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

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FREE SPEECH

He is only honest who is not discovered

by Michael P. Stafford

Perhaps the English poet Susannah Centlivre was correct, and every person truly does cheat in his own way. Her wisdom certainly applies to Dr. Wendell Gorum, a professor and departmental chair at Delaware State University (DSU). Unfortunately for Gorum, his dishonesty was discovered and he was dismissed from his position at DSU. He then sued the university, arguing that his termination was in retaliation for speech protected by the First Amendment to the U.S. Constitution.

In Garcetti v. Ceballos, the U.S. Supreme Court held that speech that occurs in conjunction with a public employee's official duties isn't protected by the First Amendment. That landmark decision has resulted in many a First Amendment claim being dismissed by the courts. Gorum's claims before the U.S. District Court for the District of Delaware, which were reviewed by our federal appeals court, suffered the same fate. The decision provides some useful insight on the scope of a public employee's official duties.

Facts

Gorum worked as a tenured professor at DSU from 1989 until 2005. For roughly seven years, he also chaired the university's Mass Communications Department.

Unfortunately for Gorum, but fortuitously for the cause of academic integrity, an audit of student grade changes conducted by DSU's registrar in 2004 revealed that he had changed withdrawals, incompletes, and failing grades to passing grades for 48 students in the department. Moreover, he did it without the professor-of-record's permission.

DSU's then-president, Dr. Allen Sessoms, immediately suspended Gorum and initiated proceedings to dismiss him. Under the faculty's collective bargaining agreement, professors facing termination may request a formal hearing before an ad hoc disciplinary committee. Gorum exercised that right.

The disciplinary committee determined that Gorum:

[1] misrepresented information on [change-of-grade forms] by signing as instructor for courses that he did not actually teach . . . [; 2] did not obtain the permission or approval of the instructor-of-record to execute modification[s] of grade[s] . . . [; 3] knew that DSU practices and procedures did not include signing for an instructor-of-record without indicating this fact . . . [; 4] arbitrarily assigned grades to students for courses they were not registered in . . . [; 5] retroactively registered and assigned grades to students for classes taught by other instructors . . . [; 6] awarded grades to some students in classes that the students had never attended . . . [; and 7] practiced favoritism, whereby selected students, especially athletes[,] obtained grades in core courses in their major, without necessarily completing required course material.

The committee recommended that Gorum merely be suspended without pay for two years and be removed from his position as chair of the Mass Communications Department. Sessoms, to his credit, decided to proceed with Gorum's termination. DSU's Board of Trustees voted unanimously to dismiss him.

Gorum subsequently filed suit in federal district court, claiming that his termination was in retaliation for speech protected by the First Amendment. In support of his claim, he pointed to three specific incidents. First, he alleged that his termination was in retaliation for his having previously opposed DSU's hiring of Sessoms. Second, he maintained that the president was punishing him for having served as an adviser to a student-athlete facing disciplinary action in 2003. Third, he pointed to an incident in 2004 in which he had rescinded Sessoms' invitation to speak at the Alpha Phi Alpha Martin Luther King, Jr. prayer breakfast.

The district court ruled in favor of DSU, noting that the three incidents Gorum identified all involved speech he had engaged in pursuant to his official duties at DSU. Gorum appealed to the U.S. Court of Appeals for the Third Circuit (which covers Delaware).

Court's decision

According to the Third Circuit, "To state a First Amendment retaliation claim, a public employee . . . must allege that his activity is protected by the First Amendment, and that the protected activity was a substantial factor in the alleged retaliatory action." A public employee's speech warrants constitutional protection if "the employee spoke as a citizen, the statement involved a matter of public concern, and the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made." Here, however, in the court's view, Gorum's speech was within the scope of his official duties at DSU. Moreover, it didn't address matters of public concern.

For example, the assistance Gorum provided to the student-athlete facing disciplinary proceedings arose from his "special knowledge of, and experience with, the DSU disciplinary code." Similarly, the revocation of the speaking invitation to Sessoms was done pursuant to his responsibilities as an adviser to a student organization.

Nor did Gorum's speech address matters of public concern, in the court's view. Instead, he addressed the personal grievance of a specific student and a speaking invitation that was made, and

rescinded, privately.

Finally, the court concluded that Gorum's speech wasn't a substantial factor in Sessoms' decision to fire him. Indeed, there was no evidence that the university president was even aware of Gorum's involvement in either the disciplinary proceeding or the rescission of the prayer breakfast speaking invitation at the time he recommended the dismissal. *Gorum v. Sessoms, et al.*, No. 08-1741 (3rd Cir., March 27, 2009).

Bottom line

Speech that occurs in the course of a public employee's official duties isn't protected by the First Amendment. This case shows that the courts are willing to broadly define the scope of an employee's official duties in some instances. Moreover, it illustrates that private grievances arising in the workplace often don't involve public concerns.

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