

Local Government Law News

Salmon P. Chase College of Law ♦ Governor's Office for Local Development ♦ Northern Kentucky University

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SUPREME COURT NARROWS SPEECH PROTECTION FOR GOVERNMENT WORKERS

A sharply divided U.S. Supreme Court ruled in May that statements made by government employees in the course of their official duties are outside the protection of the First Amendment. The case was *Garcetti v. Ceballos*.¹ Public employee advocates said the result would make it more difficult for government employees to file lawsuits claiming they were the victims of retaliation for going public with allegations of official misconduct. Public employers said the decision would prevent routine internal workplace disputes from becoming federal court cases and avoid judicial intervention in the conduct of governmental operations. The precise scope of the holding is yet unclear, but the decision is certain to generate more litigation in this area of the law.

The Prior Law

The classical approach to employee speech in the government workplace treated the government and the individual equally as free agents, mutually competent to determine their own best interests. The classical approach measured the terms of the arrangement according to general principles of the common law of contracts.² Under this approach, public employees had no right to object to conditions placed upon the terms of their employment, including conditions that restricted the exercise of constitutional rights. Oliver Wendell Holmes, in the appeal of a policeman who sought reinstatement after his department fired him for violating a rule against political activity, famously summed up this classical approach:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.³

This approach prevailed well into the twentieth century. The law began to change in the 1950s and early 1960s, spurred by challenges to statutes that required public employees, particularly teachers, to swear oaths of loyalty and to reveal the groups with which they associated. By the end of the 1960s, the U.S. Supreme Court confidently asserted

that its prior decisions “unequivocally rejected” the premise that government could constitutionally compel public employees to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest connected with the operation of the governments for which they worked.⁴

Pickering v. Board of Education was a milestone in the recognition of public employees’ rights to freedom of speech.⁵ Marvin Pickering was a teacher fired after a local newspaper published his letter to the editor. The letter was critical of the school board’s handling of a defeated bond issue and of the board’s subsequent allocations of school funds between educational and athletic programs. The school board said that the letter was detrimental to the efficient operation and administration of the school. The Supreme Court said that the firing was a violation of the teacher’s right to freedom of speech.

At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], 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 through its employees.⁶

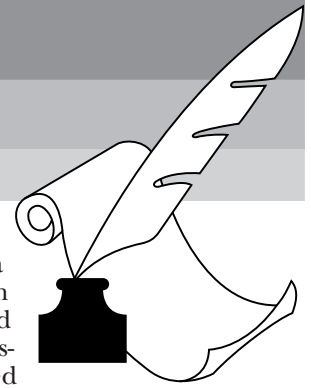
In balancing those interests, the Court emphasized that the statements in Pickering’s letter were critical of the board and the superintendent and did not affect relations with coworkers or immediate supervisors with whom the teacher regularly worked. Even though some of the statements in the letter were erroneous, that was not enough to justify his firing “absent proof of false statements knowingly or reck-

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DIRECTOR'S DESK



The Chase College of Law and the Local Government Law Center recently welcomed our new dean, Dennis Honabach. He succeeds Gerard St. Amand, who has become vice president for university advancement at NKU. In his new capacity, former dean St. Amand provides leadership to the offices of development, alumni programs, marketing and communications, special events, and WNKU public radio. In addition, he serves on the executive committee of the NKU Foundation.

Over the seven years St. Amand served as dean, Chase saw greater institutional financial support and greater private support from its alumni and friends. This led to expansion of the law school's academic, co-curricular, and extracurricular programs, including more student scholarships, increased funding for moot court and trial advocacy programs, and greater activity on the part of law student organizations. In the same period, the law school hired 12 new faculty members and added staff in student services, advancement, admissions, and career development. In addition, facility improvements created a more professional environment for the law school.

Dean Honabach comes to Chase from Washburn University School of Law, where he served as dean and professor of law beginning 2001. At Washburn, Dean Honabach was instrumental in the development of the Business and Transactional Law Center, the Center for Excellence in Advocacy, and the Children and Family Law Center. He led the School of Law's centennial celebration and a \$5.25 million fundraising campaign. Before that, he was president and dean of the Western State University College of Law in Fullerton, Calif., from 1996 to 1999 and director of the Entrepreneurial Law Center at Western State from 1999 to

2001. At Western State University, he developed and implemented a plan that moved the school from a state-accredited, county-based institution to an American Bar Association provisionally approved law school with significant regional presence.

Dean Honabach received his J.D. from Yale University in 1973 and his A.B. in economics from Bucknell University, cum laude, in 1970. Upon law school graduation, he became associated with the Pittsburgh law firm Kirkpatrick, Lockhart, Johnson & Hutchinson, where he specialized in general corporate law, including finance, planning, and securities regulation. From there he joined the faculty at Vermont Law School where he taught for 13 years before moving to the Rutgers University-Camden School of Law in 1988. In 1990, he joined the faculty at the District of Columbia School of Law and became its associate dean of education in 1992. In that capacity he supervised faculty planning and curriculum development, including a mandatory two-year clinical program.

Dean Honabach has co-authored books on directors and officers liability and proxy rules. In addition, he has published law review articles on topics ranging from managerial liability and Enron to toxic torts and nuisance law. He is the co-chair of the American Bar Association Section of Legal Education and Admissions to the Bar Clinical and Skills Education Committee and a member of the Law School Admissions Council Services and Program Committee and the American Bar Association Business Law Section Business Law Education Committee.

It is an honor to welcome Dean Dennis Honabach.

Supreme Court Narrows Speech Protection for Government Workers *continued from page 1*

lessly made by him.”⁷ The statements neither “impeded the teacher’s proper performance of his daily duties in the classroom” nor “interfered with the regular operation of the school generally.”⁸ Of particular importance to the Court was that the letter addressed a matter of legitimate public concern and current public attention – the operation of the schools. “Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such question without fear of retaliatory dismissal.”⁹

Pickering, like the cases that adopted the classical approach, recognized that the employer-employee relationship dominates the analysis in public employee free speech cases. However, *Pickering* established that a proper resolution of those cases involves identifying and weighing the compet-

ing interests of the public employee and the government employer. This “*Pickering* balancing test” involves courts in a difficult, highly fact-intensive inquiry where even Supreme Court justices sharply disagree about how to strike a proper balance.

That sharp division appeared in the Supreme Court’s next major employee speech case, *Connick v. Myers*.¹⁰ Sheila Myers was an assistant district attorney upset over her transfer to a different part of the office. After discussing the transfer and other office matters with a superior, she circulated a questionnaire among her colleagues. It sought their opinions about office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and pressure to work on political campaigns. Harry Connick, the district attorney, considered the questionnaire insubordinate and fired Myers for refusing to accept the transfer. She sued, alleging a violation of her First Amendment rights. The lower

courts agreed with her that the questionnaire related to the effective functioning of the district attorney's office and so addressed matters of public concern within the holding of *Pickering*. The Supreme Court ruled that the questionnaire "touched upon matters of public concern in only a most limited sense"¹¹ and that the First Amendment afforded Myers no protection.

The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern" was not accidental. . . . When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. . . . We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.¹²

Connick made the "public concern" inquiry the critical threshold test. Whether an employee's speech addresses a matter of public concern, the court said, depends upon the content, form, and context of a given statement.

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.¹³

Although the questionnaire related to the operation of a public office, the *Connick* majority saw it as an extension of the dispute over the transfer – an employee grievance concerning matters internal to the office, not matters of public concern. Unlike the teacher in *Pickering*, the attorney in *Connick* was not seeking to inform the public about anything.

Had the questionnaire touched upon no matter of public concern at all, the analysis would have ended there and the district attorney would have been free to take whatever action he pleased. However, the Court found that the question about forced participation in political campaigns pertained to a matter of public concern. This triggered the *Pickering* balancing test. The Court said this meant giving "full consideration" to the government's interest in the effective and effi-

cient fulfillment of its responsibilities to the public. Pertinent considerations would include whether the speech impaired discipline by superiors or harmony among co-workers, had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impeded the performance of the speaker's duties, or interfered with the regular operation of the government.¹⁴ The Court held that the district attorney did not have to tolerate action he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.

In *Connick*, the Court divided 5-4 in striking the balance in favor of the government employer. In *Rankin v. McPherson*,¹⁵ the Court divided 5-4 in striking the balance in favor of the employee. Ardith McPherson was a clerical worker in a law enforcement agency whose job did not bring her into contact with the public. When she heard on the office radio of the attempted assassination of President Reagan, she remarked to a co-worker, "If they go for him again, I hope they get him." Another co-worker overheard the remark and reported it to Constable Rankin, the elected official for whom they worked. He confronted her about the remark and, following the discussion, fired her.

The Court began its opinion by warning government employers that they should proceed against employees only for speech that hampers public functions, not for speech with which the employer disagrees. Turning then to the *Connick* analysis, the Court concluded first that the speech dealt with a matter of public concern. While a threat to kill the president is unprotected, the Court said McPherson's statement was not a threat but simply an inappropriate remark. Like the inaccurate statements in *Pickering*, remarks of this kind had to be tolerated if freedom of speech is to have "the breathing space it needs to survive."¹⁶

Having concluded that McPherson's statement addressed a matter of public concern, the Court proceeded to the *Pickering* balancing test. It found that the government provided no evidence that the remark interfered with the efficient functioning of the office, no danger that the employee discredited the office by making the statement in public, and no assessment that the remark demonstrated a character trait that made her unfit to perform her work. Therefore, the government failed to meet its burden of justifying the discharge. "Where, as here an employee serves no confidential, policymaking or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. . . . At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee."¹⁷ The dissenters chastised the holding as one that allowed a person to "ride with the cops and cheer for the robbers."¹⁸

Of the *Pickering/Connick* rule, Professor Erwin Chemerinsky observes:

On the one hand, this lessened protection of the speech of government employees can be justified based on the Court's desire to minimize judicial interference with the government's role as employer. On the other

hand, the test can be criticized for not providing adequate protection for the speech rights of government employees. The requirement that the speech be of public concern can be questioned because the First Amendment generally has no such limitation and because of the narrow definition of public concern in *Connick*; the employee's speech there concerned the functioning of an important public office. Moreover, the simple balancing test – weighing speech interests against the government's interest in administrative efficiency – can be questioned as failing to place sufficient weights on the First Amendment side of the scale.¹⁹

In *Connick*, the Court acknowledged the difficulty in its approach. However, it said, “[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.”²⁰

The *Garcetti* Decision

Cases such as *Connick* and *Rankin* reflect the modern preference for a more difficult, nuanced approach rather than for a bright-line rule.²¹ It was somewhat unexpected then that in *Garcetti v. Ceballos* the Court opted for a categorical answer to the question whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

Richard Ceballos was an experienced deputy district attorney in the office of the Los Angeles County District Attorney, Gil Garcetti. A defense attorney in a pending criminal case asked Ceballos to review an affidavit used by the police to obtain a critical search warrant. The defense attorney said there were inaccuracies in the affidavit. After examining the affidavit, visiting the location it described, and talking to the deputy sheriff involved, Ceballos concluded that the defense attorney was right. Ceballos told his superiors and followed up by preparing a disposition memorandum recommending dismissal of the case. That led to a heated meeting between representatives of the district attorney's office and the sheriff's department called to discuss the affidavit. Afterward, the office decided to proceed with the case pending the disposition of a defense motion to challenge the warrant. At the hearing on the motion, the defense lawyer called Ceballos to testify. In the end the trial court rejected the challenge.

Ceballos claimed that subsequently he suffered a series of retaliatory employment actions. He filed an unsuccessful grievance, and a lawsuit followed. The federal district court granted summary judgment in favor of the defendants; the U.S. Court of Appeals for the Ninth Circuit reversed. In another 5-4 decision, the U.S. Supreme Court reversed the Ninth Circuit. Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

Pickering and the later cases, said Justice Kennedy,

identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern.... If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.... If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee different from any other member of the public.... A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.²²

That Ceballos expressed his view inside his office rather than publicly, and that it concerned the subject matter of his employment, said Justice Kennedy, were not dispositive. The controlling factor, he said, was that his expressions were made pursuant to his duties as a calendar deputy.

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.²³

For Justice Kennedy this was a case about the public employer's ability to control what the employer itself had commissioned or created. “Official communications have official consequences,” he said.²⁴ Supervisors must be able to ensure that official communications were accurate, demonstrated sound judgment, and promoted the employer's mission. Justice Kennedy saw a greater danger in the rule adopted by the Court of Appeals, a rule that would displace managerial discretion with judicial supervision “to a degree inconsistent with sound principles of federalism and the separation of powers.”²⁵

In conclusion, Justice Kennedy said,

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, “as a matter of good judgment,” be “receptive to constructive criticism offered by their employees.” ... The dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing.... Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment.... These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.²⁶

In his brief dissent, Justice Stevens captured the essence of the dissenters' position. The proper answer to the ques-

tion posed by Justice Kennedy at the outset of the majority opinion, he said, “is ‘Sometimes,’ not ‘Never.’ ... The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong.”²⁷

Justice Souter, writing for himself and Justices Stevens and Ginsburg (Justice Breyer dissented in a separate opinion), elaborated. Prior cases, noted Justice Souter, “realized that a public employee can wear a citizen’s hat when speaking about subjects closely tied to the employee’s own job....”²⁸ Some government jobs combine the roles of employee and citizen, and Justice Souter pointed to the website of the office for which Ceballos worked as evidence that his was an example. Therefore, he argued, the need for *Pickering* balancing does not disappear when an employee speaks on matters that his job requires him to address. For Justice Souter, removing that speech from *Pickering* protection not only discounts the value of that speech to the individual but deprives the community of informed opinions on important public issues.

Justice Souter agreed with the majority that “official communications have official consequences” and that “government needs civility in the workplace, consistency in policy, and honesty and competence in public service.”²⁹ The better solution, he argued, is to adjust the *Pickering* balancing scheme rather than to exclude speech uttered pursuant to official duties. To warrant *Pickering* protection, the speech should be “on a matter of unusual importance and satisf[y] high standards of responsibility.... [I]t is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in the employee’s favor.”³⁰ Justice Breyer thought that standard gave insufficient weight to managerial and administrative concerns and led him to write a separate dissenting opinion.

Justice Souter criticized two other aspects of the majority opinion. First, he said, it was wrong for the majority to regard any statement made within the scope of government employment as the government’s own speech. Under the rule of *Rosenberger v. Rector and Visitors of Univ. of Va.*, “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”³¹ Here, however, the employee “was paid to enforce the law by constitutional action; to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally.”³² He was not paid to promote a particular policy. For the dissenters, the majority’s view of the scope of employer control over speech that owes its existence to professional responsibilities was too broad.³³

Second, Justice Souter criticized the majority’s assessment of the protection available under whistle-blower statutes. Where the majority saw “a powerful network of legislative enactments,” the dissenters saw “a patchwork” that affords individuals different protection depending on the local, state, or federal jurisdictions that employ them. Justice Breyer picked up the point in his dissent, focusing on the obligation to speak imposed by rules of professional conduct and constitutional obligations. He said such obligations augment the need to protect employee speech, diminish

the need for government to control the speech, and make *Pickering* balancing appropriate.³⁴

Response in the Lower Courts

The decision is quickly having an impact in the lower courts. For example, *Moore v. City of Detroit*³⁵ involved an employee, Ricardo Moore, in the corporate communications section of the Detroit Police Department. In the course of a media interview, he made a statement opposing the chief’s promotional policy and characterizing the chief’s actions as illegal. The chief transferred Moore to a less desirable assignment. Moore claimed retaliation for engaging in protected speech and sued the city and the chief. The matter went to trial and the jury awarded Moore \$200,000. After the trial, the defendants asked the court to set aside the verdict. A week after the decision in *Garcetti*, the court ruled in defendants’ favor. Moore was the “official spokesman” for the police department. It had a right to expect that he would promote the department’s mission. When he did not, said the court, the department was within its rights under *Garcetti* to transfer him.

*Dillon v. Fermon*³⁶ produced a similar outcome. A police officer claimed he was transferred from investigations to patrol after he advised a prosecutor that another officer was likely to give false testimony in court. His retaliation claim ended in a mistrial when the jury could not reach a verdict. Before a second trial could begin, the Supreme Court decided *Garcetti*, and the court ordered the parties to brief its applicability to their case. “This court has no trouble concluding, based on the evidence presented at trial, that Plaintiff’s statements were made pursuant to his official duties in their case.” Working with the prosecution to obtain a just and successful prosecution is part of the job. The court granted defendants judgment as a matter of law.

The defendants in *Hailey v. City of Camden*³⁷ also tried to use the decision in *Garcetti* to upset a jury verdict won by two fire department officers who complained to the fire department, the newspaper, and the city council about safety, overtime, and hiring practices in the department. The court rejected the argument saying, “I have no doubt that many courts will struggle to define the breadth of *Garcetti* and its impact on First Amendment jurisprudence.” However, the court in this case did not have to struggle to find that the officers spoke to the newspaper and city council as private citizens, not as part of their official duties.

Not long afterward, the Seventh Circuit Court of Appeals cited *Garcetti* in its disposition of *Mills v. City of Evansville*.³⁸ Brenda Mills was a police sergeant whose duties included supervision of crime prevention officers, officers who interacted with neighborhood associations in an effort to reduce the incidence of crime and foster good community relations. After a meeting in which the chief announced his intention to move some of those officers to active patrol duties, Mills told the chief and other senior department management that the plan would not work. She gave them the impres-

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DECISIONS OF NOTE

UNITED STATES SUPREME COURT



Individuals with Disabilities Education Act – Burden of Proof

The IDEA ensures disabled children a free and appropriate public education and requires schools to develop an individualized education program (IEP) for each disabled student. Parents may challenge the IEP and request a hearing, but the law does not specify who has the burden of persuasion at the hearing. The Supreme Court held that the burden of persuasion is on the party seeking relief, in this case the parents. This is the ordinary rule in administrative proceedings. There is nothing in the act to lead to a conclusion that Congress intended a different rule. *Schaffer v. Weast*, ___ U.S. ___, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

Americans with Disabilities Act – Sovereign Immunity

Title II of the Americans with Disabilities Act (ADA) creates a private right of action for damages against states and local governments. A paraplegic prisoner brought an action under the act challenging the conditions of his confinement. Among the allegations were that he was confined to a cell in which he could not turn his wheelchair around, that he was unable to use the toilet and shower without assistance, and that assistance was often denied. The inmate claimed the conditions violated both the Eighth Amendment and the ADA. To the extent that there were actual violations of the inmate's constitutional rights, section 5 of the Fourteenth Amendment authorizes Congress to create a cause of action to vindicate a citizen's constitutional rights. This includes the power to abrogate state sovereign immunity. *U.S. v. Georgia*, ___ U.S. ___, 126 S.Ct. 877, 164 L.Ed.2d 650 (2006).

Federal Funding – Unconstitutional Conditions

The Solomon Amendment denies federal funds to any university that bars military recruiters because the military's "don't ask, don't tell" policy is inconsistent with the university's generally applicable nondiscrimination rules. An association of law schools and law faculties challenged the law, arguing that the Solomon Amendment violated the members' freedoms of speech and association. The Supreme Court held that Congress could require law schools to provide equal access to military recruiters without violating the First Amendment. Although there are limits on the ability of Congress to condition the receipt of funds, a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Here, the Solomon Amendment regulates conduct, not speech. The schools are not speaking when they host interviews and recruiting receptions, and the law does not require the schools to accept military recruiters as members of the law school community. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ___ U.S. ___, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).

Sovereign Immunity – Arm of the State

An insurance company sued a county seeking damages resulting from a collision between a boat it insured and a malfunctioning drawbridge owned and operated by the county. The county claimed it was immune from suit and prevailed in the lower courts. The Supreme Court held that a county cannot claim immunity under the Eleventh Amendment either as a county or as an arm of the state. The court rejected the county's argument that a residual immunity would protect a political subdivision in these circumstances. *Northern Insurance Co. v. Chatham County*, ___ U.S. ___, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006).

Tax Sale – Adequate Notice

After taxes on residential real property went unpaid, the property was certified as delinquent. The state mailed a certified letter to the owner at the property's address advising that unless he redeemed the property, it would be subject to public sale. The letter was returned to the state unclaimed. Subsequently, the property was sold. The purchaser delivered an unlawful detainer notice to the property, which was served on the owner's daughter. The owner then sued, alleging that the notice was inadequate and that the property was taken without due process. The Supreme Court held that when mailed notice of a tax sale is returned unclaimed, a state must take additional steps to attempt to provide notice before selling the property. In view of the unclaimed letter, the state here might have resent the notice by regular mail or posted a notice on the front door. Either approach would have increased the likelihood that the owner would receive notice and demonstrated that additional reasonable steps were available to the state before taking the property. *Jones v. Flowers*, ___ U.S. ___, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).

Tax Credits – Economic Development

Ohio offered tax credits and other incentives to induce a manufacturer to expand an existing plant. Taxpayers, claiming that the tax breaks depleted state and local treasuries to which they contributed, challenged the plan as a violation of the Commerce Clause. They won a partial victory in the lower courts, but the Supreme Court held that the taxpayers had no standing to sue. Therefore, the lower courts were wrong to consider the merits of the case. Affording standing to taxpayers because their tax burden gives them an interest in the state treasury would put federal courts in the position of monitoring the wisdom of state fiscal administration. Federal courts are not forums for taxpayers' generalized grievances. In addition, status as a municipal taxpayer does not confer standing to challenge state tax credits, even though the credits may result in reduced distributions to local governments. *Daimler-Chrysler Corp. v. Cuno*, ___ U.S. ___, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006).

Public Employees – Free Speech

Statements made by government employees in the course of their official duties are outside the protection of the First Amendment. See the lead story in this issue. *Garcetti v. Ceballos*, ___ U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

Campaign Finance – Expenditure and Contribution Limits

Vermont stringently limited the amounts that candidates for state office could spend on their campaigns and the amounts that persons and organizations could contribute to those campaigns. The Supreme Court held that the expenditure limits violated the First Amendment under the rule of *Buckley v. Valeo*, 424 U.S. 1. The contribution limits also were unconstitutional because they burdened interests protected by the First Amendment in a manner disproportionate to the public purpose they were enacted to advance. However, no rationale for this decision commanded a majority opinion. *Randall v. Sorrell*, ___ U.S. ___, 126 S.Ct. 2479, 164 L.Ed.2d 482 (2006).

Individuals with Disabilities Education Act – Expert Fees

Parents who prevailed in their IDEA action sought to have the school board pay for the expert witness under IDEA's cost-shifting provision. The court held that the federal statute does not authorize the recovery. The statute authorizes an award of reasonable attorney's fees, but it does not hint that the state is responsible for the services of experts. The term "costs" does not generally include expert fees. Congress has broad power to set the terms on which it disburses federal monies to the states, but in doing so it must give the states clear notice of the conditions. The IDEA does not give the states clear notice regarding expert fees. *Arlington Central School District Board of Education v. Murphy*, ___ U.S. ___, 126 S.Ct. 2455, 164 L.Ed.2d 526 (2006).

Redistricting – Partisan Gerrymandering

After Texas Republicans gained control of both houses of the state legislature, they set out to increase Republican representation in the congressional delegation. The result was a mid-decade redistricting plan. Voters challenged the redistricting as an illegal partisan gerrymandering under the Constitution and as racially discriminatory under the Voting Rights Act. The case produced six separate opinions with a mixture of justices joining different opinions. On the gerrymandering issue, the Court held that the claims were justiciable, but that there was no manageable standard for deciding cases of political gerrymandering. The Texas redistricting was constitutional, but partisan gerrymandering in other contexts may not be constitutional. The court allowed the mid-decade redistricting, finding the legislative plan preferable to the judicially imposed plan it replaced. The court found that some portions of the plan violated the Voting Rights Act while others did not. *League of United Latin American Citizens v. Perry*, ___ U.S. ___, 126 S.Ct. 2594, 164 L.Ed.2d 609 (2006).

KENTUCKY SUPREME COURT



Zoning Amendment – Bias and Prejudgment

A company sought a rezoning to allow a mining operation. The county planning commission recommended the amendment, but the fiscal court voted to override the commission. The company appealed the fiscal court's decision claiming that the fiscal court disregarded the record and that two members of the fiscal court were biased. Both had made public and private comments opposed to mining activities generally. The circuit court upheld the fiscal court, but the Court of Appeals reversed on the ground that the company had a right to a determination by an impartial tribunal. The Supreme Court reversed the Court of Appeals. Zoning determinations, it said, were legislative functions. A fiscal court is not a tribunal, and in making zoning determinations, it is not performing judicial functions. It follows that in that context there is no broad and general right to an impartial decision maker. Despite the members' preexisting opinions, nothing indicates that the members did not seriously consider the proposal. "General policy-based controversies such as these are best ferreted out in the legislative arena, i.e., through expression of the will of the voters in the electoral process." *Hilltop Basic Resources v. County of Boone*, 180 S.W.3d 464 (Ky. 2005).

Qualification of Candidates – Pre-election suit

On the day before the general election, a candidate for state senator filed suit to disqualify her opponent for failure to meet the constitutional residency requirement. She lost the general election, but subsequently the court determined that the winner was not qualified to be a candidate. Nevertheless, the winner filed an election challenge in the Senate, which seated her despite a report of an election contest board finding that she failed to meet the residency requirement. While the election challenge proceeded in the Senate, the qualified but losing candidate proceeded in the courts. Ultimately, the matter came before the Supreme Court, which had to decide whether the statutory procedures for pre-election challenges controlled the case or whether the constitutional right of the General Assembly to judge the qualifications of its members controlled. Because at the crucial moment the unqualified winner of the election was not yet a member of the Senate, the court held in a 5-2 ruling that the controlling law was the former, KRS 118.176. The effect of disqualification was "that no valid election has actually occurred." The office was vacant. *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005).

Grand Jury – Effect of Pardons

While a special grand jury was investigating criminal violations of merit system hiring practices, the governor pardoned nine persons indicted by the grand jury and anyone else (other than himself) who might have committed an offense. The grand jury continued its work and issued indictments for pardoned offenses. The governor sought an instruction advising the grand jury that pardoned conduct was not indict-

able. A fractured court first addressed the scope and validity of the pardon, holding that the power of the governor to issue pre-indictment general pardons is constitutional. Section 77 of the state constitution gives the governor “broad and unrestricted discretion to issue pardons to whomever” and allows the governor to issue pardons prior to formal indictment for the pardoned offenses. Having determined the pardons valid, the court went on to hold that “the pardon is itself an absolute exemption from any further legal proceedings,” thus precluding further indictments or criminal prosecutions. Therefore, the circuit court must advise the grand jury of the legal effect of the pardons. *Fletcher v. Graham*, 192 S.W.3d 350 (Ky. 2006).

County Jails – Cost of Indigent Inmate Care

A dispute arose between a county jailer and the Cabinet for Health Services over which had the financial responsibility to provide psychotropic medications to indigent inmates. The jailer argued that the responsibility fell on the Commonwealth under KRS 441.047; the Commonwealth argued that it fell on the county under KRS 441.045. The county’s argument was that KRS 441.047 was enacted later in time and was more specific. Therefore, it controls because it repeals KRS 441.045 by implication. In holding for the Commonwealth, the Supreme Court observed that KRS 441.047 was enacted to curtail the costs to taxpayers associated with psychiatric evaluations, treatment, or services by rendering those services at state facilities. Only when indigent inmates are at those facilities is the cost of care a state cost. Otherwise, KRS 441.045 requires the county jail to cover the costs. *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006).

KENTUCKY COURT OF APPEALS



Solid Waste – Exclusive County Authority

After a city accepted bids for garbage collection, the county sued for an injunction asserting that it held the exclusive authority to regulate the collection and disposal of solid waste in the county. The circuit court granted summary judgment in favor of the county, and on appeal the Court of Appeals affirmed. The city relied on an earlier case, *City of Radcliff v. Hardin County*, which the court held was no longer applicable because of statutory changes. KRS 67.083(3)(o) places exclusive management of solid waste with fiscal courts. The city, having discontinued refuse collection, cannot resume doing so under authority of KRS 224.43-315(5). *City of Salyersville v. Magoffin County*, 178 S.W.3d 539 (Ky. App. 2005).

Tax Protest Petitions – Timing and Content

A library, funded by an independent taxing district, proposed to improve one of its facilities. The project required a tax increase beyond the compensating rate and was subject to a recall vote. When opponents filed the recall petitions with the county clerk, the clerk refused to accept them on the ground that they were untimely. The petitioners sued,

and the circuit court granted them summary judgment directing the clerk to accept the petitions and proceed. The library and the clerk appealed. The issue on appeal required the court to determine whether KRS 118.365(7) or 132.017 controlled the time for filing the petitions. The former, part of the election laws, required petitions to be filed by the second Tuesday in August, the day after the library adopted the tax rate at issue. The latter, titled “Levy and Assessment of Property Taxes,” allowed for petitions within 45 days of the passage of the tax. Invoking the rule that the specific takes precedence over the general, the court held that the latter controlled and that the petitions were timely. The court went on to hold that the petitions were valid as to form despite the fact that they identified the entire rate of the tax and not just the amount above the compensating rate. Further, an intervening rate reduction by the library did not render the petitions moot. *Daviess County Public Library Taxing District v. Boswell*, 185 S.W.3d 651 (Ky. App. 2005).

Zoning Change – Substantial Evidence

A developer owned land zoned agricultural-residential that it sought to rezone to highway-commercial. After a hearing, the planning commission recommended against the change, setting out its reasons in a nine-page document. The city adopted the commission’s findings and recommendations and denied the requested change. The circuit court found the decision to be arbitrary but the court of appeals reversed. It found ample evidence that the proposed change did not comply with the comprehensive plan. It was the burden of the developer to show that it did, and the developer did not carry its burden. *Danville-Boyle County Planning Commission v. Centre Estates*, 190 S.W.3d 354 (Ky. App. 2006).

UNITED STATES COURT OF APPEALS



Kentucky

Ten Commandments Display – Secular Purpose

A county displayed an exhibit in its courthouse that included a copy of the Ten Commandments. The display was identical to the display that was the subject of the appeal to the U.S. Supreme Court in *ACLU v. McCreary County*. The Sixth Circuit held its decision in abeyance while that appeal was pending. Following the Supreme Court’s decision in that case, the Court of Appeals concluded that the instant display lacked any religious purpose and did not endorse religion. Unlike the display in *McCreary County*, the display here had no “sectarian pedigree.” The court accepted the county’s express purpose as an acknowledgment of history, not the “mere litigation position” adopted by *McCreary County* in its appeal. “We generally defer to the government’s rational judgment of what is historically relevant.” The court rejected plaintiffs’ contention that the display was an endorsement of religion as fundamentally flawed. “If the reasonable observer perceived all government references to the Deity as endorsement, then many of our Nation’s cherished symbols would be unconstitutional, including the Declaration of Independence

and the national motto. Fortunately, the reasonable person is not a hyper-sensitive plaintiff.” *American Civil Liberties Union v. Mercer County*, 432 F.3d 624 (6th Cir. 2005).

Solid Waste – Flow Control Ordinance

A trade association whose members collected municipal solid waste challenged a county’s ordinance that required disposal of waste collected under county franchises at the county’s landfill. The district court found that the ordinance facially discriminated against interstate commerce in violation of the constitution; the Court of Appeals agreed. Although the ordinance did not discriminate against out-of-state waste collectors, it did discriminate against out-of-state waste disposal facilities. The result might have been different had the county charged nothing for the disposal of waste and thereby eliminated the market. *National Solid Waste Management Association v. Daviess County*, 434 F.3d 898, reh. den. 446 F.3d 647 (6th Cir. 2006).

Construction Bids – Antitrust Conspiracy

A disappointed bidder for county construction projects discovered that the selected bidder had posted insufficient surety bonds. It sued the successful bidder and the county alleging violations of section 1 of the Sherman Act and of the Fourteenth Amendment and making various state law claims. The district court granted summary judgment to the defendants and dismissed all the claims; the plaintiff appealed only the federal claims. The transaction at issue was “vertical” in nature. Neither the plaintiff nor the court could find a previous example where the alleged conspiracy was unlawful under the antitrust laws. The court said that there was no economic rationale to restrict, as a violation of Section 1, a buyer’s latitude in selecting the entity from whom it purchased products or services. “To allow any auction, bidding, or other competitive sales process to be challenged whenever one potential supplier is distraught because it did not win the sale would be to outlaw competition and salesmanship...” *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336 (6th Cir. 2006).

Exonerated Inmate – Malicious Prosecution

A former inmate, incarcerated for seven years before being freed after his conviction for rape was vacated based on DNA evidence, sued those involved in his conviction. On motions for summary judgment, the district court dismissed the case as to some defendants and not as to others. Both sides appealed. The detectives and the forensic examiner claimed absolute immunity based on their testimony at trial and asserted that this immunity extended to pretrial acts. The court rejected this position. Immunity does not protect the fabrication of evidence. The court also rejected certain defendants’ claims of qualified immunity related to the fabrication of evidence and faulty identification procedures. The district court had granted summary judgment to the city on all claims against it, but the Court of Appeals reversed. The former inmate alleged sufficient evidence of failure to train and of a custom of overly suggestive line-ups that these matters should go to a jury. *Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006).

Termination – Retaliation and Due Process

A jury-pool manager was fired after she complained about issues of court administration. She sued, alleging violations of her rights to free speech and due process and stating a claim under the Kentucky Whistleblower Act. The district court granted summary judgment to the defendants based on qualified immunity on both the First Amendment and due process claims. On appeal, the court agreed with the court below that the manager’s speech was not protected because it did not involve a matter of public concern. Dismissal on that ground was therefore proper. The due process issue turned on whether the employee was tenured or untenured. Although the evidence was conflicting, the defendants reasonably relied on advice that the position was untenured. The employee’s right to due process was not clearly established, and the defendants were entitled to qualified immunity. The Whistleblower Act claim failed because the Kentucky Supreme Court held in *Cabinet for Families and Children v. Cummings* that the act does not impose individual civil liability. *Miller v. Administrative Office of the Courts*, 448 F.3d 887 (6th Cir. 2006).

Michigan

Prisoners – Visitation Rights

The Michigan Department of Correction (MDOC) imposed limitations on the visitation rights of prisoners, in part to control the widespread use of drugs and alcohol. A district court judge found the regulations unconstitutional and the Sixth Circuit affirmed, but the U.S. Supreme Court reversed the lower courts. *Overton v. Bazetta*, 539 U.S. 126 (2003). On remand, the district court found other flaws in the regulation and again enjoined their enforcement. MDOC again appealed, this time successfully. The Sixth Circuit found that the Supreme Court’s holding that the regulation was a regular means of effecting prison discipline that did not constitute a dramatic departure from accepted standards for conditions of confinement implicitly undermined the district court’s decision. The district court’s reliance on procedural due process required that the prisoners have a liberty interest at stake, but the Supreme Court signaled against such a finding. *Bazetta v. McGinnis*, 430 F.3d 795 (6th Cir. 2005).

Search Warrant – Evidence of Crime

During the course of a building search, the friend of the building owner asserted ownership of the computers there. Police then obtained a search warrant to search the friend’s business for the documents that would substantiate ownership and found marijuana. This led to forfeiture proceedings that a judge dismissed after suppressing the evidence because of an unconstitutional search. The friend sued for the violation of his constitutional rights, and the officers claimed qualified immunity. The Court of Appeals agreed with the district court that the search was unlawful because, in looking for the ownership documents, the police were not searching for evidence of a crime. Nevertheless, the officers were entitled to qualified immunity. They relied on the advice of an assistant prosecutor who reviewed the supporting affidavit before it went to the judge who issued the warrant.

The officers exercised reasonable professional judgment in applying for the warrant. *Armstrong v. City of Melvindale*, 432 F.3d 695 (6th Cir. 2006).

School Shooting – Failure to Protect

A first-grade teacher took her students to computer lab, leaving behind six students as punishment for not completing their work. While the teacher was in the hall, one of the six with a history of stabbing students with a pencil pulled out a gun he had brought to school, inserted a magazine of bullets, and shot a fellow student, killing her. The mother of the dead student sued the teacher, the principal, and the school district under a theory of state-created danger. The Court of Appeals held that the teacher's leaving the students unsupervised was not an affirmative act creating or increasing the risk to the victim. The danger existed irrespective of the teacher's location; the danger to the victim was created by the boy's possession of a gun and the victim's presence in the classroom with him. In addition, the teacher did not know or suspect that the student had a gun and had no reason to expect that the student's misbehavior would escalate to use of a gun. The parent had no viable direct claim against the teacher and without it no claim against the principal or the school board. *McQueen v. Beecher Community Schools*, 433 F.3d 460 (6th Cir. 2006).

Drag Racing – Failure to Protect

In the course of a drag race on a public street, one driver lost control of his car, veered into a crowd, and killed a spectator. Police officers at the scene before the race began not only failed to prevent the race from beginning, but also expressly allowed it to proceed. The mother of the deceased sued the city and the officers for the death. The court held that a failure to act does not give rise to a state-created danger. *DeShaney*, therefore, precludes holding public officials constitutionally responsible for this private act of violence. "Further breaking the link between the officers' actions and Jones' death is the uncontested fact that the officers played no role in Jones' decision to attend the drag race." *Jones v. Reynolds*, 438 F.3d 685 (6th Cir. 2006).

Warrantless Search – Exigent Circumstances

Police, responding to a neighbor's call reporting gunshots next door, found no one at home at the reported address. They entered the fenced-in backyard and found bullet casings, then forcibly entered the house to check for injured persons inside. They found the residents inside, who later disputed the officers' version of events. They sued, alleging a violation of their Fourth Amendment rights. The district court denied the officers' motion to dismiss based on qualified immunity; the Court of Appeals reversed. The officers in this case reasonably suspected that immediate police action was necessary to ascertain whether someone in the house was in peril. This safety exigency entitled the officers to qualified immunity. *Causey v. City of Bay City*, 442 F.3d 524 (6th Cir. 2006).

Free Speech – Retaliation

The medical director of a community mental health authority alleged that his termination was retaliation for his exercise of First Amendment rights and a violation of Michigan's Whistleblowers' Protection Act. He complained to an accrediting agency and to the board overseeing the authority about reduction of the position to half time and the diminished role of the medical director in the organization. The district court dismissed his suit, ruling that the speech did not touch on a matter of public concern and so was not protected by the First Amendment. It also ruled that the speech did not report a hidden violation of law and failed to state a claim under the whistleblower act. The court first discussed whether the agency's sovereign immunity defense was jurisdictional or was an affirmative defense. It concluded that, because sovereign immunity was waivable, the state was free to express its preference about whether the defense was a threshold issue or one that arose only if it lost on the merits. Therefore, the court deferred to the agency's desire to reach the merits. Here the speech was about the medical director's own job responsibilities, not about a matter of public concern or about a violation of law. Both the retaliation claim and the whistleblower claim failed. *Nair v. Oakland County Community Mental Health Authority*, 443 F.469 (6th Cir. 2006).

Public Housing – Lead Poisoning

A mother sued the city of Detroit and its housing authority seeking damages for lead poisoning suffered by her minor son. She complained that the defendants violated rights conferred by the Lead-Based Paint Poisoning Prevention Act and the United States Housing Act and breached state law. The district court found no private right of action under the federal acts, dismissed those complaints, and dismissed the state law complaints without prejudice. The Court of Appeals agreed that the acts create no individually enforceable rights. Examining the language of the LBPPPA, the court found no congressional intent to create an entitlement enforceable by a tenant. A similar analysis led to the same conclusion under the housing act. Absent rights-creating language, statutory text that benefits residents of public housing is not enough to confer a federal right. *Johnson v. City of Detroit*, 446 F.3d 614 (6th Cir. 2006).

Ohio

Deadly Force – Failure to Train

The parents of a schizophrenic man fatally shot by a police officer sued the city and the officer seeking to vindicate his right not to be killed by the police. They alleged that the city failed to train its officers appropriately. The federal district court dismissed the case against the city finding no constitutional violation and against the officer on grounds of qualified immunity. The Court of Appeals affirmed. Applying a totality of the circumstances test, the Court of Appeals found that the officer's conduct was justified because the suspect posed an immediate threat to others in the area and was actively resisting attempts to restrain him. The officer reasonably perceived an immediate and serious threat and so was entitled to qualified immunity. In the opinion of the

court, no reasonable juror could conclude that the officer violated the suspect's Fourth Amendment rights. *Untalan v. City of Lorain*, 430 F.3d 312 (6th Cir. 2005).

Independent Candidates – Filing Deadline

Ohio requires a person who wants to be an independent candidate for Congress to file a statement of candidacy and a nominating petition by the day before the primary election. A prospective candidate who did not meet the deadline challenged the constitutionality of the requirement. The court first considered whether the requirement imposed a severe burden upon the right to vote or whether it was a reasonable, nondiscriminatory regulation of the election process. The court concluded that Ohio's early primary date burdened all candidates, but placed independent candidates at no additional burden. It was not so early that a diligent candidate could not meet the requirement. Considering Ohio's election scheme as a whole, the early filing deadline is both reasonable and nondiscriminatory. The state's interest in verifying that a candidate has a modicum of support justifies Ohio's procedures. *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005).

Indigent Patients – Hospital Reimbursement

A county distributed tax monies that funded healthcare for indigent county residents to two hospitals in the county. Three hospitals that did not share in the distribution claimed that the distribution of the monies violated their equal protection and due process rights and violated Ohio law on competitive bidding. The court rejected the equal protection claim, finding several reasons why the county's decision was factually supported and undeniably reasonable. The due process claim, grounded in an asserted property right under the public bidding law, fared no better. The hospitals have no property interest in the procedure by which a county awards a contract. *TriHealth, Inc. v. Board of Commissioners*, 430 F.3d 783 (6th Cir. 2005).

Excessive Force – Qualified Immunity

During a riot a police officer shot a man in the face with a beanbag round. Claiming that his hands were up and that he was getting away from the crowd, the man brought an excessive-force claim against the city. The district court analyzed the claim using the shocking-to-the-conscience standard applicable to claims under the Fourteenth Amendment. The Court of Appeals concluded that the case was properly analyzed under the reasonableness standard applicable to Fourth Amendment claims. Although the man was not arrested or taken to the police station, he was still seized; police officers seize those persons who are the deliberate object of their exertion of force. The officer in question, the court said, is not entitled to qualified immunity. The officer was on notice that it is unreasonable to use less-than-deadly force against an individual who posed no immediate risk to the officer's safety. *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006).

Child Abuse Investigation – Right of Familial Association

A woman gave birth to a severely brain-damaged baby girl. Suspecting that the mother might pose a danger to the child, the hospital staff informed the county, which assigned a social worker to the case and conducted an investigation. Ultimately, the county concluded that the parents were not a danger to the child, who died several months later. After the investigation, the parents sued. The Court of Appeals construed the complaint to state a claim for infringing on the right to familial association without due process of law. The court dismissed the claim, holding that the right to familial association is not implicated merely by governmental investigation into allegations of child abuse. *Kottmyer v. Maas*, 436 F.3d 684 (6th Cir. 2006).

Domestic Violence – Failure to Protect

Dispatched to an apartment in response to a 911 call of suspected domestic violence, an officer investigated but did not see or hear any signs of a struggle. The caller's body was discovered in the apartment the next day. The administrator of the victim's estate sued, alleging that the police conduct increased the risk of harm to the victim. The district court rejected the claim, and the Court of Appeals affirmed. In the court's opinion, dispatching the officer did not increase the risk of harm. The court declined to interpret the Due Process Clause in a manner that discourages law enforcement from responding to requests for assistance. To do so would put police in a catch-22 where they faced potential liability whether they took action to attempt a rescue or they failed to do so. *May v. Franklin County Commissioners*, 437 F.3d 579 (6th Cir. 2006).

Policymaker – Discharge

An employee of a city civil service board disagreed with the board's proposed diversity plan for the city fire department and the manner of its adoption. The board placed her on paid leave intending to terminate her when it ascertained the required procedures. While on leave she wrote to the newspaper, which published her letter critical of the new diversity plan. Five days later the board voted to terminate her employment. She sued the board and its members claiming violations of her due process and First Amendment rights. When the district court denied them qualified immunity, the members appealed. Finding that the employee was entitled to specific termination procedures denied her by the board, the Court of Appeals found that the board members were not entitled to qualified immunity on the due process claim. However, the court found that she did not state a First Amendment claim. Because she was a policymaker commenting on matters of policy, the government interests in efficient delivery of services outweighed the employee's interest in speaking out. *Silberstein v. City of Dayton*, 440 F.3d 306 (6th Cir. 2006). [See "Discharge and Due Process," *Local Government Law News*, Fall 2005. –Ed.]

Voting Rights – Balloting Methods

A group of voters residing in counties that used punch-card systems brought suit claiming that, compared to voters using other voting methods, voters using punch-card equipment were more likely not to have their votes counted. They alleged that the use of unreliable voting equipment in some Ohio counties but not others violated their equal protection rights and the Voting Rights Act. A three-judge panel of the Court of Appeals found a violation of the Equal Protection Clause, but remanded the case to the district court on the Voting Rights Act claim. *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006). In an order dated July 21, 2006, the court vacated the decision and agreed to hear the case en banc.

Police Officer Candidate – Age Discrimination

A 54-year-old applied for a position as a city police officer. He passed the exam and received a conditional offer of employment that the city revoked because he was over 35 years old. The candidate sued the city under the Age Discrimination in Employment Act. The district court granted summary judgment for the city; the Court of Appeals affirmed. The applicant failed to establish that he was objectively qualified for an original appointment. State law prohibited an original appointment if the candidate was 35 or older. The refusal to hire was, therefore, pursuant to a bona fide hiring plan, and the city was protected from the ADEA claim. *Jones v. City of Cortland Police Department*, 448 F.3d 369 (2006).

Tennessee

Fleeing Arrest – Deadly Force

A deputy sheriff left a suspect unsupervised in a patrol car with its engine running and its keys in the ignition. The suspect took control of the cruiser and attempted to escape in it. The deputy shot and killed the fleeing suspect, claiming that the driver tried to run him over. The driver's survivors claimed that the deputy fired only after the car drove by him and the immediate danger was past. Taken in a light most favorable to the plaintiffs, this would demonstrate an unconstitutional use of deadly force. The showing was sufficient to deny qualified immunity for the deputy. "It is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head.... Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005).

Free Speech – "Choose Life" License Plates

Tennessee makes available for purchase automobile license plates with the message "Choose Life" but does not make available a plate with a pro-choice message. Half of the specialty plate fee goes to New Life Resources, Inc., a not-for-profit corporation, for counseling and financial assistance to pregnant women. The ACLU and others challenged the law as a violation of the First Amendment. The district court found that the statute discriminated based on viewpoint and enjoined enforcement. New Life, but not Tennessee,

appealed. The Court of Appeals treated the "Choose Life" message as the state's own, rather than as a mixed message subject to the viewpoint neutrality requirement. Government may express public policy views by enlisting volunteers to disseminate its message. The First Amendment does not prohibit the government from doing so because the views are controversial. The one-sidedness of the message may be unwise, but a government-crafted message disseminated by private volunteers does not create a forum for speech that must be viewpoint neutral. *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).



UNITED STATES DISTRICT COURTS

Corrections Officer – Disability

A county corrections officer had back surgery to correct an injury that occurred in the course of employment. He requested and received leave under the Family and Medical Leave Act (FMLA). After his return to work, he was assigned jobs that did not involve inmate contact. He also had conditional permission to work a second job. Time and attendance problems led to revocation of that permission and to an internal affairs investigation. The investigation resulted in his termination. He then filed a charge of discrimination with the EEOC, alleging he was terminated in violation of the Americans with Disabilities Act because he was regarded as having a disability. After receiving a right-to-sue letter, he brought this action in district court, which granted summary judgment to the defendants. The ADA claim failed because his misconduct and resulting suspension of his peace officer status made him unable to show that he was otherwise qualified to hold the position. *Taylor v. Louisville/Jefferson County Metro Government*, 400 F.Supp.2d 1014 (W.D.Ky. 2005).

Union Activities – Retaliatory Failure to Hire

A teacher, active in her union and critical of school leadership, did not have her contract renewed and was not hired to fill other vacancies for which she was qualified. She sued the board of education and the superintendent claiming retaliation for her exercise of her First Amendment rights. On a motion for summary judgment, the court dismissed the claims against the board of education and the superintendent in his official capacity because the board had no role to play and did not play a role in the employment decisions. Therefore, sovereign immunity attached. However, the court denied the motion as to the superintendent in his individual capacity. The teacher's rights were clearly established in law, so the superintendent cannot claim qualified immunity. *Smith v. Floyd County Board of Education*, 401 F.Supp.2d 789 (E.D.Ky. 2005).

OPINIONS OF THE ATTORNEY GENERAL

OPEN RECORDS / OPEN MEETINGS ALERT

The Attorney General's office has posted this reminder on its website (<http://ag.ky.gov/civil/alert.htm>):

KRS 65.055(1), 160.395(1), and 164.465(1) require all judge/executives, mayors, county attorneys, city attorneys, superintendents of public schools, school district attorneys, presidents of state postsecondary educational institutions, and university counsel to discharge the following duties on a *continuing* basis.

Distribute written materials

You must distribute "Your Duty Under the Law" and "Managing Public Records," either electronically or in hard copy, to each *newly* elected official or elected or appointed member within sixty days of their election or appointment. [Links to those publications are available online at <http://ag.ky.gov/civil/alert.htm>.] For judge/executives, mayors, city attorneys, and county attorneys, this includes "each elected official and each member, whether elected or appointed, of every county and city legislative body, local government board, commission, authority, and committee, including boards of special districts." For superintendents of public school districts and school district attorneys, this includes "each elected school board member and each school based decision making council member." For presidents of state postsecondary educational institutions and university counsel, this includes "each board of regents or governing board member of their university."

Obtain signatory proof of receipt

You must obtain signed proof from each official or member that he or she received the documents. The Attorney General has devised a "Certificate of Receipt of Written Documentation" that you can provide to the recipient. [Links to the certificate are available online at <http://ag.ky.gov/civil/alert.htm>, and a copy of the certificate appears on page 16 of this issue.] Ask the recipient to complete the bottom portion of the "Certificate of Receipt" and return to you (or your employee designated to maintain the "Certificates of Receipt"). Maintain the "Certificates of Receipt" on your agency's premises as part of your agency's records. **DO NOT RETURN CERTIFICATES OF RECEIPT TO THE ATTORNEY GENERAL.**

Return proof of distribution to the Attorney General

You must return *only* the "Certificate of Distribution of Written Documentation" to the Office of the Attorney General after the lower portion of the "Certificate of Distribution" is completed. [Links to the certificate are available online at <http://ag.ky.gov/civil/alert.htm>, and a copy of the certificate appears on page 17 of this issue.] Mail the "Certificate of Distribution" to:

Jean Ann Myatt
Office of the Attorney General
700 Capitol Avenue
Frankfort, KY 40601

SUMMARIES OF SELECTED OPEN MEETINGS DECISIONS

Public Agency Defined – KRS 61.805(2)

A city council debate over a provision in the city's zoning ordinance led to the formation of an informal group of officials and citizens to recommend an appropriate amendment to the ordinance. A citizen complained that this group was a public agency subject to the Open Meetings Act, but the city disagreed. The Attorney General called the question "a close one," but concluded that the group fell within the act by virtue of KRS 61.805(2)(g) as a committee established, created, and controlled by a public agency, i.e. the city council. The council initiated formation of the committee and gave it its charge. Its composition with less than a quorum of the city council and its advisory nature did not take the committee outside the act. Because the committee played a role in the formation of public policy, said the Attorney General, it was subject to the requirements of the act even though it had no authority to act on its own. 06-OMD-068.

Open to the Public – KRS 61.810

In anticipation of a larger than usual crowd, a city council moved its meeting to a larger space. However, even the larger space could not accommodate all those in attendance, and citizens complained that they could not attend, see, or hear the proceedings. In its defense, the city explained that it had taken all reasonable measures to maximize the public's ability to attend and participate in the meeting. Calling this "a *very* close question," the Attorney General agreed with the city. Citing the decision in *Knox County v. Hammond*, the opinion somewhat reluctantly concluded that the citizens

had not proved their case. It warned, “This decision should not, however, be construed as a license to randomly move meeting locations to suit the whims of agency members or thwart public access to agency meeting, but as a narrow holding reflecting the exigencies of the particular situation....” 06-OMD-079.

Notice of Special Meetings – KRS 61.823(3), (4)

A site based decision making council held special meetings of an ad hoc interview committee and of the council itself after providing notice to the members verbally and by email. Citing earlier open meetings decisions, the Attorney General stated again that the Open Meetings Act does not recognize the validity of verbal notification or email notification. The act requires written notification delivered personally, by fax, or by mail. Verbal and email notification may be used in addition to, but not in lieu of, the statutorily required methods of communication. 06-OMD-044.

Minutes – KRS 61.835

A fiscal court supplemented the draft minutes of a meeting by including a “clarification.” A citizen complained that this rendered the minutes inaccurate and so violated the Open Meetings Act. The Attorney General found no violation because the clarification resulted in no inaccuracy in the record of votes and actions taken. However, the Attorney General described the practice as “deeply troubling.” The fiscal court, noted the Attorney General, is a court of record, and the practice tends to destroy the value of the minutes as legal evidence of what transpires at its meetings. 06-OMD-103.

Under KRS 61.846 the Attorney General reviews complaints alleging violations of the Open Meetings Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available online at <http://ag.ky.gov/civil/openrecords.htm>.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

Public Agency Defined – KRS 61.870(1)

A citizen requested records of an automobile accident from an incorporated volunteer fire department. The department replied that it was not an agency subject to the act. On appeal, the requester took the position that because the department derived revenue from membership charges added to property tax bills and from federal grant funds, the department fell within the definition of a public agency. The Attorney General concluded that the membership charges were neither taxes nor the functional equivalent of taxes. They were instead fees for services rendered to voluntary subscribers for fire protection services. The manner of their collection and distribution does not determine their character; they remain private funds. Although the

department received a majority of its operating revenue from a federal grant, the definition of public agency turns on the percentage of revenue derived from state and local funds. 06-ORD-085.

Public Record Defined – KRS 61.870(2)

A citizen requested a copy of an audio recording made in conjunction with a traffic stop. The police department denied the request because the officer involved made the recording on his own initiative using his own recorder. The police department did not direct the officer to make the recording and did not provide the equipment to the officer. Therefore, the city asserted, the recording belong to the officer and was not a public record. The Attorney General agreed. While recordings can fall within the definition of a record, this one need not be made available unless it was prepared by, owned by, used by, in the possession of, and made at the direction of the agency. 06-ORD-039.

Unreasonable Requests – KRS 61.872(6)

A city denied a request for documents related to the contractor that provides it with building and zoning services. It asserted that the volume of the request, coinciding with tax collections, solid waste fee collections, and audits, was burdensome and intended to disrupt those other services. The Attorney General determined that the city failed to show the alleged burden by clear and convincing evidence, particularly in light of its ability to honor similar earlier requests. To prevail, the city would have to elaborate on the difficulty associated with accessing the records with a high degree of specificity. 06-ORD-028.

Exempt Records Generally – KRS 61.878

An attorney representing a police officer in litigation with a city sought access to the officer’s personnel file on behalf of another client. The city refused on the ground that the request was an attempt to circumvent a stay on discovery in the ongoing litigation. Further, the city asserted, the client on whose behalf the attorney sought the records was funding the litigation by the police officer against the city. The Attorney General agreed with the city that the identity of purpose was sufficient to invoke the exception in KRS 61.878(1) related to pretrial discovery. Because the attorney cannot obtain the requested records through discovery, he cannot obtain the records through an Open Records Act request. 06-ORD-137.

Information of a Personal Nature – KRS 61.878(1)(a)

A union official asked for records of accidents involving bus drivers in the employ of a transit authority. The authority provided documents with the names of the employees removed, and an appeal followed. The transit authority asserted that to provide the names would be improper. The Attorney General disagreed, saying that the public interest in monitoring the performance of the bus drivers outweighed the minimal privacy interest in protecting their identities. The names of public employees are “the least private thing about them.” 06-ORD-006.

A newspaper requested records pertaining to an investigation of a rape cleared by exception. In response, the police released the file but redacted information related to the suspect who was neither arrested nor charged. The city relied in part on OAG 91-35 to support its claim that the suspect had an expectation of privacy. The Attorney General disagreed with the city's interpretation of that opinion, saying that it does not establish a *per se* rule. Citing to 05-ORD-224, the Attorney General stated that where the suspect is a public figure, he forfeits to some extent his privacy interests. The public's interest in seeing that criminal activity will be investigated and prosecuted without favoritism or bias is heightened in such instances and warrants disclosure of the suspect's identity. OAG 91-35 does not authorize withholding of the suspect's identity in all cases cleared by exception. 06-ORD-052.

Law Enforcement – KRS 61.878(1)(h)

A city police department denied a request for police radio transmission tapes and an incident report because the matter was still under investigation by the Commonwealth Attorney. On appeal, the Attorney General determined that the city improperly denied access to the records because it failed to establish that the records were compiled as an integral part of a specific investigation and the harm that would result to the ongoing law enforcement action. The bare claim of premature release is insufficient to qualify for exemption. 06-ORD-035.

Preliminary Materials – KRS 61.878(1)(i), (j)

A newspaper asked for records related to the suspension of a high school basketball coach. The high school denied the request on the ground that the requested records were preliminary, and the newspaper appealed. After conducting an *in camera* review of the documents, the Attorney General agreed with the high school. The disciplinary action taken against the coach was substantially different from that recommended by the person who conducted the investigation of the coach's conduct. The Attorney General inferred that the ultimate decision maker rejected the investigator's findings and recommendations. Therefore, the records retained their preliminary character. The Attorney General noted, however, that the initial complaint was subject to disclosure. The premature destruction of the complaint raised records retention issues that the Attorney General referred to the Department for Libraries and Archives. 06-ORD-61.

Confidential by Law – KRS 61.878(1)(k), (l)

A county attorney denied an open records request on several grounds including the ground of attorney-client privilege. Addressing the assertion of the privilege, the Attorney General adopted the analysis laid out in 04-ORD-087. The attorney may withhold confidential communications with the client, but not all records involving legal services fall within the privilege. Contracts and billing records of attorneys working for public agencies, for example, are not protected by the privilege. Likewise, studies conducted by outside sources are not within the privilege, although advice to the client based on those studies arguably qualifies. 06-ORD-096.

A citizen asked a school district to allow inspection of the national and state responses to criminal background checks of 227 individuals. The school district refused, citing provisions of state and federal law mandating nondisclosure. An earlier opinion, 03-ORD-141, did not consider the statutes cited by the school district and held that the records were available. In this instance, the Attorney General agreed with the school district that 28 U.S.C. § 534 and KRS 17.150(4) operate to keep the requested records confidential, overruling the earlier decision. 06-ORD-136.

Records Related to Employee – KRS 61.878(3)

An employee of a state university sought a copy of her personnel file and any other records concerning her, including notes taken by her supervisor at meetings. The university denied the request with respect to notes not included in her personnel file on the ground that they were preliminary documents not subject to disclosure. The Attorney General opined that the employee was entitled to the withheld records regardless of whether they would be exempt under KRS 61.878(1)(i). A public employee has a greater right of access to records that relate to him or her than does the public generally. Statute specifically grants the employee a right to inspect preliminary documentation related to him or her and overrides other exemptions in the Open Records Act. 06-ORD-014.

A city employee asked for a copy of a taped conversion in which she participated. In response, the city provided a transcript, redacting the names of other employees mentioned on the tape on privacy grounds. The requesting employee appealed, seeking an actual copy of the recording. Because it related to her as an employee, the Attorney General decided that the city must give her a copy without redactions. The Attorney General noted only four exceptions to the employee's broad right of access, none of which applied here. 06-ORD-083.

Denial of Inspection – KRS 61.880

In response to a request for copies of contracts, a judge/executive produced from the records in his office only the bid forms submitted by contractors. Other relevant documents were later found within the records of a member of the county solid waste committee. The judge/executive asserted that his initial response satisfied the Open Records Act, but the Attorney General disagreed. Although the latter documents were not in his possession, the judge/executive had duty to search beyond the records in the most obvious place. An adequate search would extend to records kept by the solid waste committee, by support staff, and in any other location they might reasonably be found. Records retention schedules require the county to keep such contracts for 15 years, which raised the issue of why such contracts were not readily accessible. 06-ORD-020.

Under KRS 61.880 the Attorney General reviews complaints alleging violations of the Open Records Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available online at <http://ag.ky.gov/civil/openrecords.htm>.

CERTIFICATE OF RECEIPT OF WRITTEN DOCUMENTATION

Under the terms of House Bill 77, enacted by the 2005 General Assembly, signed into law by Governor Fletcher on March 11, 2005, and available for review on the website of the Legislative Research Commission at <http://www.lrc.ky.gov/record/05rs/HB77.htm>, the Office of the Attorney General is directed to prepare and distribute to a wide variety of public officials written information that explains the procedural and substantive provisions of the Open Meetings Act (KRS 61.805-.850) and the Open Records Act (KRS 61.870-.884), together with information prepared by the Department for Libraries and Archives that explains the proper retention and management of public records. Of the designated group of recipients, the bill specifically calls for county judge executives, mayors, superintendents of public school districts, and presidents of state postsecondary institutions, according to their specific responsibilities, to further distribute this same information to each elected and appointed member of every county and city legislative body, local government board, commission, authority, and committee, including boards of special districts located within their jurisdictions; to every school board member and each school council member; and to each board of regents member or governing board member of a university. County judge executives, mayors, superintendents of public school districts, and presidents of state postsecondary education institutions are required to secure signatory proof from each of the officials to whom they have distributed the information cited above that those individuals have received this information, and to certify to the Office of the Attorney General that the information has been distributed as required.

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Signature: _____

Name (printed or typed): _____

Name of Public Agency: _____

Your position or function: _____

Agency Address: _____

Agency Phone: _____

Agency E-mail: _____

CERTIFICATE OF DISTRIBUTION OF WRITTEN DOCUMENTATION

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Jean Ann Myatt, Office of the Attorney General, 700 Capitol Ave., Room 118, Frankfort 40601-3449 KY

sion that she would enlist the community against the plan rather than describe its virtues. Afterward, she received a counseling memo and was herself reassigned to patrol duties, actions she considered to be retaliation for her speech. The district court decided the case for the defendants finding that although her comments addressed a matter of public concern, the department's interest in efficient management outweighed her speech on the *Pickering* balance. On appeal, the Seventh Circuit held that the threshold question was whether her speech was in her official capacity. Here, said the appellate court, she was on duty, in uniform, and engaged with her superiors in the formation and execution of official policy. "Under *Garcetti* her employer could draw inferences from her statements about whether she would zealously implement the Chief's plans or try to undermine them; when the department drew the latter inference it was free to act accordingly."³⁹

An interesting extension of *Garcetti* and *Mills* is *Logan v. Indiana Department of Corrections*.⁴⁰ *Logan* was "a hybrid situation, involving a private employee suing her private employer based on the claim that her supervisor conspired with the State of Indiana and its agents to violate her First Amendment rights. *Logan's* broad responsibilities included those owed not only to her private employer, but those which were required of her by her employer's client, the Indiana Department of Corrections." *Logan* made statements critical of a prison's nursing director that caused an irreparable rift and led the department to request her employer to transfer her to another facility. The court dismissed *Logan's* retaliation claim saying that she made her statements pursuant to her job duties, and thus they were not protected by the First Amendment.

Another interesting extension of *Garcetti* is *Duran v. City of Corpus Christi*. There an agent for a health insurance provider alleged that the city's failure to renew its contract was retaliation for the agent's having raised concerns about the coverage of a claimant. The First Amendment claim failed, the court said, because the agent spoke only in his capacity as the "Designated Coordinator for the City" under the contract. When he informed the city of potential problems with the claim, he was speaking pursuant to his duties as coordinator. As such he could not claim the protection of the First Amendment.

In *Ryan v. Shawnee Mission Unified School District No. 512*,⁴¹ the court had to grapple with statements the bulk of which were made in the course of official duties but some of which were not. *Ryan* was a physical therapist for the school district who asserted that the district was not providing adequate services to disabled children. The court held that *Garcetti* foreclosed the possibility that the statements she made in the course of conducting her daily professional activities could be considered protected speech. Focusing on the remainder of *Ryan's* speech – where *Ryan* spoke as a citizen rather than pursuant to her official duties – the court found that none of it touched upon matters of public concern. The content, form, and context of those statements related to the handling of one student's educational needs or to internal personnel matters and working conditions.

Another case involving "mixed" speech was *Sweeney v. Leone*.⁴² A police dispatcher eavesdropped electronically on a conversation between two superiors and was disciplined. Analyzing the speech that led to the disciplinary action, the court determined that a portion dealt with personal grievances about the supervisors' treatment of dispatchers, speech not protected under *Connick*. The balance of the speech considered by the court was speech as a public employee. The court in *Sweeney* cited as instructive the Seventh Circuit's opinion in *Mills* above. *Mills*, noted the court, involved the formulation of department policy, arguably a matter of public concern; the statements in this case were merely work requests necessitated by department protocol. If the statements in *Mills* were not protected, neither were the statements here.

In *Boykin v. City of Baton Rouge/Parish of East Baton Rouge*,⁴³ the court found strong parallels between the facts in the case before it and the facts in *Garcetti*. *Boyken* was a city human resources director discharged for creating and disseminating a report on diversification of the city workforce. The city regarded the report as inflammatory and misguided. Finding that the report was consistent with the nature of the employee's responsibilities and drafted pursuant to his official duties, the court found *Garcetti* controlling. It acknowledged that this was a case where the employee spoke as both a citizen on a matter of public concern (race discrimination) and in his capacity as a government employee. His discrimination complaint could go forward, but his First Amendment retaliation complaint could not.

A similar case is *Springer v. City of Atlanta*.⁴⁴ *Springer* claimed he was wrongly fired from one position and not hired into another position because he reported mismanagement within the Atlanta Workforce Development Agency. Noting that every employee has a duty of loyalty, faithful service, and regard for an employer's interest, the court found that *Springer* had an obligation to engage in the speech at issue. Therefore, held the court, he was acting pursuant to his official duties and his speech was unprotected. In contrast, the court in *Walters v. County of Maricopa*⁴⁵ refused to push the envelope that far. Citing the Supreme Court's admonition in *Garcetti* that "the proper inquiry is a practical one," the district court said "any attempt to inflate [the employee's] job description so as to include blowing the whistle on other officers would likely exceed the 'practical inquiry' suggested.... *Garcetti* should not be read to overrule all First Amendment whistle blower protection cases by generally categorizing whistle blowing as part of employees' employment obligations."⁴⁶

In *Ruotolo v. City of New York*,⁴⁷ a police sergeant claimed he was forced into retirement after the city subjected him to acts of retaliation for a report he wrote. He was the training and safety officer for his precinct, in which capacity he wrote a report identifying possible environmental risks at the precinct. He delivered the report to his commanding officer, after which the issues received publicity in several newspapers and the hazards were ultimately abated. *Ruotolo* alleged that after he submitted the report, he suffered a pattern of retaliation by his superiors – reassignment to lower-status

work, transfer to a less desirable precinct, and discipline for trivial matters. He retired rather than risk loss of benefits, and sued claiming a violation of his First Amendment rights. The court dismissed the claim saying, “his speech is exactly the type addressed in *Garcetti*.”

These are but a sampling of the dozens cases in the lower courts that invoke the holding in *Garcetti v. Ceballos*. As these examples reflect, the holding in that case has done little to settle the law governing public employee speech.

Endnotes

1. ___ U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689, 74 USLW 4257 (May 30, 2006).
2. See William Van Alstyne, *The American First Amendment in the Twenty-First Century* 293-98 (2002). Professor Van Alstyne notes two other approaches reflected in the cases. One of these regards the common law of contracts as essentially irrelevant. In this view, the First Amendment disallows government from imposing any restrictions on free speech by contract or otherwise. Any terms, conditions, regulations, or restrictions on free speech, insofar as they come from government, are constitutionally void. The other of these treats the First Amendment as applicable, and then tries to sort out what that means in particular instances.
3. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892).
4. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).
5. See generally Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 Texas Tech. L. Rev. 5 (1999).
6. 391 U.S. at 568.
7. 391 U.S. at 574. See Howard C. Nielson, Jr., Comment, *Recklessly False Statements in the Public-Employment Context*, 63 U. Chi. L. Rev. 1277 (1996).
8. 391 U.S. at 572-73.
9. 391 U.S. at 572.
10. 461 U.S. 138 (1983).
11. 461 U.S. at 154.
12. 461 U.S. at 146-47.
13. 461 U.S. at 149.
14. Professor Schoen lists the following among the factors that enter into the *Pickering* balance: the content of the speech, the time, place, and manner of the speech, the context and motive of the speech, the actual or potential effects of the speech, and the employee’s responsibilities within the government. Schoen, *supra* note 5, at 30.
15. 483 U.S. 378 (1987).
16. 483 U.S. at 387.
17. 483 U.S. at 390-91.
18. 483 U.S. at 394 (Scalia dissenting).
19. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1112-13 (3d ed. 2006).
20. 461 U.S. at 154 quoting *Pickering*, 391 U.S. at 569.
21. See *Board of Commissioners of Wabaunsee County v. Umbeh*, 518 U.S. 668 (1996) (First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of freedom of speech). “There is ample reason to believe that such a nuanced approach [the *Pickering* balancing test], which recognizes the variety of interests that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees.” *Id.* at 678.
22. 164 L.Ed.2d at 698-99.
23. 164 L.Ed.2d at 701.
24. 164 L.Ed.2d at 702.
25. 164 L.Ed.2d at 702.
26. 164 L.Ed.2d at 703-04 (internal citations omitted).
27. 164 L.Ed.2d at 704.
28. 164 L.Ed.2d at 706.
29. 164 L.Ed.2d at 709.
30. 164 L.Ed.2d at 709-10.
31. 515 U.S. 819, 833 (1995).
32. 164 L.Ed.2d at 711.
33. Justice Souter suggested that the rule might have important ramifications for academic freedom in public colleges and universities. About this Justice Kennedy wrote, “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” 164 L.Ed.2d at 703.
34. Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School, makes a similar point. “After *Ceballos*, employees who do know what they are talking about will retain First Amendment protection only if they make their complaints publicly without going through internal grievance procedures. Although the Court suggests that its decision will encourage the creation and use of such internal procedures, it will probably not have that effect. Note that if employees have obligations to settle disputes and make complaints within internal grievance procedures, then they are doing something that is within their job description when they make complaints and so they have no First Amendment protections in what they say. Hence employees will have incentives not to use such procedures but to speak only in public if they want First Amendment protections (note that if they speak both privately and publicly, they can be fired for their private speech). However, if they speak only publicly, they essentially forfeit their ability to stay in their jobs, first because they become pariahs, and second, because they have refused to use the employer’s internal mechanisms for complaint (mechanisms which, if they used them, would eliminate their First Amendment rights). In short, whatever they do, they are pretty much screwed. So the effect of the Court’s decision is to create very strong incentives against whistle blowing of any kind. (Another possible result of the case is that employees will have incentives to speak anonymously or leak information to reporters and hope that the reporters don’t have to reveal their sources).” *Ceballos—The Court Creates Bad Information Policy*, <http://balkin.blogspot.com/2006/05/ceballos-court-creates-bad-information.html>.
35. 2006 WL 1556208 (E.D.Mich. June 6, 2006).
36. 2006 WL 2457516 (C.D.Ill. Aug. 23, 2006).
37. 2006 WL 1875492 (D.N.J. July 5, 2006).
38. 452 F.3d 646 (7th Cir. 2006).
39. *Id.* at 648.
40. 2006 WL 1750583 (S.D.Ind. June 26, 2006).
41. 437 F.Supp.2d 1233 (D. Kansas 2006).
42. 2006 WL 2246372 (D.Conn. July 31, 2006).
43. 439 F.Supp.2d 605, (M.D.La. 2006).
44. 2006 WL 2246188 (N.D.Ga. Aug. 4, 2006).
45. 2006 WL 2456173 (D.Ariz. Aug. 22, 2006).
46. “The court recognizes that although the Ninth Circuit has not yet addressed this issue, some courts have interpreted employees’ job duties in an expansive light that would encompass Walters’ whistleblowing. See *Mills v. City of Evansville*, 452 F.3d 646, 648 (7th Cir.2006); *Springer v. City of Atlanta*, Civ. No. 05-0713, 2006 WL 2246188, *3-*4 (N.D.Ga. Aug. 4, 2006). In light of the “practical” inquiry suggested by the Supreme Court on this issue, the court finds other authority more persuasive. See *Day v. Borough of Carlisle*, Civ. No. 04-1040, 2006 WL 1892711, *6 (M.D.Pa. July 10, 2006) (holding that employment duties of police Corporal did not include reporting misconduct by fellow officers).”
47. 2006 WL 2033662 (S.D.N.Y. July 19, 2006).

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