



DELAWARE

EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

William W. Bowser, Editor; Scott A. Holt and Adria B. Martinelli,
Associate Editor
Young, Conaway, Stargatt & Taylor

Vol. 16, No. 6
June 2011

CONSTITUTIONAL RIGHTS

District court jumps the gun on free speech

by Lauren E. Moak

*In 2006, the U.S. Supreme Court issued a landmark decision. In *Garcetti v. Ceballos*, the Court held that public employees do not enjoy First Amendment free-speech rights when their speech is in connection with their official duties. A new decision by the Third Circuit limits the applicability of the *Garcetti* decision, holding that an employee acts as a citizen — not an employee — when he anonymously criticizes his employer on an online message board.*

Annie, get your gun!

Eric Beyer was a police officer for Duncannon Borough in Pennsylvania until he was fired for anonymous criticisms he posted online about his employer. The story began in 2005, when a police officer was killed in the line of duty. Beyer responded by advocating the purchase of new weapons so the police force could better combat the weapons being used by criminals. The Duncannon Borough Council later approved the purchase of two AR-15s for police use.

In 2008, after the new weapons were purchased, there was a dispute about whether the police department had been properly authorized to purchase the weapons. One of the AR-15s was eventually sold, and the police department retained the other one. Beyer reacted to the borough's actions by taking to the Internet and posting comments under the name "Big Bear." His comments were particularly critical of the council members who opposed the purchase of the AR-15s.

Beyer was terminated from his job in summer 2008 as a result of his online criticisms. He sued soon after, alleging that the borough violated his First Amendment right to free speech. Applying the Supreme Court's decision in *Garcetti v. Ceballos*, the district court dismissed Beyer's complaint, holding that he had acted in his official capacity and his speech was not protected by the First Amendment. Beyer appealed to the Third Circuit.

Going off halfcocked

On appeal, the Third Circuit reversed the district court's dismissal, finding that Beyer had alleged sufficient facts to support his First Amendment claim. More specifically, the court found that accepting the facts as alleged by Beyer, his online posts (1) were made as a citizen and (2) related to a matter of public concern. In reaching its conclusion, the court paid particular attention to the nature of the conduct involved — that is, anonymous online speech.

First, the court determined that Beyer was speaking as a citizen and not a police officer when he posted the comments. The court found it significant that his online statements were made using a pseudonym. The court concluded that the same statements couldn't have been made as part of his duties as a police officer. The court also emphasized the fact that Beyer's expertise on the AR-15s resulted from hours of research that he performed after work, on his own time. Consequently, his knowledge was unrelated to his position as a police officer.

Second, the court determined that Beyer was speaking on a matter of public concern. The court found that the purchase and use of the AR-15s was an issue of public safety, which was relevant to the public at large. In fact, Beyer emphasized that his online statements were intended to disseminate accurate information about the AR-15s.

Interestingly, the court also found that posting the statements online, in a public manner, supported the argument that the speech related to a matter of public concern, without regard to the content of the speech itself.

Beyer v. Duncannon Borough.

Bottom line

An employee's online criticism of his employer can be particularly damaging. As a result, implementing a reasonable and enforceable Internet policy and monitoring employee Internet conduct is important. However, the Third Circuit's decision limits the actions a public employer can take in response to online criticism by an employee. You must be aware of First Amendment repercussions if you intend to restrict employee speech that is critical of your organization.

While the court's decision doesn't alter the traditional analysis applied to employee speech, it does indicate that anonymous online speech by public employees enjoys First Amendment protection. As a result, public

employers should be particularly careful of any disciplinary action taken in response to such conduct.

Copyright 2011 M. Lee Smith Publishers LLC

DELAWARE EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Delaware employment law. Questions about individual problems should be addressed to the employment law attorney of your choice.

[Back to Results](#)

[Back to Search](#)

[Exit Search](#)