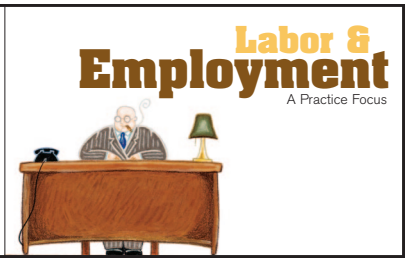
Legal Times
WEEK OF MAY 21, 2007 • VOL. XXX, NO. 21
ALM

More Than Employees

Citizens working in government need better constitutional protection from retaliation.



By Paul M. Secunda

Well before the Supreme Court's April bombshell decision in *Gonzales v. Carhart* that upheld a federal ban on "partial-birth" abortion, Justice Samuel Alito Jr. was the decisive vote in another significant case.

This case most likely would have come out differently if Justice Sandra Day O'Connor, not Alito, were still on the Court. Indeed, *Garcetti v. Ceballos* had to be argued again after O'Connor retired, apparently because the Court's remaining members had deadlocked.

Alito's vote with the majority in *Ceballos* involved not abortion, but the free-speech rights of public employees. In *Ceballos,* the Supreme Court held that the First Amendment provided absolutely no protection to an assistant district attorney who alleged that he suffered retaliation when he spoke out against law enforcement corruption. The majority held, "[W]hen 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."

It has been almost a year since that decision, and with the benefit of that perspective, the ruling's significance, though not necessarily apparent on its face, can hardly be overstated.

The case does nothing less than redefine the whole conception of what role public employees should play in ensuring the fair and efficient administration of government services. Through its holding, the Court has now made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers.

At the Vanguard

So how did we arrive at this unfortunate state of affairs? Before *Ceballos,* the Court had focused the debate over public employee free-speech rights on whether speech was about a matter of public concern or about purely private matters. This distinction was important because, under the Court's formulation established in *Pickering v. Board of Education* (1968), only speech on matters of public concern was due some form of First Amendment protection.

Pickering held that when public employees speak as citizens on matters of public concern, their First Amendment rights had to be weighed against their employer's interests in running an efficient governmental service. This is not the same robust protection that ordinary citizens receive for their speech against government restrictions, but nonetheless, the framework provided a modicum of protection for public employees who wanted to be part of the debate on issues of the day and did not want to jeopardize their jobs by doing so.

So, at least under *Pickering* and its progeny, it was not inconsistent that the same person could be both an effective government employee and an effective citizen concerned for the greater society. Under this conception of public employment, there was no internal tension within these citizen-employees, because when they spoke publicly to point out an injustice in government or to right a government wrong, not only were they making their own workplace better, but they were making society better, as well.

The Court itself developed this idea that public employees play a unique role in a representative democracy. Given the sheer size of American government, it is impossible for ordinary citizens to keep tabs on everything their government is doing at any given time. Because government employees are part of the process of providing government services, they are ideally situated to raise alarms when something goes amiss. They are quite simply the vanguard of the citizenry. This is so not only because of their physical proximity to the problem but also because of their special expertise in dealing with the governmental issues that come to their attention.

In particular, the Court embraced the concept of a public-employee vanguard when discussing the importance of allowing the schoolteacher in *Pickering* to speak out on legitimate matters of public concern: "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 operations of the schools should be spent.

Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

A Public Employee Divided

Justice Anthony Kennedy's opinion for the five-justice majority in *Ceballos* introduces a revolution in thought from this previous view of citizens as a vanguard.

In essence, the Court declares in *Ceballos* that it is no longer possible to be a citizen and a public employee simultaneously. The Court divides government employees' speech into two rigid, separate categories: speech pursuant to official duties and speech engaged in as a citizen. And ne'er the twain shall meet.

In other words, even when the government engages in malfeasance, this new conception of public employment robs public employees of their ability to speak out honestly and inform other citizens about problems occurring within government. Like their private-sector counterparts, these employees are subject to the whim of their employers if they decide to engage in such speech. Under Kennedy's miserly conception, public employees retain no qualities of citizenship while in the public workplace.

Employers can easily game this new system by writing all-encompassing job descriptions so that employees are never truly speaking as citizens while at work. If they want to again become citizens and exercise the attendant rights that come with citizenry, these employees must wait until they leave the workplace before speaking out publicly. For them, being a concerned citizen must be reserved for after work hours.

Speaking Out

One need only consider the facts of *Ceballos* and one representative lower-court case since *Ceballos* to gauge the impact that this holding will have on the effective functioning of government.

Richard Ceballos was a deputy district attorney for Los Angeles County in California. In his position as calendar deputy, he made sure that search warrants contained proper information before they were used for criminal investigations. Ceballos learned that one of the warrants that he was asked to approve contained misrepresentations. After confirming these misrepresentations, he recommended that the case be dismissed because of the defective warrant.

When his superiors refused, Ceballos testified on the defense's behalf at trial. For his troubles, Ceballos was retaliated against by being denied a promotion and by being given a less prestigious assignment in a less desirable part of the county.

Although Ceballos clearly appeared to be speaking out on a matter of public concern involving the administration of justice, the majority concluded that Ceballos' speech was pursuant to his official duties. He was thus entitled to no First Amendment protection and could be disciplined accordingly.

It does not stretch the imagination to see that the consequence of this holding is likely to deter other conscientious district attorneys from confronting their bosses with allegations of misconduct. And, of course, we are all diminished when bad deeds go unpunished.

Seeing the Harm

One example of how the lower federal courts are likely to apply this precedent comes from a January case in the U.S. Court of Appeals for the 6th Circuit. In *Haynes v. City of Circleville, Ohio*, a police officer was fired for complaining about the incompetence of his superior in reducing training for the canine unit and for asserting his belief that these actions would adversely affect public safety.

Before *Ceballos*, the police officer survived summary judgment in the district court on his First Amendment retaliation claim because he was clearly speaking out on a matter of public concern. After *Ceballos* came down, however, the 6th Circuit dismissed the officer's claim. Once the court classified the officer as a "public employee carrying out his professional responsibilities," from that point forward he was robbed of citizen status and was considered a mere employee without constitutional protections.

Remarkably, the court hinted that if the police officer had taken his gripe outside the police department and written a letter to a newspaper editor criticizing the city's canine program, he could have received First Amendment protection.

The perverse incentive thus established by *Ceballos* is for employees such as the officer in *Haynes* not to bring their concerns and complaints through internal dispute mechanisms, but rather to make any workplace disagreement into a public affair. One would think such outcomes would fly in the face of *Pickering*'s concern of ensuring the efficiency of governmental service.

All in all, *Ceballos* is counter to having public employees act as the eyes of the citizenry upon government operations. It is also counter to the unequivocal statement in the Court's 2004 per curiam decision in *City of San Diego v. Roe* recognizing "the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment."

In short, the holding in *Ceballos* is counter to good government. Without the ability of public servants to bring to light government's baser practices, all citizens suffer from the resulting lack of government transparency and accountability.

A year after the *Ceballos* decision, the time has already come to turn away from the case's stilted conception of an individual being either an employee or a citizen, incapable of being both.

A citizen does not cease being a citizen just by walking through the door of a government employer. *Ceballos*' pigeonholing of citizen-employees as mere employees does not comport with how most employees view themselves. Nor does it comport with the reality of the modern public workplace, where employee-citizens discuss and speak out on issues of public concern as a matter of course.

It is time to give First Amendment protections back to public employees speaking out on matters of public concern. They should not have to rely on statutory whistle-blowing protections, which may not protect their specific activity and which, unlike the First Amendment, may not apply at all levels of government.

The time has already come for the Supreme Court to overturn its erroneous *Ceballos* decision. It's time to call citizen-employees back to the vanguard.

Paul M. Secunda is an assistant professor of law at the University of Mississippi School of Law in University, Miss. He is also the co-editor of the Workplace Prof Blog. He may be contacted at psecunda@olemiss.edu.