

## THOUGHT LEADERSHIP

LEGAL UPDATES

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# U.S. Supreme Court Clarifies First Amendment Citizen Speech Protections for Government Employees

On June 19, 2014, the U.S. Supreme Court handed down its decision in *Lane v. Franks*, a case closely watched by public employers, institutions of higher education, and employment lawyers. The case is about First Amendment-protected speech for government employees and qualified immunity for government employers. The unanimous decision, which affirmed in part and reversed in part a finding by the Eleventh Circuit, may provide greater clarity in formerly uncertain areas of the law.

## What This Means to You

The Supreme Court's decision in *Lane* may prove significant for government employers because (1) it provides a clearer analysis for discerning between citizen speech and employee speech; and (2) it provides more definite limits to the application of the *Garcetti* analysis. The First Amendment protection provided for public employee speech is limited to speech by a citizen on a matter of public concern where the government does not have an adequate justification for treating an employee differently from another member of the public. The *Lane* decision also provides clarity for public employers in weighing First Amendment interests and the interests of the government as an employer.

More important, *Lane* reaffirms the proposition that officials who make employment decisions are entitled to qualified immunity when the law is unsettled. Unless legal precedent clearly precludes the relevant employment action, government employers who reasonably believe their actions are justified will receive qualified immunity for those actions.

## Background

“Speech by citizens on matters of public concern lies at the heart of the First Amendment.” As recounted by the Supreme Court in *Lane*, an employee does not relinquish his or her constitutional rights as a condition of employment by a public employer. Yet, there remains a tension between balancing the interests of the employee as a citizen, and the interest of the state as an employer. The framework for determining whether a public employee’s speech is entitled to protection can be found in *Garcetti v. Ceballos*.

First, did the employee speak as a citizen on a matter of public concern (i.e., relating to political, social, or other community concerns, or a subject of legitimate news interest, based on content, form, and context of the speech)? The critical question on the first *Garcetti* element is whether the speech at issue is “ordinarily within the scope of an employee’s duties.” Speech that is ordinarily within the scope of an employee’s duties is employee speech and outside the protections of the First Amendment (e.g., an internal memorandum prepared by a deputy district attorney for his supervisors).

Second, if the employee spoke as a citizen on a matter of public concern, did the government entity have an adequate justification for treating the employee differently from any other member of the general public? In other words, courts look to whether the government took action based on legitimate needs as an employer. Examples would include terminating employment based on unnecessary disclosure of sensitive, confidential or privileged information, or terminating employment for providing false testimony.

Additionally, although public employee speech may be entitled to First Amendment protection, qualified immunity exists for government officials who make reasonable but mistaken judgments about open questions of law. Such immunity exists for government officials unless they have violated an established constitutional right. When there are discrepancies in the law, government employers who make reasonable employment determinations have the defense of sovereign immunity.

## The *Lane* Decision

The *Lane* plaintiff, Edward Lane, worked as the director of the Community Intensive Training for Youth (CITY) program at Central Alabama Community College (CACC). He claimed CACC terminated his employment in retaliation for testifying, under subpoena, in a case against another former CITY employee. His allegations of retaliation centered on a case of corruption within CITY. When Lane initially became the director, he conducted an audit of the CITY program because the program faced significant financial difficulties. During the course of his audit, he discovered a woman—a state representative, Suzanne Schmitz—on the payroll who had not been reporting for work. Steve Franks, then-president of CACC, warned Lane that terminating Schmitz’s employment at CITY would have adverse consequences for Lane, but Lane terminated her employment anyway. Schmitz later faced

indictment on federal charges of mail fraud and theft concerning a program receiving federal funds. In the case against her, Lane testified under subpoena and she later received a 30-month prison sentence.

A few months after Lane's testimony, President Franks terminated Lane's employment and the employment of 28 other CITY employees in a purported effort to address budget problems. However, Franks rescinded all but two of the 29 terminations just a few days later. Franks did not rescind Lane's termination. Thereafter, Lane filed suit alleging Franks violated the First Amendment by firing him in retaliation for testifying.

Under those facts, the U.S. District Court for the Northern District of Alabama granted Franks' motion for summary judgment, holding that Franks had qualified immunity because, although there were genuine issues of material fact concerning his motivation for terminating Lane's employment, "a reasonable government official in Franks' position would not have had reason to believe that the Constitution protected Lane's testimony" under *Garcetti*. On appeal, the Eleventh Circuit affirmed, reinforcing the notion that an employee's speech is not protected by the First Amendment if the speech came into existence because of the employee's professional responsibilities, even if official duties did not require the speech.

Ultimately, in an opinion authored by Justice Sotomayor, the Supreme Court agreed in part and disagreed in part with the lower courts. The court found that Lane's testimony constituted speech protected by the First Amendment and not employee speech. "Sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer."

In so holding, the Supreme Court rejected the notion that testifying on matters within the scope of public employment could be characterized as unprotected employee speech, as the Eleventh Circuit had held in a "far too broad[]" interpretation of *Garcetti*. "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." Additionally, the government respondents showed no adequate justification for the retaliatory termination of Lane's employment.

However, the Supreme Court upheld the lower courts on the question of Franks' entitlement to qualified immunity. The court recognized that, although Lane's speech is afforded First Amendment protection, the unsettled precedent within the Eleventh Circuit and other Courts of Appeal provided qualified immunity, barring claims against Franks in his individual capacity. Citing discrepancies in Eleventh Circuit case law, the Supreme Court found qualified immunity existed because the question

of whether Franks could terminate Lane's employment based on his testimony "was not beyond debate at the time Franks acted."

**Contact Us**

For more information, please contact an attorney in Husch Blackwell's Higher Education group.

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