



MANAGEMENT INSIGHT

Employee Relations Newsletter

AUGUST 2006

DAS Human Resources
Services Division

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Please provide feedback on the Management Insight Newsletter and the Labor Relations Unit by taking a few minutes to complete a short 11 question survey. It will be available for the next 10 days, through August 24th. Follow the following link:

<http://FreeOnlineSurveys.com/rendersurvey.asp?sid=i391x09ubm8nx2c214802>

LABOR RELATIONS WEBSITE PROJECT

Since last year, the Labor Relations Unit has worked on converting over 750 grievance arbitration case decisions, including employer and union briefs, into an Adobe PDF electronic format. As of April 26, 2006, all of the decisions were converted into PDF files with assistance from Save As Inc, a paperless solutions company.

The electronic conversion was the first step in the process of creating electronic accessibility and functionality. The second step involves meta-tagging each individual file (inserting keywords for search functionality) to create an internet-based search engine. This process is approximately 30% complete. Once completed, Labor Relations will add a new page to its website that will house the search engine. The new search functions are expected to be added to the LRU webpage and fully operational by early 2007.

HRSD STAFFING UPDATE

Retirement - Tom Wells retired effective July 31, 2006 from the Labor Relations Unit. Currently, Tom is working in the unit a few days a week during August in order to accommodate a transitional period.

Congratulations - Jerry Korson is the new HR Management & Consultation Manager. Jerry was previously the DAS Human Resources Manager.

Welcome - James Callahan is the new HR Analyst 1 in the Classification and Compensation Unit. He is a recent MPA graduate from PSU. Prior to joining HRSD, he worked for the City of Portland in the Labor and Employee Relations Unit.

Welcome - Glenn West has accepted a Job Rotation with the Labor Relations Unit as a State Labor Relations Manager. He is currently a DAS HRMC Human Resource Consultant.



The right of a represented employee to have a union representative present during investigatory interviews were announced by the U.S. Supreme Court in a 1975 case ([NLRB vs. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689](#)). These rights have become known as the Weingarten rights.



ARBITRATION & CASE SUMMARIES

by Mike Halpern—State Labor Relations Manager

In the Matter of the Arbitration Between the State of Oregon, ODOT and SEIU Local 503, OPEU (Arbitrator, Gary L. Axon; June 19, 2006)

Two conditions must be established for a grievant to have, on request, a right to union representation under the SEIU Contract or the *Weingarten* line of cases: (1) the employee must be subjected to an investigatory interview and (2) the employee must have a reasonable belief that the interview will result in disciplinary action. In this case, both conditions were absent. The fact that one of the two grievants was “in fear of losing his job” did not trigger a right to representation. The other grievant, a steward, was appropriately disciplined for calling a district manager a profane name while talking to him about the first grievant’s alleged right to representation. At the time, the steward was in the presence of coworkers in the work site break room.

Facts: Grievant Atwood, an ODOT Transportation Maintenance Specialist, indicated that he would not be available for overtime work on a Sunday because he would be in church. He had previously stated that he was available for Sunday work and he had previously worked on Sundays. Grievant Atwood’s district manager (DM) asked the Grievant to meet with him and an office manager to discuss expectations and to allow DM to find out what was needed in order to fulfill any religious accommodation obligations which ODOT might have.

During a previous meeting between Grievant Atwood and DM, the Grievant had requested Union representation. DM had denied the request since the meeting was about expectations and a letter of concern which DM stated was not a disciplinary action. The Union did not grieve that denial. However, as a result of this previous history, DM asked a Union business agent to be available by phone to act as a facilitator during the meeting about Sunday work. The business agent agreed.

At the time of the meeting, DM made numerous attempts to contact the business agent by phone, but these proved unsuccessful. After Grievant Atwood refused to attend the meeting without Union representation, DM asked him to remain in the waiting area while he again tried to contact the business agent. These attempts were unsuccessful. DM then called a local steward (the second Grievant in this arbitration) to tell him that the meeting would be proceeding without Union representation (the steward had previously called DM to talk about the meeting and had been told that the business agent would be representing Grievant Atwood). DM told the steward that the meeting was not investigatory, but concerned expectations. When the steward told DM that he would be there in twenty

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minutes to represent Grievant Atwood, DM told him to stay at his work site. After continued angry exchanges between the two, the phone conversation ended with the steward threatening DM with an unfair labor practice charge. As he was hanging up the phone, DM (and the office manager who was present with DM) heard the steward call DM, "f---er." The steward was in the work site break room during the phone conversation, in the presence of a number of coworkers.

After DM informed Grievant Atwood that the meeting would precede without Union representation and that it was not an investigation but to discuss expectations, Grievant Atwood again requested Union representation. The request was denied and the meeting went forward. While there is a conflict between Grievant Atwood and DM as to exactly what discussions took place at the meeting, the subject concerned the availability of Grievant Atwood for overtime work necessitated by inclement weather. DM also told Grievant Atwood that DM needed to understand why the Grievant could no longer work on Sundays so DM could accommodate Grievant Atwood's religious beliefs.

At the arbitration hearing, Grievant Atwood testified that he did not go to church on the Sunday in question. No inclement weather arose that day and no overtime work was required of any of the available employees. No disciplinary action was taken against Grievant Atwood. The steward, however, was issued a one-step pay reduction for one month. The charges included unprofessional conduct and violation of ODOT's Workplace Harassment Policy stemming from the steward's use of profanity and providing false and/or misleading information about the incident during the disciplinary investigation (when questioned, he stated that he "did not recall" directing profanity at DM).

Questions Presented: Did the Employer violate the collective bargaining agreement when it denied Union representation to Grievant Atwood? Did the Employer have just cause to issue the steward a one-step, one-month pay reduction?

Discussion and Ruling: *Union Representation.*

The Arbitrator initially noted that the collective bargaining agreement contains two identical sections which "... set forth the principles in *Weingarten* and other cases on the subject of an employee's right to Union representation." The contract language provides that, upon request, "... employees have the right to Union representation where two conditions are established." These are, first, being "... subjected to an investigatory interview"; and, second, "... the context of an investigatory interview that 'an employee reasonably believes will result in disciplinary action.'" In this case, concluded Arbitrator Axon, neither of the two conditions was proved to exist during the meeting in question.

Arbitrator Axon then went on to identify "five basic reasons" why he holds that Grievant Atwood did not have a reasonable belief that the meeting

*SEIU 05-07,
Article 20—
Discipline
and
Discharge,
Section 5:*

*Upon
Request and
EE shall
have the
right to
Union repre-
sentation
during an in-
vestigatory
interview
that an EE
reasonably
believes will
result in
disciplinary
action. The
EE will have
an
opportunity
to consult
with a local
Union
Steward or
Field Rep
before the
interview,
but such
designation
shall not
cause an
undue delay.*

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Employees (EES) do not have Weingarten rights (WR) when a manager is just giving instructions, correcting work technique or training the employee.

Nor do EES have WR when discipline is being imposed.

Employers have no obligation to inform EES of this right prior to conducting any investigatory interview. EES have WR only if they request a Union Rep.

Management should ALWAYS be CLEAR about the purpose of the meeting.

would result in disciplinary action: “First, [DM] advised Grievant that the purpose of the meeting was not disciplinary. Second, [DM] told Grievant Atwood at the commencement of the meeting that the purpose of the meeting was to discuss job expectations regarding weekend work and to confirm Grievant could no longer work on Sundays because of his religious beliefs. Third, [DM] ... asked Grievant questions to fulfill the protocol on religious accommodations. The subject matter of the interview was not an area that could result in discipline. Fourth, [DM] had no evidence or belief Grievant had violated any Employer requirement concerning weekend work.... Fifth, absent from the record is any evidence the Employer had ever disciplined any employee for refusing to perform weekend work.” (Emphasis in original)

Addressing the Union’s argument that the meeting was investigatory, the Arbitrator explained that, “The evidence is undisputed [DM] repeatedly told Grievant that the purpose of the meeting was not disciplinary, but to gather information to accommodate Atwood’s religious beliefs. The inquiry was prompted by the fact that Atwood had stated that he could no longer work Sundays because of his religious beliefs. ... All of the information sought by [DM] pertained to future events that may or may not occur. None of the questions directed at Atwood [by DM] were intended to elicit information regarding prior incidents that would lead to discipline. ... Grievant missed the point that the Sunday in question had not arrived so there was no issue concerning the propriety of whether he had actually failed to work as directed.”

Regarding Grievant Atwood’s testimony that “... he had a right to Union representation whenever he was in fear of losing his job,” Arbitrator Axon noted that the right to representation is “... conditioned not on fear.” Rather, the contract states, in part, “... an employee shall have the right to Union representation during an investigatory interview that an employee reasonably believes will result in disciplinary action.” (Emphasis added by the Arbitrator). The Arbitrator concluded: “...Grievant did not have a reasonable belief the [meeting] was an investigatory interview or a reasonable belief the meeting ‘will result in disciplinary action.’”

Use of Profanity

While there was conflicting evidence, the Arbitrator found that, “...[the steward] did utter the word ‘f---er’ at the conclusion of a volatile telephone conversation with [DM]. The comment was made in the break room at the Humbug shop. Other employees were present in the break room who could readily overhear [the steward’s] words.” A former Union representative testified that the steward called him after the incident and admitted to him that he had called DM a “f---er.” This corroborated the testimony of both DM and the office manager that they heard the steward use the expletive in reference to DM and “further undercuts” the steward’s testimony that he did not recall using the word. The steward is, moreover, “... an experienced employee and shop steward who understands that if you call your supervisor a profane name in the presence of other employees, consequences are likely to follow.” While several Union

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witnesses testified that they “did not hear” the steward use the expletive, “None of the Union witnesses testified unequivocally that [the steward] did not call [DM] a ‘f---er.’” Arbitrator Axon concluded that, “... the Union’s evidence was insufficient to contradict the testimony of [DM and the office manager] that they heard [the steward] direct the profanity at [DM].”

Finding the steward’s could-not-recall explanation “implausible,” the Arbitrator also sustained the false and/or misleading information charge.

Finally, addressing the Union’s argument that because the steward was acting in his steward capacity when he used the profanity it was protected conduct, Arbitrator Axon focused on the setting and circumstances of the incident -- a break room with other employees present as opposed to a private office during a grievance meeting. “Simply put,” concluded the Arbitrator, “verbally abusing a supervisor while in the work place in the presence of coworkers is not protected activity.”

Both grievances were denied.

In the Matter of the Arbitration Between the State of Oregon, OYA (Oregon Youth Authority) and SEIU Local 503, OPEU (Arbitrator, Sylvia Skratek; June 30, 2006)

The Arbitrator reinstated a long term employee with no prior disciplinary history who had been dismissed for allegedly engaging in personal matters and committing theft while on the job. The Arbitrator found the charged misconduct to be minor in nature and mitigated by the circumstances. The conduct included the picking of several tulips without permission from the front area of a McDonald’s restaurant while the Grievant was in charge of youth offenders during a lunch break, taking the flowers to his girlfriend’s work location a half mile away in the van the Grievant was using to transport the offenders, and leaving them on his girlfriend’s car.

Facts: The Grievant had worked as a Group Life Coordinator 2 for the Oregon Youth Authority since 1995. His duties included supervision, control and treatment of youth offenders and required strict adherence to security measures and acting as a positive role model. There had been no formal disciplinary action taken against the Grievant in the past three years.

On the morning in question the Grievant was directed to substitute for another employee who had called in sick. This assignment included supervising a work crew and later transporting them in a state-owned van to McDonald’s for a lunch break. The Grievant had planned to take his girlfriend to lunch that day but had to cancel the engagement due to his changed work assignment. His girlfriend had been going through some significant health problems and was facing major surgery. While sitting in

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Equality Principle:
Under the NLRA, stewards & union reps have a protected legal status. When engaged in rep activities they are considered to be equals with mgmt. They are protected from retaliation or discrimination for raised voices, gestures, forceful expressions, or threats of legal action. Non-protected actions include: threats of violence, extreme profanity, racial epithets, violence, illegal work-stoppages, work disruptions, slow-downs, and filing grievances in bad faith.

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the van at McDonald's, he spotted several tulips in the front area of the McDonald's property. He put the van keys in his pocket, stepped out of the van for "a few seconds," picked a few tulips and got back into the van. With the offenders in the van, he then drove it approximately ½ mile to the clinic where his girlfriend worked, stepped out of the van "for a few seconds" placed the tulips on her car and drove the van back to the work site.

After conducting an investigation, the Employer commenced pre-dismissal proceedings. In addition to the McDonald's incident, the Grievant was charged with repeatedly leaving youth unsupervised for periods of time while he engaged in personal business and one occasion of failing to obtain approval from his supervisor to leave work early.

The Grievant provided the Employer a letter written by the McDonald's store manager stating that McDonald's does not view the Grievant's conduct as theft and would not take any legal recourse against him. The Employer considered the letter but felt that it did not establish that the Grievant had permission to take the flowers and did not change the fact that he had committed theft when he took the flowers in the presence of the youth offenders he was supervising.

Question Presented: Did the Employer have just cause to dismiss the Grievant?

Discussion and Ruling: The Arbitrator began her analysis by citing the Latin maxim, "*De minimis non curat lex*," which means the law does not concern itself with trifles. She explained that, "The Employer's reliance on a strict interpretation of Oregon Statutes to dismiss a long term employee fails to take into consideration this very basic, but too often ignored concept. ... This case requires that a common sense perspective be brought to an action that was nothing more than the picking of a few flowers." While other charges were made against the Grievant, the Employer stated at the arbitration hearing that it considered the alleged theft in the presence of the offenders to be the main reason for the Grievant's dismissal and that this charge alone was egregious enough to justify his dismissal.

Addressing the Employer's argument that the Grievant had left the youth unsupervised when he left the van, the Arbitrator explained that the Grievant "... took care to make certain that he removed the keys to the van and that he was no more than a few steps away from the van enabling him to be fully aware of the activities within the van." An Employer witness testified that while supervising offenders, every single youth need not be in direct visual sight, so long as the staff person knows exactly where every single youth is situated. Finding that, "At no point did [the Grievant] leave the youths unsupervised," the Arbitrator concluded that she, "... has no doubt that [the Grievant] knew exactly where every single youth on his work crew was situated when he stepped a few feet out of the van for a few seconds to pick the tulips."

Most arbitrators accept that implicit in the concept of just cause for discharge is a requirement to take a progressive or corrective approach to discipline before resorting to the ultimate penalty of discharge.

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Regarding the extra mileage driven by the Grievant to his girlfriend's work site, the Arbitrator cited the testimony of an Employer witness that it is not unreasonable to provide a change in scenery for the youth offenders during their lunch break. Based on this testimony, the Arbitrator found, "... that a one mile deviation during a lunch break with the youth offenders cannot be viewed as a violation of any stated policy." The Arbitrator also noted that the fact that the Grievant was required unexpectedly to be on duty during his lunch break, "... must be taken into consideration when viewing the one mile deviation."

The Arbitrator clarified that she, "... is not suggesting that theft by an employee is a trifling matter however she does question the Employer's determination that the picking of the tulips was a theft. Strict reliance on the Oregon Statutes would make thieves of many ordinary individuals for their everyday ordinary actions: the taking of condiments that were not needed for a food order; the appropriating of napkins to clean a car windshield; the use of a hotel ice maker to fill a picnic cooler; the removal of bathing amenities from a hotel room. None of these actions could reasonably be expected to lead to one's arrest" The letter from the store manager, moreover, showed that he did not consider the picking of the flowers to be theft and that, "... McDonald's wanted no part of the Employer's action."

The Arbitrator concluded that the Grievant "... did not engage in theft and did not violate any stated policy when he drove the one mile roundtrip during the lunch break with the youths in the van to place the flowers on the windshield of a car." Rather, his actions were, "... nothing more than an act of kindness." The Arbitrator noted that she is, "... perplexed as to how the Employer could make the leap from the Grievant being a good, long term employee with no performance deficiencies to the Grievant being a thief who engages in anti-social behavior. It simply makes no sense."

Regarding the charge that the Grievant failed to obtain approval from his supervisor to leave work early, the Arbitrator explained that the incident occurred immediately before the surgery of the Grievant's girlfriend: "He left work an hour early to assist her in her preparations. He checked with his coworkers and they did not have any concerns that he left early. He reported the time on his ... timesheet. He explained ... why he could not contact his supervisor due to his supervisor being away from the facility on a fishing expedition with [youth offenders]" The Employer, moreover, did not provide any evidence that the Grievant could, in fact, have contacted the supervisor. The Arbitrator concluded that, "... given the circumstances of his girlfriend's major surgery coupled with the fact that the Grievant is an employee with an impeccable attendance record there is no cause to raise this one hour incident to the level of a charge to be considered as part of a discipline or dismissal proceeding."

The Employer also asserted that the Grievant had, on other occasions, repeatedly left youth unsupervised for periods of time while engaging in personal business. The Arbitrator, reviewing the evidence presented in

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The principle of progressive discipline is based, generally, on the notion that it would be unjust to discharge an employee if the employer has not first attempted to correct the misconduct with a lesser penalty or penalties.

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Due Process requires that an employee be informed promptly, and in reasonable detail, of the charges (or possible charges) against him or her.

support of this charge, found that on one occasion the Grievant received a phone call from his girlfriend while he was supervising youth offenders who were “high tag” (the most trusted level of offender). The call was made to him because his girlfriend was upset about her upcoming major surgery. It was, noted the Arbitrator, “... not a casual, social telephone call....” The Grievant, while acknowledging the phone call, testified that, “... at all times he knew exactly where every single youth was situated.” The Arbitrator also noted that there is no Employer policy restricting an employee from receiving a personal phone call at work. The Employer, furthermore, waited more than a month before bringing this charge forward, “... relying upon sketchy information provided by other staff sometime after the alleged occurrences.” Due process, noted the Arbitrator, “... requires that an employee be informed promptly, and in reasonable detail, of the charges (or possible charges) against him. When coworkers point the finger at an employee, an employer has an obligation to verify or find support for the allegation. Rumors, innuendos and hearsay are insufficient reasons for an employer to move forward against an employee. ... A vague reference to a couple of dates from staff who were not on duty at the time is not sufficient to conclude that the Grievant left youth unsupervised while attending to his personal business.”

The Arbitrator ruled that the Employer did not have just cause to dismiss the Grievant. She ordered that the Grievant be reinstated and receive compensation for all lost wages and benefits.

NOTES FROM THE DEPARTMENT OF JUSTICE

by Leigh A. Salmon—Labor & Employment Section



NEW US SUPREME COURT CASE ON EXERCISE OF PUBLIC EMPLOYEES' FIRST AMMENDMENT RIGHTS IN THE WORKPLACE

Introduction

On May 30, 2006, the United States Supreme Court issued its decision in the case of *Garcetti v. Ceballos*.¹ The Court ruled 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.”² This development is significant because it means that, in such circumstances, public employees may be disciplined or otherwise retaliated against for speech without First Amendment scrutiny, regardless of whether the speech touches on matters of “public concern.” Determining when a public employee makes statements pursuant to his official duties is not a simple task, however, and employers must continue to be cautious when imposing discipline based on speech-related conduct.

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Facts

Ceballos was employed as a deputy district attorney in the Los Angeles County District Attorney's Office. In the course of performing his job responsibilities, he reviewed an affidavit used by police to obtain a critical search warrant. Ceballos concluded that the affidavit contained serious misrepresentations and recommended to his supervisors, through an internal memorandum, that the case be dismissed. A heated exchange occurred during a meeting between Ceballos, the Sheriff's Department, and Ceballos's supervisors when the Sheriff's Department sharply criticized Ceballos's handling of the case. Despite Ceballos's concerns, his supervisors decided to proceed with the case. Ceballos was called as a witness for the defense to testify about his observations about the affidavit, but the trial court rejected the challenge to the warrant.³

After the trial, Ceballos was transferred to a position he found less favorable and denied a promotion. He sued his supervisors in federal court, claiming that he was retaliated against for his speech, in violation of the First Amendment to the United States Constitution.⁴

Legal Background

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . ."⁵ The Supreme Court has interpreted that to mean that when acting as sovereign, the government generally cannot punish citizens for the content of their speech.⁶ When the government acts as employer, however, to ensure a harmonious and effective workplace, there are limitations on government employees' First Amendment rights.⁷

Before *Garcetti*, to determine whether a public employee's workplace speech was protected, courts would engage in the "*Pickering* balancing test:" if a public employee was speaking on matters of public concern as a citizen, courts would balance the interests of the employee in commenting upon matters of public concern against the interests of the state, as an employer, in promoting an efficient and harmonious workplace.⁸

The Court's decision in *Pickering* provides a good example of that balancing. There, a school teacher wrote a letter to a local newspaper addressing issues such as the school board's funding policies. In balancing the competing interests, the Court noted that the teacher's speech did not impede his teaching performance or "interfere[d] with the regular operation of the schools generally."⁹ The Court concluded that such speech, even though speaking "on subjects closely tied to the employee's own job,"¹⁰ was protected because of the minimal effect it had on the working environment.

The Supreme Court's *Garcetti* Analysis

With that framework in mind, the Supreme Court addressed a specific question in *Garcetti*: Does the First Amendment protect an employee who



The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states.



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Oregon Constitution, Art. I, section 8, states “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.”

speaks on matters of public concern, but does so in the performance of his official job duties? The Court concluded that, when the employee is speaking pursuant to his official duties, the employee does *not* speak as a citizen for First Amendment purposes, “and the Constitution does not insulate [his] communications from employer discipline.”¹¹ Effectively, this addressed the *Pickering* balancing test by concluding that, in such situations, *Pickering* does not apply, and the employee will never receive First Amendment protection, regardless of whether the speech concerns matters of public concern.

In reaching this conclusion, the Court reasoned that an employee is performing his job when he speaks as part of that job. Because a public employer may discipline an employee based on his job performance, the employer may discipline the employee for speech made pursuant to the employee's job requirements. The controlling factor was whether Ceballos's speech was made pursuant to his “official duties.”¹² In other words, the speech would not have occurred but for his responsibilities as an employee.¹³ Because Ceballos's memo was a part of his official job duties as a deputy district attorney, and the memo would not have existed but for his duties as a district attorney, his superiors had the authority to take disciplinary action if they believed that the memo was inflammatory or otherwise objectionable.

The Court specifically did not set out a framework for defining the scope of what constitutes an employee's official duties, particularly where there is room for debate. What the Court did say, however, is that public employers cannot restrict employees' rights by drafting overly broad job descriptions.¹⁴ According to the Court, “[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.”¹⁵ Thus, it is simply not enough to point to a formal job description as justification for disciplining an employee based on his or her speech. The speech must be a requirement that the employee is legitimately expected to perform as a part of his job.

Finally, it is important to note that the Supreme Court expressly excluded from its consideration “expression related to academic scholarship or classroom instruction.”¹⁶ While such speech is, arguably, a requirement of the academic's official job requirements, the Court noted that it may implicate additional constitutional protections.

What Impact Does *Garcetti* Have on the State of Oregon as an Employer?

As a practical matter, the *Garcetti* decision may have little or no impact on the State of Oregon as an employer. Simply because an employee's speech is not protected by the First Amendment does not mean that the speech is not otherwise protected under the law. An employee may be entitled to protection under the Oregon Constitution¹⁷ or under the whistleblower statutes.¹⁸ Accordingly, public employers still must use caution in disciplining or otherwise retaliating against an employee on the basis of his speech.

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Practice Tips for HR

The Labor and Employment Section of the Department of Justice suggests the following practice tips for state agencies:

- *Always* consult the DOJ for advice before taking any action on personnel matters involving free speech issues.
- When considering the discipline of an employee for speech or expressive conduct, DOJ will look first to see if that speech was made pursuant to the employee's official job requirements, so be sure to provide DOJ with all of the pertinent information about the employee's duties. Those requirements will be practical in nature—not necessarily based on the formal job description. Whether the employee was asked by a supervisor to engage in the speech and whether the speech was done regularly as a part of the employee's job will be important facts. If the speech was made pursuant to the employee's legitimate job requirements, then there is no First Amendment Protection.
- If the employee's speech is *not* made pursuant to his official job requirements, the court will apply the *Pickering* balancing test: Is the employee speaking on matters of public concern? If so, the court will then determine to what degree that speech disrupts the agency's workplace and balance that against the employee's interest in expressing himself and the public's need for the information. If there is minimal workplace disruption, or if the matter of public concern is particularly important, then the employee's speech may be entitled to First Amendment protection.
- The Court's opinion in *Garcetti* has the effect of providing more protection to employees who initially go public with their information in lieu of going "up the chain of command." To avoid having matters made public, consider setting up a procedure to protect and to allow employees to come forward internally with potentially embarrassing information.

[1] *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).

[2] *Id.* at 1960.

[3] *Id.* at 1955-56.

[4] *Id.* at 1956.

[5] The First Amendment has been applied to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 n.4 (1964).

[6] See *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[7] *Garcetti*, 126 S.Ct. at 1957-58.

[8] *Pickering*, 391 U.S. at 568.

[9] *Id.* at 572-73.

[10] *Garcetti*, 126 S.Ct. at 1964 (Souter, J., dissenting).

[11] *Id.* at 1960.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1961-62.

[15] *Id.* at 1962.

[16] *Id.*

[17] Oregon Constitution, Art. I, section 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.")

[18] See, e.g., ORS 659A.200 to 659A.224.



Always consult the DOJ for advice before taking any action on personnel matters involving free speech issues and be sure to ALWAYS provide all the pertinent information about the employee's duties.

BARGAINING CONCEPTS

The Labor Relations Unit received over 120 bargaining concepts regarding a wide variety of issues ranging from contract language to compensation. The Labor Relations Unit will be reviewing all concepts over the next few months. If you have any questions regarding bargaining concepts please contact your assigned Labor Relations Manager. For a current list of Labor Relations Manager Agency Assignments to to:

<http://www.das.state.or.us/DAS/HR/docs/lr/LRUContAdm2106.pdf>



ABOUT HRSD'S SECTIONS:

Human Resource Management & Consultation

The HR Management and Consultation (HRMC) Section develops and implements the state's workforce management plan; develops and administers HRSD rules and policies; and provides consulting services and technical assistance to agency HR offices.

HR Systems, Services and Audits

The HR Services Unit is responsible for ongoing operation and security of the statewide computerized HR system. The HR Audits Unit provides administrative review of state agencies' human resource management practices to ensure compliance with personnel relations law, rules, and policies. The HR Services Unit administers the retirement benefit reporting and reconciliation process for all state employees.

Statewide Training & Development & Recruitment Services

Statewide Training and Development Services is committed to increasing the effectiveness of Oregon State Government by providing state and local government employees with high quality training that is accessible, affordable, and relevant. Recruitment services are provided for State Agencies through this unit.

Labor Relations Unit

The Labor Relations Unit represents the Governor on behalf of all executive branch agencies in collective bargaining. Currently the Labor Relations Unit administers 32 collective bargaining agreements. These cover approximately 26,000 employees who are represented by 11 different labor organizations and one SEIU bargaining unit of 25,000 home care workers.

Classification and Compensation

Classification and Compensation is responsible for maintaining the State's compensation plan for approximately 40,000 employees in classified, unclassified and management service positions, and is responsible for development and maintenance of the classification system.