Free Speech & Election Law

Ninth Circuit Upholds Professor's First Amendment Claim in *Demers v. Austin*

*By Arthur Willner**

Note from the Editor:

This article is about the Ninth Circuit's decision in *Demers v. Austin*. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about free speech and the First Amendment in general. To this end, we offer links below to other sources, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

- Demers v. Austin, No. 11-35558, 2014 WL 306321 (9th Cir. Jan. 29, 2014): http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/04/11-35558.pdf
- *Ninth Circuit Finds* Garcetti *Official Duty Rule Inapplicable to Professorial Speech in Public-University Context*, 127 Harv. L. Rev. 1823 (2014): http://cdn.harvardlawreview.org/wp-content/uploads/2014/04/vol127_demers_v_austin.pdf

The decades-long debate over whether the First Amendment protects government-employed academics whose comments fail the "political correctness" test will ultimately be resolved by the U.S. Supreme Court, but until then, free speech advocates in the U.S. Court of Appeals for the Ninth Circuit can take heart from a recent decision that upholds the rights of public employee professors to speak freely on matters of public interest.

The Ninth Circuit recently denied a petition for panel rehearing and a petition for rehearing en banc in a case, *Demers v. Austin*, in which it strongly affirmed the First Amendment free speech rights of faculty employed at public colleges and universities.[1] The opinion's robust language in support of free speech should be cause for celebration by both faculty and students on campuses, once famously regarded as the "marketplace of ideas," where these days a purported right not to be offended is thought to trump the First Amendment right to free expression.

Any discussion of *Demers* must begin with the Supreme Court's decisions in *Pickering v. Board of Education*[2] and *Connick v. Myers*.[3] These cases held that, when speaking as a citizen, a public employee's First Amendment claims were governed by a balancing test in which the Court would determine whether the employee was speaking on a matter of public concern and, if so, whether the employee's interest in speaking outweighed the employer's interest in regulating that expression.

In 2006, the Supreme Court departed from the *Pickering* balancing test in *Garcetti v. Ceballos*.[4] *Garcetti* arose out of an incident in which a Los Angeles prosecutor alleged that his employer, the district attorney's office, had retaliated against him in violation of the First Amendment because he had written a memorandum in which he asserted that a police affidavit contained serious misrepresentations. The Supreme Court held that, "when 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."[5]

In a "not so fast" moment in *Garcetti*, however, dissenting Justice David Souter expressed concern that the majority opinion might "imperil First Amendment protection of academic freedom in public colleges and universities,"[6] noting the Court's long recognition of the importance of freedom of speech within the university environment. Justice Anthony Kennedy's majority opinion took note of this concern and acknowledged that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[7] Consequently, the Court chose not to reach the issue of whether its opinion applied to speech related to scholarship or teaching, carving out the issue for a later day, and in the meantime leaving the question to the various circuits.

Demers was the Ninth Circuit's first opportunity to address whether faculty speech at a public college or university falls within the *Garcetti* rule for public employees generally. The Plaintiff was a member of the Washington State University (WSU) faculty in its School of Communications. He sued various WSU administrators in a 42 U.S.C. § 1983 action when they allegedly retaliated against him after he circulated within the university community and to the media a "plan" containing his proposals for the restructuring of the school faculty as well as the draft of portions of a book he had authored that was critical of the academy in general and of certain events at WSU in particular. The U.S. District Court for the Eastern District of Washington granted summary judgment for the Defendant administrators, holding that the plan and book were written pursuant to the Plaintiff's official duties as a WSU faculty member, and were therefore unprotected under *Garcetti*. The district court also held, as to the plan, that it did not in any

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event address a matter of public concern.

The Ninth Circuit affirmed the district court's finding that the Plaintiff had prepared and circulated the plan pursuant to his official duties. However, it reversed the lower court's holding that the Plaintiff's speech was unprotected under *Garcetti.* Using particularly strong language affirming the importance of academic freedom under the First Amendment, the Ninth Circuit held that *Garcetti* does not apply to speech related to scholarship or teaching, and concluded that, "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[8] Instead, academic employee speech will be subject to the *Pickering* analysis—*i.e.*, the employee must show that the speech addressed a matter of public concern (as opposed to a mere private grievance); and, if so, the court will balance the employee's interests in speaking against the interests of the public entity, as an employer, in regulating the speech in furtherance of the efficient operation of its services.

In addition to the overall significance of the Ninth Circuit's ruling regarding the applicability of *Garcetti* to academic speech, *Demers* was also important in its analysis of certain underlying issues. For example, although the court acknowledged that the balancing process regarding disputes concerning esoteric topics of academic speech may be difficult, it warned against simply concluding that such disagreements are "mere squabbles over jobs, turf, or ego."[9] Furthermore, the court found that protected academic speech is not limited to what is generally considered "scholarship," such as writings on literature. Thus, speech pertaining to even mundane issues involving school organization, governance, budgets, and hiring may well address matters of public concern under *Pickering.* Finally, because there had been no previous Ninth Circuit case on point regarding the application of *Garcetti* to a professor's academic speech, one could not say that the law was sufficiently certain that a reasonable official in the Defendant administrators' positions would have understood that their conduct had violated the Plaintiff's rights. Therefore, the court found that the *Demers* Defendants were entitled to qualified immunity from monetary damages.

Academic speech, whether in the form of classroom teaching or writing, is central to the official duties of public college and university instructors. The Supreme Court will likely ultimately decide whether the application of *Garcetti* conflicts with their First Amendment rights. In the meantime, in the Ninth Circuit, faculty can take heart that their free speech rights will not be foreclosed simply because they spoke or wrote within the scope of their positions as public employees.

Endnotes

1 Demers v. Austin, No. 11-35558, 2014 WL 306321 (9th Cir. Jan. 29, 2014).

2 391 U.S. 563 (1968).

3 461 U.S. 138 (1983).

4 547 U.S. 410 (2006).

5 *Id.* at 421.

6 *Id.* at 438 (Souter, J, dissenting).

7 *Id.* at 426 (majority opinion).

8 Demers v. Austin, No. 11-35558, slip op. at 14 (9th Cir. Jan. 29, 2014).

9 *Id.* at 18.