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# Discussing Career Issues from Your PBA General Counsel

## COMMENT AT YOUR OWN RISK, CRITICIZE AT YOUR PERIL: U.S. Supreme Court Effectively "Guts" Free Speech Rights of Public Employees

If you have been a police officer, a deputy sheriff, or a correctional or correctional probation officer for any length of time, you have heard the expression: "Public employees don't surrender their First Amendment right to free speech when they accept employment with public employer". As of May 30, 2006, that statement is no longer true! On that date, the United States Supreme Court effectively gutted the "free speech" rights of all public employees in the case of Gil Garcetti v. Richard Ceballos! (P.S: We are not kidding!)

### The Case

Let us explain. The Ceballos case involved a state prosecutor who was requested by a defense attorney in a criminal case to review the probable cause affidavit that an arresting officer used in obtaining a search warrant. After reviewing it, the prosecutor prepared a memorandum to his supervisor. The memorandum explained essentially that, after review of the case, he thought that the officer involved had made a "bad search" and the criminal charges should be dropped.

You guessed it. The supervisor wasn't happy with the memorandum. The police officer involved wasn't happy with the memorandum, and his department wasn't happy with the memorandum. Neither were they happy when the assistant state attorney was called to testify in a hearing to challenge the probable cause affidavit, especially when the court upheld the criminal charges based upon the officer's affidavit.

The immediate result was that the prosecutor was reassigned by his supervisor to a new position with less responsibility. Essentially, his career with the prosecutor's office was over simply because of a memorandum he prepared in the good faith belief that the officer conducted a bad search.

Obviously, the prosecutor felt that he was being punished for exercising his First Amendment right to "free speech." He sued the prosecutor's office alleging that the memorandum was "protected free speech." He lost the first round, but, fortunately won on appeal when appeals court followed what is described by one Supreme Court justice as "over 17 years" of case precedent.

What followed next is "history." Unfortunately, it is bad history! Simply put, the U.S. Supreme Court threw out the prosecutor's "free speech" claim on the basis that "the speech" occurred while he was acting within the scope of his employment and not as a private citizen. **The court concluded: "We hold 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."**

PLEASE NOTE: the U.S. Supreme Court did not care whether the prosecutor acted in good faith or if the concerns set out in his memorandum were correct or incorrect. **As the Court makes clear, the decision to discipline an employee for such comments is a matter of "managerial discretion." It is not the responsibility of the courts to provide "oversight of communications between and among government employees and their superiors in the course of official business."**

### Questions and Guesses

Now that we have your attention, it is clear that the case will create a lot of questions and a lot of concerns among our membership. It should. Below we have listed several questions and our best "guess-estimate" of the correct answers:

#### What does the case "really" mean to me as an officer?

Best case scenario (you work at a reasonable and fair-minded agency), you need to dial-back your comments, opinions and criticism at work. If and when you are asked for

input, stick with the facts and be professional. Be cautious about expressing opinions. Be extremely cautious about making critical comments directed at agency policies or personnel. Steer clear of "rumors" especially if they are about supervisors or command staff. Finally, do not "bitch and moan" about "stupid policies" or "jerk" supervisors.

#### What if I have a real problem at work that needs to be surfaced?

Go to your PBA representative and let the PBA surface the problem. We understand that to some of you "biting your tongue" seems cowardly, but sometimes discretion is the better part of valor. Truthfully, the reason many officers join the PBA is to have a representative who can speak on their behalf. Now, more than ever, you need to have the PBA representative speak on your behalf. Just remember, the PBA represents you with respect to "wages, hours and other terms and conditions of employment," so when contacting the PBA make sure your problem falls into one of those categories.

#### Can I still file a grievance?

Absolutely. With a few rare exceptions, participation in the grievance process is considered "protected activity", but you will still need to be cautious and your comments will still need to be on point and professional when arguing your grievance.

#### Do I still have my free speech rights once I am off-duty?

The answer is not so simple and the playing field may have changed as a result of this case. Generally, a public employee has a protected right to comment as a citizen on matters of "public concern" even if the comments involve your employer so long as the comments do not unduly interfere with the operations of the employer. However, these are conservative times, and this right has slowly been limited over the past 10 years. Certainly, many employers and many judges are going to read this decision as telling the courts to give employers wide latitude in regulating the speech of their employees, on or off-duty.

#### If my comments concern unlawful conduct, can I report it?

Yes. The Supreme Court specifically noted that many public employees had "whistleblower protections" and other statutory protections in place which permitted them to surface unlawful conduct. Additionally, most employers have either "just cause" provisions or other disciplinary review procedures in place which afford protection. If you are going to file this type of complaint, we advise caution, stick with the facts and make sure they can be verified if you intend to accuse an employer or supervisor of "unlawful conduct." **Most importantly, we suggest you consult with a PBA attorney BEFORE you surface this type of complaint.**

#### How does this affect me if I want to campaign for or against a public official in my off-duty time?

Technically it doesn't (make sure it is off-duty) and the decision should not be read to deal with "political speech". However, let's be realistic, the "new" Supreme Court is obviously very conservative and very pro-management. It can be expected to be that way for the next 20 or so years. So, just be cautious and professional even when you are off-duty and speaking on issues involving "political speech."

In closing, the "new" United States Supreme Court decision in Ceballos sends a clear signal that things are changing at the court and not in favor of public employees, including law enforcement officers. You need to be cautious, be professional and, now more than ever, be a member of the Florida PBA.

As always, stay safe! If you have a question, feel free to contact me at [hal@flpba.org](mailto:hal@flpba.org). ●

### McHUMOR by T. McCracken



"Dad, instead of reading me my rights tonight, how about reading me a fairy tale?"

A nursery school teacher was delivering a station wagon full of kids home one day when a fire truck zoomed past.

Sitting in the front seat of the fire truck was a Dalmatian dog. The children started to discuss the dog's duties.

"They use him to keep crowds back," said one youngster.

"No," said another, "he's just for good luck."

"I know!" said a third... "They use it to find the fire hydrant!"