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Teacher's Free Speech

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In 2003, Deborah Mayer, an elementary teacher in Indiana, made the statement, “I honk for peace” in response to a student's question (Egelko, 2007). It seemed like an innocent statement at the time, but this statement cost Ms. Mayer her job. It also started one of the more recent court cases on free speech as applied to government employees. Teachers are a subset of government employees. Because of this, several of the court cases mentioned in this paper are about government employees, not strictly teachers.

The free speech rights of government employees, specifically teachers, has evolved in the recent past. Before 1968, the courts held that, “the contract provisions between the board and the teacher could prohibit the exercise of various rights and freedoms by teachers.” (Alexander, 2003 p.394) This followed the idea that public employment was a privilege, not a right. By choosing to be employed by the government, the employee was, at least partially, relinquishing his or her political freedoms. Under this standard, teachers who violated their contract, even if the contract was “repressive of the teacher's rights,” (Alexander, 2003 p.394) could be dismissed. Occasionally teachers did successfully contest their dismissal, but these decisions were based on reasonableness, not on constitutional rights or freedoms. This was the *status quo* until 1968 and Pickering v. Board of Education.

Marvin Pickering was a teacher in Will County, Illinois. In this case, Pickering wrote a letter to the editor about a recent proposal to increase school taxes. In the letter, Pickering criticized how the board handled past proposals, as well as how funds were appropriated within the school. The letter was published in the local newspaper. The school board members read the letter and found it to be “detrimental to the efficient operation and administration of the schools

of the district." (Pickering v. Board of Education, 1968). As a result, Pickering was dismissed from his position. Pickering contested his dismissal claiming the material in his letter was protected by the constitutional right of free speech. Both the Circuit Court of Will County, and the Supreme Court of Illinois upheld the school board's decision to dismiss Pickering. The case was heard by the Supreme Court which reversed the decision and found in favor of Pickering (Pickering v. Board of Education, 1968).

The Supreme Courts decision in Pickering v. Board of Education was the first decision that explicitly gave public employees, in particular teachers, constitutional protection of free speech. The most important decision the court came to was that teachers could speak out on public issues and have that speech be protected. In other words, a teacher cannot be dismissed for speaking about public issues. Obviously, the teachers statements must be true. A teacher cannot knowingly or recklessly make false statements. The public needs to be informed, not intentionally misled. In the case that a teacher did indeed purposefully pass along false information, his or her dismissal is considered an appropriate course of action and that speech is not protected under the First Amendment.

One of the basic tenets of a democratic society is to have an informed public. In many cases, public employees are the best situated to give correct information to the public. The court did grant constitutional protection of free speech to teachers and other public employees, but it is limited. While it is important to have an informed public, the court also recognized the necessity of having efficient public services. To account for this, the court said teacher's free speech rights are protected as long as that speech does not impede the regular operation of the school (Pickering v. Board of Education, 1968). An important test came from this court case, the

Pickering balancing test. In this test, the "interests of the teacher, as a citizen, in commenting upon matters of public concern" (Alexander, 2003 p. 395) must be weighed against the "interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees." (Alexander, 2003 p. 395).

Another court case, Connick v. Myers (1983), along with Pickering v. Board of Education (1968) created a two step process to determine if speech was protected. Connick v. Myers involved a district attorney (DA) and an assistant district attorney (ADA). The ADA, Myers, was vocally unhappy about an office transfer. Shortly after she learned of her transfer, she distributed a questionnaire to her coworkers. The questionnaire included questions about how they felt about the transfer policy, if they had confidence in their supervisors, and if they ever felt pressure to work on political campaigns. The DA called the questionnaire an act of insubordination and consequently dismissed Myers. Myers contested her dismissal on the grounds that the questionnaire was protected under her constitutional right of free speech. Both the District Court and Court of Appeals found that Myers' questionnaire was protected speech and ordered her reinstatement. The Supreme Court reversed this decision in 1983.

One thing the Supreme Court did was look at the questionnaire itself. They found that only one of the questions was of legitimate public interest (pressure to work on campaigns), and that some of the questions could disrupt the efficient operation of the office (confidence in supervisors). In Pickering v. Board of Education the main result was the Pickering balancing test. In addition, the court also said that the speech had to address a public concern. In this case, Connick v. Myers, the court clarifies the public concern part of the Pickering decision.

The court found that speech is protected when the employee is speaking as a citizen on an

issue of public concern. Using this standard, Connick v. Myers was decided without even applying the Pickering test. Based on the timing of the questionnaire and the type of questions asked, the court came to the conclusion that Myers circulated the questionnaire for personal reasons. Since Myers was not speaking with the intent of informing the public about an issue of public concern that speech was not protected and therefore the DA was given discretion in handling the situation as he saw fit.

Between Connick v. Myers and Pickering v. Board of Education the court came up with a two step process for determining whether speech of public employees is protected. The first step came from Pickering v. Board of Education and was refined in Connick v. Myers. The court must first determine if the speech was a matter of public concern. If the speech was not a matter of public concern then the court defers to the employers judgement. If the speech is a matter of public concern then the court applies the Pickering balancing test. The court must balance the employees right of free speech with the interests of the state.

Another important case in the determination of government employee free speech rights was Mt. Healthy v. Doyle. In this case a teacher called a radio station after hearing about a new dress code for teachers in the district. The radio DJ announced it as news. At the end of that school year the superintendent did not recommend Doyle for rehire. The teacher had also had several altercations with teachers, students, and other school staff during the year. In one incident he swore at students, and in another he made obscene gestures towards two female students. Based on laws and regulations, teachers may request the reason for their dismissal. Doyle put in his request and in the response the board specifically mentioned the radio incident and the obscene gestures incident. Doyle took the board to court on the grounds that he was

dismissed primarily because of his call to the radio, and that that call was protected under the First Amendment.

The District Court found that the call made to the radio was indeed a protected form of speech. Since, the call played a substantial role in Doyle's dismissal, the dismissal was held unconstitutional and the court ordered Doyle to be reinstated as a teacher. The Court of Appeals affirmed the lower courts decision. It reached the Supreme Court in 1977. The Supreme Court remanded the case back to the lower courts. The Supreme Court decided that if the free speech was the motivating factor in the teachers dismissal, then the dismissal was unconstitutional. The key here is that the contested speech was the reason the teacher was dismissed.

This distinction between the speech being the motivating factor or a substantial factor in the teachers dismissal is very important. The court made this distinction for one very good reason. This ruling prevented teachers from using free speech as a defense against a deserved dismissal. Consider a situation in which a teacher has had several altercations and suspects his or her contract will not be renewed at the end of the year because of these altercations. A devious teacher might choose to exercise their free speech rights in a way to offend the school board. If the school board then lists that free speech incident as a reason for the teachers dismissal, that dismissal could be found to be unconstitutional. In this hypothetical situation the altercations are the motivating factors for his dismissal, but based on a wording choice the dismissal could have been held unconstitutional. For this reason the courts decision to change the wording to 'motivating factor' was a very important one.

A point of interest in this case is that none of courts explained why the call to the radio was protected speech. The standard set in Pickering v. Board of Education and Connick v. Myers

stated that the speech had to spoken as a citizen on an issue of public concern in order to be protected. Based on this standard, I would argue that Doyle's speech was not protected in the first place. A teacher dress code is hardly an issue of public concern. In this regard, I was surprised by the District Court's ruling.

Regardless of how the court reached its decision, that decision became an important decision about teacher free speech rights. The Court found that dismissal motivated by a teachers free speech is unconstitutional. This gave rise to the mixed motive test. This test holds that if both constitutional and non-constitutional matters played a role in a teachers dismissal the 'motivating' factor must be found. If the motivation for the dismissal was a non-constitutional matter then the dismissal would be upheld. If, however, the motivation for the dismissal was a constitutional matter, such as free speech, then the dismissal would be unconstitutional.

Pickering v. Board of Education (1968), Connick v. Myers (1983), and Mt. Healthy v. Doyle (1977) formed the basis of teacher free speech cases for many years. The next case to change employee free speech was decided in 2006. This was Garcetti v. Ceballos, another case involving the district attorney's office.

In Garcetti v. Ceballos, Ceballos, a deputy district attorney, was asked to review a case. This was a typical part of Ceballos's job as deputy district attorney. After reviewing the case, Ceballos composed a memo of his findings. Based on his finding he suggested that the district attorney's office dismiss the case. This finding was also entered into the memo. Ceballos then claimed that the district attorneys office retaliated against him based on the contents of the memo. He was transferred to a different court, transferred to a different job, and, according to him, denied a promotion. Ceballos filed an employment grievance but the grievance was

dismissed. He then sued, alleging that Garcetti had violated his First Amendment right of free speech (Garcetti v. Ceballos, 2006).

The District Court found that the memo was not protected speech, and therefore ruled in favor of Garcetti, or the district attorney's office. This decision was overturned by the Ninth Circuit Court. The Circuit Court believed that the memo was protected speech following the test described in Pickering, and Connick. The case was taken to the Supreme Court which agreed with the District Court.

Connick v. Myers created the standard that the contested speech had to be given as a citizen on a matter of public interest in order to be protected. The Supreme Court looked at Ceballos's speech and concluded that the speech was not of public concern. One of the determining factors for the court, was that Ceballos wrote the memo as part of his job. Because the memo was part of Ceballos's job, he was speaking as an employee, not as a citizen. This type of speech is not protected by the First Amendment. In this case the court set a new standard; speech made pursuant to official duties is not protected speech and therefore has no protection against discipline (Garcetti v. Ceballos, 2006).

Garcetti v. Ceballos sets a much stricter standard for government employee free speech. This judgement causes some concern. First, the phrase 'pursuant to official duties' is a very broad area. Who decides what is part of an employees official duties? The employer, which makes this ruling inherently in favor of the employer. The court did caution that employers cannot restrict employee rights by creating broad job descriptions. This cautionary measure on the part of the court shows that they saw potential pitfalls with this ruling.

The second concern applies directly to teachers. A teachers job is to share knowledge

with students, to educate students through pedagogy. Under the Supreme Courts ruling in Garcetti v. Ceballos it would appear that none of a teacher's speech is protected. Part of a teachers job is to foster a learning environment where different opinions can be expressed and to teach students to respect other opinions. It is in school where children learn to question and debate. It is in school where children start to learn about different opinions and make informed decisions. However, teaching these other opinions is part of a teachers job. Under this ruling a teacher could be dismissed for saying something in the course of a class discussion that the employer disagrees with. The offending speech was made 'pursuant to official duties' and therefore not protected speech. Again, the court did recognize that teachers are a special case. In Justice Souter's opinion he suggests, "today's decision may have important ramifications for academic freedom." (Garcetti v. Ceballos, 2006 p.16). He states later in his opinion that, "We need not, ... decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." (Garcetti v. Ceballos, 2006 p.16). Although the court recognized that teachers are a special case, until they make a ruling involving teachers, this is the standard that will be applied.

This decision was a 5-4 decision. In one of the dissenting opinion, Justice Stevens makes several excellent points. First, this new ruling discourages employees from taking their concerns to their superiors. In fact, it encourages employees to take their concerns directly to the public, because at least then their speech would be protected. Second, Justice Stevens said, "it is senseless to the constitutional protection for exactly the same words hinge on whether they fall within a job description." (Garcetti v. Ceballos, 2006 p.19).

The Garcetti v. Ceballos decision has already had an effect on teachers. In 2003, Deborah

Mayer talked about the Iraq war with her students during a current events discussion. This discussion was based on an article in the "Time for Kids" newsletter, an approved part of the curriculum. The article discussed peace marches occurring in Washington D.C. to protest the Iraq war. During this discussion a student asked whether she, Ms. Mayer, had ever participated in a peace march. In response she said that there are peace marches going on all around the country and that "I honk for peace." (Mayer v. Monroe County Community Sch. Corp., 2006) This comment resulted in parent complaints and, ultimately, the non-renewal of Ms. Mayer's contract.

Ms. Mayer sued the school district, claiming her speech was protected under the First Amendment. Ms. Mayer had several other complaints, but they are not of importance in this paper. Again, going back to Pickering and Connick, the court had to determine first, if the speech was made as a citizen on a matter of public importance, and second, if the speech was protected, did it have an adverse affect on the efficiency of the school. Both parties agreed that the speech was on matter of public concern, the Iraq war. They differed on whether the speech was made as a citizen or employee. The court found that Ms. Mayer made her speech in the role of employee and is therefore not protected under the First Amendment. It is important to note that this decision came prior to the Garcetti v. Ceballos decision by a few months. Already the court had set a standard that speech made in the classroom is made as an employee and not protected. Once the court determined that the speech was not protected, it followed that the school's decision to not rehire Ms. Mayer would be upheld. As mentioned earlier, a few months after this decision was reached, Garcetti v. Ceballos confirmed that speech given as part of an employees official duties is not protected under the constitution.

Ms. Mayer appealed the District Courts decision to the Seventh Circuit Court of Appeals.

The Court of Appeals rendered their decision in 2007, and affirmed the District Court's finding. The Circuit Court does refer to Garcetti when affirming the District Court's decision. In fact, the Circuit Court applied Garcetti directly to Ms. Mayer's case. Since Ms. Mayer's current event lesson was part of her assigned tasks in the classroom, she was speaking as an employee, just as the court found in Garcetti v. Ceballos (Mayer v. Monroe County Community Sch. Corp., 2007). The result of this decision is that teachers have essentially no First Amendment protection in the classroom. Ms. Mayer appealed to the Supreme Court, but they declined to hear the case (Walsh, 2007). In Walsh's article for "Teacher" magazine in 2007, he does suggest that the Supreme Court is looking for an appropriate case to hear about teacher's First Amendment rights in the classroom. For an unknown reason, the Supreme Court decided that Mayer v. Monroe County Community Sch. Corp. was not an appropriate case.

As it stands today, teachers have virtually no First Amendment rights in the classroom. Free speech rights of teachers have been and will likely remain a controversial issue. The courts will need to compose a balancing test for teacher's rights in the future. Teachers, like other government employees, forfeit their right to complete protection under the First Amendment. This is necessary, particularly in early education, to prevent teachers from promoting their personal beliefs to a 'captive' audience. These limitations are legitimate. They prevent teachers from advocating their personal beliefs, whether it is evolution versus creationism or democracy versus communism. These are necessary limitations, but limiting the teacher to the extent that they cannot do the job they are meant to is ridiculous. Under the current court rulings teachers are restricted to teaching what will not get them fired. Since speech in the classroom is not protected speech, teachers can fear being fired for saying something the principal does not agree

with. Under this ruling, it is my belief, that the students are a captive audience to whoever is currently in charge. If teachers are not allowed to present opinions contrary to those currently held by the majority, then they are not effectively doing their job of creating informed citizens.

There has to be a middle ground between teachers advocating their own beliefs and advocating those of their employer. Unfortunately, that middle ground will not be determined until the Supreme Court makes a ruling.

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