Lane v. Franks: Reviving Pickering? Limiting Connick & Garcetti?

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1) Government Employment
   a) McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (1892) (Holmes, J.): “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech . . . by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.”

b) The Assault on the Right-Privilege Distinction
   i) Board of Regents v. Roth, 408 U.S. 564 (1972) (“[T]he Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.”)
   ii) “It is rudimentary that the state cannot exact as the price of . . . special advantages the forfeiture of First Amendment Rights.” Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (Scalia, J., dissenting).

2) Pickering v. Board of Education
   b) A public school teacher was dismissed after writing a letter criticizing the board of education for its fiscal policies.
   c) Held: The dismissal violated the teacher’s rights of free speech.
      (1) The power of a public employer to establish conditions to public employment, “regardless of how reasonable, has been uniformly rejected.”
   d) Balancing. “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs...”
      i) The teacher’s remarks were “public criticism.”
      ii) The remarks were “in no way directed towards” any person with whom the teacher would be working.
      iii) No issue of “discipline” is involved.
      iv) No issue of confidentiality or loyalty is present.
   e) Justification:
      (1) The Board has no interest in preventing public criticism.
      (2) Could the Board dismiss the teacher for false statements?
         (a) There was no proof that the statements fomented great controversy or conflict within the school system.
(b) Opportunity for rebuttal was sufficient.

(c) The test. The actual malice standard of New York Times v. Sullivan applies: “[A]bsent proof of false statements knowingly or recklessly made . . . , a teacher’s exercise of [the] right to speak on issues of public importance may not furnish the basis for . . . dismissal.”

3) Connick v. Meyers
   b) An assistant district attorney was told she was transferred to a less desirable post. She developed an internal office questionnaire, which solicited the views of others concerning the transfer policy, morale, grievance handling, confidence in supervisors and perceptions of political pressure. She was fired.
   c) Held: No First Amendment claim. The questionnaire was not expression directed to matters of public concern.
      i) Government’s managerial authority in the absence of clear First Amendment issues.
         (1) When an employee’s activity focuses on matters of personal interest and “cannot fairly be considered as relating to any matter of political, social or other concern to the community, officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”
      ii) This was not employee participation in public debate; it was employee maneuvering in an internal challenge to office management.
      iii) Deference. “When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”

4) LANE v. FRANKS, 573 U.S. — (2014)
   a) Facts.
      i) The director of a training program for underprivileged youth – operated by a community college – conducted an audit of the program’s expenses. An Alabama State Representative was on CTTY’s payroll, but had not been reporting for work.
      ii) The director terminated the employment of the representative.
      iii) Federal authorities investigated and indicted the politician on charges of mail fraud and theft concerning a program receiving federal funds.
      iv) The director testified at two trials which “garnered extensive press coverage.” At the second trial, the jury convicted the politician on three counts of mail fraud and four counts of theft concerning a program receiving federal funds.
      v) Sentence: 30 months in prison; $177,251.82 restitution and forfeiture.
      vi) The city college president terminated the director.
   b) Proceedings below
      i) The director sued the college president on grounds that the president violated the First Amendment by firing him in retaliation for testifying.
ii) The District Court granted the employer’s motion for summary judgment.

(1) qualified immunity: The court found no violation of clearly established law because Lane had “learned of the information that he testified about while working as Director at [CITY].”

(2) the Eleventh Amendment.

iii) The Eleventh Circuit affirmed: The director had no First Amendment protection because he acted as an employee, not as a citizen, when he investigated and when he testified.

c) The issue

i) The petition for a writ of certiorari: Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee’s ordinary job responsibilities?

ii) Justice Sotomayor

(1) Issue: “whether the First Amendment … protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities.”

(2) “We hold that it does.”

d) The holding

i) The director’s sworn testimony outside the scope of his ordinary job duties is entitled to First Amendment protection.

ii) The director’s testimony is speech as a citizen on a matter of public concern.

iii) There was no conceivable justification for a retaliatory termination.

5) The opinion of Justice Sotomayor

a) Pickering remembered. “Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee’s speech depends on a careful balance ‘between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” Pickering, 391 U. S. 563, 568 (1968).

b) Speech by citizens on matters of public concern lies at the heart of the First Amendment.

c) Still true “when speech concerns information related to or learned through public employment.”

d) “[P]ublic employers may not condition employment on the relinquishment of constitutional rights.”

e) There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees.
i) “[g]overnment employees are often in the best position to know what ails the agencies for which they work.” Waters v. Churchill, 511 U. S. 661, 674 (1994) (plurality opinion).

ii) “The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.” San Diego v. Roe, 543 U. S. 77, 82 (2004) (per curiam).

f) But...

i) “Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.” Garcetti, 547 U. S., at 418.

ii) The Connick – Garcetti two step:

(1) Step One: “determining whether the employee spoke as a citizen on a matter of public concern.

(a) “If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.

(2) Step Two: “If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” 547 U. S., at 418 (citations omitted).

g) Garcetti distinguished. Limited?

i) “Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”

ii) Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.

iii) “the obligation, as a citizen, to speak the truth”:

(1) “That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.”

iv) The sworn testimony in this case is far removed from the speech at issue in Garcetti—an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution.

v) 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.

vi) “It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who
witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”

vii) Step Two: Justification

(1) Government employers often legitimate “interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public,” including “ ‘promot[ing] efficiency and integrity in the discharge of official duties,’ ” and “ ‘maintain[ing] proper discipline in public service.’ ” [Connick]

(2) “Here, the employer’s side of the Pickering scale is entirely empty”

(a) There is no government interest that tips the balance in their favor.

(b) There is no evidence, for example, that the director’s testimony was false.

(c) There is no evidence that he unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.

6) Justice Thomas, concurring

a) Justice Scalia and Justice Alito join

b) The case “requires little more than a straightforward application of Garcetti.”

i) The director did not speak “pursuant to” his ordinary job duties because his responsibilities did not include testifying in court proceedings.

ii) No party has suggested that he was subpoenaed as a representative of his employer.

iii) Because petitioner did not testify to “fulfil[l] a [work] responsibility,” he spoke “as a citizen,” not as an employee.

c) “We accordingly have no occasion to address the quite different question whether a public employee speaks ‘as a citizen’ when he testifies in the course of his ordinary job responsibilities.

d) “For some public employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties. Others may be called to testify in the context of particular litigation as the designated representatives of their employers. The Court properly leaves the constitutional questions raised by these scenarios for another day.”

7) Significance

a) Unanimity, because of clarity and narrowness: The independent obligation of all citizens to give evidence.

b) Continuing problems with Connick-Garcetti

i) No need for severe, categorical limit of First Amendment freedom.

ii) A tool for censorship and management control of expression.

iii) Widespread, “easy” summary judgments for employers

c) Does Lane reduce risk for whistleblowers?
i) Garcetti: whistleblowing is not protected by the First Amendment from employer discipline because employees are typically required by their job duties to report official misconduct and illegality.

ii) Increased incentive to go public

d) But what if...

   i) ... internal & external?

   ii) ... ordinary job duty & citizen’s role?

   iii) ... speaking as a citizen is “disruptive”?

8) Academic freedom: the great unknown

   a) Situations easy to imagine...

      i) Unpopular expression in classroom

      ii) Unpopular expression in public venues

      iii) Unpopular expression in scholarship

      iv) The utility of a disclaimer

   b) The continuing fragility of academic freedom doctrines

   c) The parallel paths of public employee rights and academic freedom

   d) Academic freedom’s ultimate dependence on tenure, contract, due process and non-First Amendment rules.