

May 30, 2006

MEMORANDUM

TO: Chapter Presidents

RE: Adverse First Amendment Decision

SUMMARY: The Supreme Court today issued a 5-4 decision narrowing the First Amendment rights of public employees. It held that speech made “pursuant to” an employee’s duties is not entitled to First Amendment protection. Employees do have other statutory and contractual protections, however.

I am disappointed to have to report that the Supreme Court today issued a decision restricting the constitutional protections that will be afforded to public employee speech. Garcetti v. Ceballos, No. 04-473. The five justices in the majority (which included the two new justices, Chief Justice Roberts and Justice Alito) held that speech by public employees made “pursuant to” their duties is not entitled to protection under the First Amendment. The majority, however, rejected arguments that the Court should go even further; it held that speech on subjects “related to” employees’ jobs and areas of professional expertise may still be protected. It also reaffirmed earlier decisions holding that speech does not lose its protection merely because it occurs in the workplace.

As I reported to you in a chapter presidents’ memorandum dated July 22, 2005, NTEU filed an *amicus* brief in support of the employee, an assistant district attorney in Los Angeles. The employee had alleged that he suffered retaliation because of a memorandum he had written on the job that had concluded that a search warrant had been based on perjured information. The U.S. Court of Appeals for the Ninth Circuit had held that the speech was on a matter of “public concern” and thus entitled to constitutional protection. It therefore weighed the speech against the government’s interests in promoting the efficiency of its operations. The Supreme Court has now held that the courts do not have to balance the interests involved because speech made pursuant to official duties cannot even meet the threshold requirement.

The four justices in dissent refused to go along with the majority’s categorical denial of constitutional protection to such speech. Although the balancing test set forth in the three dissenting opinions differed somewhat, all four justices agreed that public employees may have access to information whose disclosure serves the public interest. Justice Souter, joined by Justices Stevens and Ginsburg, stressed that employees are also citizens, whose “avocation and vocation” may combine to compel them to speak out to right wrongs. They thus argued that the speech should be constitutionally protected and subject to the balancing test under which the employees’ interest is weighed against the government’s interest in efficient operations.

This decision does not resolve all related questions. The Court refused to address the scope of constitutional protections that should be afforded in the teaching and scholarship context. In addition, there will inevitably be litigation over the scope of employees' duties and whether the speech was "pursuant to" those duties. Finally, the decision does not address the scope of whistleblower laws.

Although the federal whistleblower law has been narrowly construed, it nevertheless does provide protection to those who would disclose violations of law, gross mismanagement or gross waste of funds, abuses of authority, or substantial and specific dangers to public health and safety. Federal employees also have an explicit statutory right to furnish information to members of Congress or congressional committees. Perhaps most importantly, federal employees have civil service protections against arbitrary or discriminatory treatment, as well as grievance procedures to challenge unfair treatment and reprisals by supervisors.

In short, although this decision is a troubling limitation on the constitutional rights enjoyed by public employees, we will work aggressively to make sure that employees do not suffer when they disclose important but controversial information on matters of public concern, even when the disclosures are made pursuant to their public duties.

Colleen M. Kelley
National President