Enemy of the People: Pleading the First Amendment Retaliation Claim

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An Enemy of the People, a Norwegian play written by Henrik Ibsen, explores how the fictional Dr. Thomas Stockmann can fall from celebrated citizen to despised pariah in the court of public opinion. After conducting several scientific experiments, Dr. Stockmann discovered the town's popular bath houses, from which local businesses derived significant revenue, were contaminated with bacteria and caused serious illness to its tourist customers. When Dr. Stockmann announced his discovery, he expected to be lavished with civic pride and reward for protecting the health and reputation of the town. Instead, Dr. Stockmann was defamed by civic leaders, including his own brother as town mayor, for an announcement that could lighten their wallets. Throughout the remainder of the play, town citizens retaliate against Dr. Stockmann in various ways in an attempt to run him out of town.

While Dr. Stockmann may not have been a town "employee" as defined under American law, citizens who speak out about civic waste and harm to the public interest may fear reprimand, suspension or termination from their government employer. Accordingly, the First Amendment of the Constitution of the United States of America has been construed to protect federal, state and municipality workers from employer-based retaliation in certain circumstances. This article aims to identify whether a viable First Amendment Retaliation claim exists when drafting or responding to a pleading.

As a preliminary matter, a non-employee citizen needs to meet a lower burden than a government employee to establish a First Amendment Retaliation claim. This article focuses on public sector workers only, whether a non-employee has a First Amendment claim is outside the scope of this analysis. Also, these types of claims must be brought through the vehicle of 42 U.S.C. § 1983, meaning if there is no "state action" or "state actor", there will be no claim.

The United States Supreme Court initially set forth the analysis for a First Amendment Retaliation claim in Pickering v. Board of Ed. of Township High School Dist. 205, 391 U.S. 563 (1968). In Pickering, a teacher was discharged after challenging the school district employer's funding policies in a local newspaper article. The Court found a viable claim under the First Amendment for retaliation would exist if the teacher spoke as a citizen on a matter of public concern and the school district did not have an adequate justification for treating the employee differently from any other citizen. If the school district could

demonstrate such justification, then the First Amendment interests of the employee are weighed against the school district's need to squelch that speech to maintain order and discipline within the working environment (the "Pickering balancing test").

The Pickering balancing test still exists today, however, the recent Court decision of Garcetti v. Ceballos, 547 U.S. 410 (2006) has seemingly set a higher threshold for government employees attempting to establish a First Amendment Retaliation claim. The Garcetti case concerned a deputy district attorney who claimed he suffered various forms of retaliation after circulating a written memorandum about a botched prosecution. While restating the Pickering analysis, the Garcetti court also stated that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy". As recommending whether a person should be prosecuted was within the job functions of a deputy district attorney, the Garcetti court found the employee was not speaking as a citizen on a matter of public concern and denied a First Amendment Retaliation claim. Id. at 421.

From Pickering and Garcetti, most federal district courts utilize the same standard when evaluating a First Amendment Retaliation claim, examining whether the employee (1) spoke as a citizen on a matter of public concern; (2) suffered an adverse employment action; and (3) the speech was a substantial or motivating factor in the adverse employment action. In our opinion, federal district courts interpreting Garcetti have been increasingly likely to dismiss a government employee's First Amendment Retaliation claim before an answer to a complaint is filed. Our cursory research suggests that, since Garcetti, federal district courts have issued 525 reported and unreported decisions based on Fed. R. Civ. P. 12(b)(6) challenges to First Amendment Retaliation claims.

Whether a government employee "spoke as a citizen on a matter of public concern" is usually interpreted as a question of law and federal district courts seem much more likely to engage in this analysis based on the pleadings alone. Focusing on the content and form of the alleged speech, a First Amendment Retaliation claim is likely to be dismissed if its content is clearly intertwined with the employee's job responsibilities. Written statements in a police report, for example, are unlikely to create a First Amendment Retaliation claim because part of a police officer's duties is to prepare a written report of alleged criminal activity. Generally, we have found police and fire department employees are held to a higher standard in First Amendment Retaliation cases because of obvious health and safety considerations within their profession.

Despite its holding, Garcetti warned civic employers that it cannot immunize itself from the First Amendment by creating extremely broad job descriptions. An employer cannot claim reporting waste was an employee's job responsibility based on a position requirement that all employees have good communication skills. Nevertheless, courts

consider the necessary job functions of a position as a "practical" analysis and may be willing to dismiss a First Amendment Retaliation claim based on the pleadings if it is clear the employee was engaged within the scope of his or her employment when making the speech.

Another good rule of thumb is to consider the mode and timing of the speech when evaluating a First Amendment Retaliation claim. A government employee who comments on wasteful spending of other departments while explaining the annual budget for his or her own department is less likely to state a First Amendment Retaliation claim. Yet, the same speech, may receive First Amendment protection if made at a point of the meeting where citizen comments are solicited. The pleading needs to be clear that the employee was speaking as a citizen at the time the comments were made or it could be vulnerable to a motion to dismiss.

Beyond speaking as a "citizen", courts also scrutinize whether the speech addressed a "public concern". While the public concern aspect of First Amendment Retaliation claims is interpreted broadly, speech concerning purely internal grievances is less likely to be protected. If the facts presented indicate the speech rose out of a conflict between the government employee and a supervisor or co-worker, such may make the First Amendment Retaliation claim vulnerable because it implies the government employee was motivated by personal concerns when engaging in the speech.

Speech is also less likely to be of "public concern" exposing specialized knowledge or confidential material. A government employee who divulges information learned during closed-session meetings protected by executive privilege may not be protected from employer discipline by the First Amendment. The issue of specialized knowledge, however, may present a trickier issue because public interest is necessarily benefitted by transparency from experts in the field who work within the government. Therefore, while courts seem more willing to evaluate whether a government employee was speaking "as a citizen" based on the pleadings alone, whether that speech was a "matter of public concern" is more likely to be reserved until time of summary judgment or trial unless it is clear from the complaint the speech was a personalized grievance or based on purely confidential material.

The type of audience and substantive value of speech are factors which, surprisingly, may have little impact on the viability of a First Amendment Retaliation claim in a complaint. First Amendment Retaliation cases can be actionable regardless of whether the speech is provided to superiors internally or to the general public at a mass meeting, so long as the employee can demonstrate he or she was acting as a citizen at the time of the speech. Whether the speech contains false statements is also less relevant, unless the employee made such statements knowing they were false or with reckless disregard as to their truthfulness. Even then, however, such would likely be considered a question of fact not pertinent until

summary judgment, at the earliest.

Even after establishing the government employee was speaking as a citizen on a matter of public concern, a complaint must still set forth sufficient facts indicating the remainder of the Pickering analysis will be met; that he or she suffered an adverse employment action caused by the speech. While these issues may present questions of fact, a First Amendment Retaliation claim can be dismissed if either of these factors are missing from the complaint.

An "adverse employment action" within a First Amendment Retaliation context is usually broader than required in a discrimination or retaliation claim brought through Title VII of the Civil Rights Act of 1964 ("Title VII"). Courts often find a well-pled adverse employment action where the employer took some action or inaction which, if true, would chill a reasonable person from exercising his or her free speech rights. First Amendment Retaliation claims have been actionable for position transfers with no change in salary or benefits, written reprimands and proverbial "shunning" by supervisors and co-workers. Yet, mere verbal reprimands and threats are less likely to qualify as an adverse employment action unless sufficiently specific and outrageous to frighten a reasonable person. Courts also recognize the constructive discharge doctrine, where an employee resigns his or her position while under duress, through a similar standard as accepted in Title VII cases.

Whether speech was the "substantial or motivating factor" behind the adverse employment action is usually a question of fact, unless the timing between the speech and the adverse employment action is unusually remote. Most First Amendment Retaliation claims can survive a Fed. R. Civ. P. 12(b)(6) motion based on temporal proximity alone, so long as the adverse employment action occurred weeks or months after the speech. If, however, years have passed between speech and the adverse employment action, and there are no facts connecting the two in the interim, then a court may be willing to dismiss a First Amendment Retaliation claim on this issue based on pleadings alone. Like Title VII claims, direct evidence connecting the speech to the adverse employment action usually minimalizes the importance of temporal proximity between the two events.

First Amendment Retaliation claims also present fact patterns supporting alternative theories of relief. Many states have enacted "whistleblower" statutes which provide additional protection beyond the First Amendment. First Amendment Retaliation claims may also lead to other Constitutional claims under the Fourteenth Amendment for procedural and substantive due process as well as conspiracy claims us 42 U.S.C. § 1985.

We encourage you to research recent First Amendment Retaliation cases decided within your own jurisdiction to learn how Pickering and Garcetti are applied locally.

Federal district courts in a variety of jurisdictions have interpreted both cases broadly and narrowly in a variety of contexts. Understanding what fact patterns exhibit a strong First Amendment Retaliation claim is important before engaging in a lengthy and expensive discovery process.

Keywords: First Amendment Retaliation, Garcetti, Pickering, matter of public concern, whistleblower, 12(b)(6), adverse employment action, temporal proximity, free speech.

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