U.S. Supreme Court cases include, among others, *Pickering v. Board of Education*, 391 U.S. 563 (1968), where the court recognized that a government has interests as an employer in regulating the speech of its employees that differs from the regulation of citizens' speech.

A teacher was dismissed for sending a letter to a local newspaper critical of a proposed tax increase and the way the school's superintendent and board had handled past proposals to raise revenues for the school. The court held that the First Amendment was violated by terminating the teacher for speaking out about a matter of public concern.

The decision shows that there is a balance between the interests of the employee speaking as a citizen in commenting upon matters of public concern and the interest of the state as an employer in promoting the efficiency of the public services it performs. The balance is whether the employee's right to speak is outweighed by the employer's interest in effective operation of the workplace. What has become known as the *Pickering* balancing test considers several relevant factors, including, among others, the extent of disruption caused by the employee's speech on: (1) workplace discipline; (2) harmony among co-workers; (3) working relationships; (4) the employee's job performance; (5) the responsibilities of the employee within the agency; and (6) whether the speech is made publicly or privately.

Distributing Questionnaires

In another leading case, *Connick v. Myers*, 461 U.S. 150 (1983), the U.S. Supreme Court

David S. Poppick is member of Epstein Becker & Green P.C., where he practices in the firm's Stamford and New York offices representing national and regional employers in all aspects of labor and employment law and litigation.

held that the discharge of a district attorney for distributing questionnaires concerning internal office affairs did not violate the First Amendment. The court stated that the First Amendment does not extend to speech made by an employee expressing job-related opinions and ideas; it does not elevate internal personnel problems or grievances to constitutional importance; it does not empower employees to "constitutionalize the employee grievance" or require an office to be run as a roundtable for employee complaints about internal office affairs.

Therefore, the court followed the *Pickering* requirement that the employee's speech must be on "a matter of public concern" in order for a court to scrutinize the reasons for the adverse employment action or discharge. "A matter of public concern" is determined by the content, form and context and relates to any matter of political, social or other concern to the community, not an employee-employer dispute about work-related matters. If the speech addresses exclusively private concerns, the interest in managing a business without oversight by the courts outweighs the First Amendment free speech rights, and courts should not second-guess the employer's decision absent the most unusual circumstances. Otherwise, virtually every workplace dispute would become a free speech case.

Schumann brought his claim under Connecticut General Statutes § 31-51q, which creates a statutory cause of action that extends First Amendment free speech rights on matters of public concern to government employees, and also to private sector employees, without a state action requirement.

The Connecticut Supreme Court previously addressed the application of C.G.S. § 31-51q in the private sector in *Cotto v. United Technology Corp.,* 251 Conn. 1 (1999), where the plaintiff was discharged from Sikorsky Aircraft for his refusal to display an American flag at his workstation. The Connecticut Supreme Court ruled that the protections of § 31-51q were not limited to speech on public property, but also extended to employee speech in the private workplace. The court ruled, however, the plaintiff had no cause of action for violation of free speech because his issue was a grievance about working conditions, not a matter of public concern.

For its analysis in *Dianon Systems Inc,* the Connecticut Supreme Court turned to *Garcetti,* where a prosecutor antagonized colleagues and supervisors when he criticized the accuracy of a sheriff's affidavit in support of a search warrant. The U.S. Supreme Court stated that "government employers, like private employers, need a significant degree of control over their employees' words and actions . . . for the efficient provision of public services. . . . Public employees can express views that contravene governmental policies or impair the performance of governmental functions."

Therefore, the U.S. Supreme Court held that: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment purposes, and the [c]onstitution does not insulate their communications from employer discipline." The analysis turns on whether the employee speaks as a citizen by some altruistic desire to improve the public service, to protect the public, or to bring about systemic reform; or, conversely, the employee speaks as an employee about employment responsibilities or to air or redress a grievance motivated by personal interest to secure relief for himself or herself.

Official Duties

Schumann, the laboratory doctor, argued that *Garcetti* should be applied only to public sector employers, but not to the private workplace. The Connecticut Supreme Court disagreed and ruled that *Garcetti* applies to both public and private sector workplaces. The court concluded that *Garcetti* requires determination first of whether a public sector or a private sector employee is speaking about official duties before turning to the rest of the First Amendment analysis under *Pickering* and *Connick.* It agreed with Dianon Systems that Schumann's speech was simply an employee's disagreement with his supervisors about the best way to process the biological diagnostic test reports. Therefore, his constitutional claim was barred by *Garcetti.*

Schumann's speech was not entitled to constitutional protection because it took place in the work environment, not on his own time; it interfered with his job performance and responsibilities; and it constituted insubordination resulting in disruption to Dianon's efficient office operation. *Connick* had held that a termination does not violate the First Amendment where it was prompted by insubordination that can fairly be predicted to disrupt the office, undermine authority and destroy close working relationships. For the same reasons, the Connecticut Supreme Court ruled that speech manifesting an employee's refusal to do his job as desired by his employer is not protected by the First Amendment and Connecticut General Statutes § 31-51q.

To support its conclusion, the Connecticut Supreme Court said that if *Garcetti* was inapplicable to the private sector, it would improperly give private sector employees greater workplace free speech rights than public sector employees. The court said that result is not supported by the words in *Garcetti* that, "government employers, *like private employers*, need a significant degree of control over their employee's words and actions . . . for the efficient provision of public services." (Italics in original.)

Property Valuation Case

Dianon follows the reasoning of a decision from the U.S. Court of Appeals for the Fourth Circuit, *German v. Fox,* Docket No. 5:06CV00119 (W.D.Va Apr. 26, 2007), among other federal district court decisions holding that *Garcetti* essentially affirms the right of every employer to control its employee's official job-related speech. The Connecticut Supreme Court disagrees with a contrary ruling in the Connecticut U.S. District Court case of T*rusz v. UBS Realty Investors LLC*, Docket No. 3:09CV268 (JBA) (D. Conn. Mar. 30, 2010). That district court concluded that a retaliation claim brought under C.G.S. § 31-51q by a real estate appraiser who criticized his employer's improper property valuation practices was not subject to *Garcetti,* finding that *Garcetti* was limited to the public sector employment, not the private sector employment. Several Connecticut Superior Court decisions are consistent with the decision in *Trusz* on this point, however, they are now inconsistent with *Dianon.*

Finally, the Connecticut Supreme Court concluded that since Schumann's speech was not constitutionally protected under the *Pickering/Connick* balancing test, and, therefore, not covered by C.G.S. § 31-51q, the court need not and did not decide whether *Garcetti* applies under the state constitution.

In sum, the decision in *Dianon Systems Inc.* offers private sector employers the same degree of control as public sector employers have over their employees' words that are spoken about job-related matters in the course of their employment. If those employees' words disrupt workplace discipline, harmony among co-workers, working relationships and job performance, and consequently, the employers take adverse employment action against those employees under those circumstances, then the employers should not face liability for violation of First Amendment free speech rights. ■