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Cheri Cannon discusses the case of Lane v. Franks and how the MSPB may apply ramifications.

MSPB may look to apply Lane when considering free speech protections

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** IN FOCUS:**

When determining limitations on free speech for federal employees, the Merit Systems Protections Board and other judicial bodies may need to apply a new Supreme Court decision outlining when public employees' testimony is protected under the First Amendment. The case -- Lane v. Franks, 114 LRP 27432, No. 13-483 (S. Ct. 06/19/14); reversing in part Lane v. Central Alabama Community College, Steve Franks, 523 F. App'x 709 (11th Cir. 2013) -- involves a youth program director at Central Alabama Community College who was allegedly let go along with several other workers for financial reasons. After the terminations of the other workers were rescinded, the program director claimed he was fired because he terminated a state representative who had not been reporting for work and testified against the worker under subpoena during criminal proceedings on related mail fraud and theft charges. The director sued the college president in his individual and official capacity for allegedly violating the First Amendment by firing him for testifying against the state representative. The Supreme Court held that public employees' testimony is protected speech under the First Amendment when compelled by subpoena and provided outside the scope of ordinary job responsibilities, applying the standard set forth in Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563 (S. Ct. 1968) and Garcetti v. Ceballos, 106 LRP 32663, 547 U.S. 410 (S. Ct. 05/30/06). Under Pickering, courts must balance the employee's interest as a citizen in commenting

upon matters of public concern and the state's interest as an employer in promoting the efficiency of public services. The High Court clarified in *Garcetti* that the Pickering analysis is two-fold. The first question is whether the speech is made pursuant to ordinary job duties as opposed to a citizen on a matter of public concern. When the person speaks pursuant to ordinary job duties, "the employee is not speaking as a citizen for First Amendment purposes, and the inquiry ends," the Court said. However, if the employee speaks as a citizen on a matter of public concern, the second part of the Pickering inquiry asks whether the government had adequate justification to treat the employee differently than any other member of the public. Impact

Cheri Cannon, a partner at Tully Rinckey PLLC, told cyberFEDS® that "there are already protections in the law to protect federal civilian employees' testimony under the merit system principles." Cannon said it is a prohibited personnel practice, under 5 USC 2302 (b)(9), for federal employees who have authority over personnel decisions to take or fail to take a personnel action against an employee or applicant for:

- Exercising an appeal, complaint, or grievance right.
- Testifying for or assisting another in exercising such a right.
- Cooperating with or disclosing information to the special counsel or to an inspector general.
- Refusing to obey an order that would require the individual to violate a law.

So federal employees who "testify, which is always under oath, about themselves as employees or another person are already protected under federal law" against reprisal, she said. However, Cannon did say that Lane could "provide additional protection beyond what's already protected by the prohibited personnel practices statute" in unique circumstances. For example, if a federal employer took a reprisal action against someone who was called to testify outside of the parameters of 5 USC 2302 (b)(9), then "it's not inconceivable" that Lane would provide protection for subpoenaed testimony provided outside of normal job duties, she explained. Matter of public concern

Lane is distinguishable from *Garcetti* because the "sworn testimony in this case is far removed from the speech at issue in *Garcetti*, which involved an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution." In *Lane*, the Court explained

that the 11th Circuit erred in reading Garcetti "far too broadly" when finding that because the petitioner learned about the subject matter during his employment, he did not speak as a citizen. Instead, Garcetti required the Court to determine "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." This is especially important because "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment," the Court said. In addition, the standard for determining whether speech is a matter of public concern requires looking at the speech's content, form, and context. And as seen in Garcetti, corruption and misuse of funds in public programs are matters of "significant public concern," the Court said. As a result, the Court found the testimony by the youth program director was a matter of public concern. MSPB

One high-profile case where the MSPB used Garcetti as a guide is *Chambers v. Department of the Interior*, 106 LRP 55398 (MSPB 09/21/06), vacated in part, 108 LRP 7934 (Fed. Cir. 02/14/08). The case involved former Park Police Chief Teresa Chambers, who was removed for making public comments about security concerns and improperly disclosing budget deliberations to a Washington Post reporter. The MSPB held that the appellant's First Amendment defense failed under both Garcetti and prevailing law when the initial decision was issued. Because Chambers filed her petition for review before the Supreme Court issued Garcetti, the MSPB considered her First Amendment claim under pre- and post-Garcetti law. Citing Garcetti, the MSPB ruled that Chambers was not speaking as a citizen when she made the statements for which she claimed First Amendment protection. They were made as part of her official duties as she perceived them. In 2011, the MSPB ultimately granted Chamber's request for corrective action under the Whistleblower Protection Act and ordered her reinstatement. *Chambers v. Department of the Interior*, 111 LRP 2069 (MSPB 01/11/11). Reprinted with permission from: cyber

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