

Connecticut Employees Gain Broader Free Speech Rights

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The Connecticut Supreme Court recently weighed in on the scope of employee free speech rights in the workplace. [Trusz v. UBS Realty Investors, LLC](#). In doing so, it expanded the protections afforded employees when speaking out on matters of public concern, including those related to their job duties. The Court's interpretation will bolster the rights of whistleblowers reporting job related wrongdoing, and better protect employees speaking out on serious job related issues.

Free speech rights originate from the First Amendment of the U.S. Constitution, and Article I, §§ 4,5 and 14 of the Connecticut Constitution. Conn. Gen. Stat. § [31-51q](#) provides a statutory remedy for employees disciplined or fired for exercising their free speech rights at work. The statute protects both private and public employees.

Over the years, the U.S. Supreme Court has provided guidance on the scope of free speech rights in the workplace under the federal Constitution. The federal test is known as the *Pickering/Connick* balancing test, modified by *Garcetti*.

In *Pickering* the Court recognized that a public employer may regulate employee speech by applying a balancing test that weighs the interests of the employee, as a citizen, in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the public services it provides. This test was refined in *Connick*, which stated that if a government employee's speech cannot be fairly characterized as

constituting speech on a matter of public concern, it does not enjoy first amendment protections. Thus, under the *Pickering/Connick* balancing test, employee speech in a public workplace is protected from employer discipline if it involves a matter of public concern, and the employee's interest in commenting on the matter outweighs the employer's interest in promoting the efficient performance of public services.

This test was narrowed in *Garcetti v. Ceballos*, which held that even if the speaker is discussing matters of public concern, if those matters encompass official job duties, the speech is not protected by the first amendment. As a result, when analyzing federal free speech claims, a court must first determine if the employee was speaking as an employee pursuant to his/her official duties, or as a citizen speaking on non-work related matters of public concern. If the employee is found to have been speaking as an employee the speech is unprotected. However, if the employee is found to have been speaking as a citizen on public matters not associated with official job duties, the court will apply the *Pickering/Connick* balancing test to determine if the employee's right to speak outweighed the employer's interests in performing its function. In doing so the court will look at the extent of disruption caused by the speech on workplace discipline, co-worker harmony, working relationships, the employee's job performance, the employer's responsibilities, and whether the speech was made publically or privately.

While the Connecticut Supreme Court applied this test to federal claims, the question of employee speech rights under the Connecticut Constitution remained somewhat unsettled. In 2012 the Connecticut Supreme Court issued companion rulings in [*Schumann v. Dianon Systems, Inc.*](#), and [*Perez-Dickson v. City of Bridgeport*](#). Those cases reinforced that the federal test applies only to federal claims made by either private or public sector employees. Left open was

whether the state Constitution bestowed broader free speech rights to public and private employees than its federal counterpart.

In *Trusz* the Court answered the question in the affirmative. The new test applicable to free speech claims brought under the state Constitution modifies the *Pickering/Connick* balancing test, and eliminates the *Garcetti* requirement that an employee prove he was not speaking out on a matter tied to his official duties. Under this modification, while not every employment dispute will be protected, if the speech is connected to an employee's job related concerns about official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety, it will not be automatically dismissed, but will be subjected to the *Pickering/Connick* balancing test.

In fashioning the new test, the Connecticut Supreme Court adopted Justice Souter's dissent in *Garcetti*, in which he argued that his "test properly balances the employer's heightened interest in controlling employee speech pursuant to official job duties—an interest that *Pickering* did not specifically address—and the important interests of the employee and of the public in allowing employees to speak without fear of retaliation about matters of particularly acute public concern—interests that the *Garcetti* standard fails to protect." The Court went on to state that the new test will apply to both public and private employees who bring suit via 31-51q contending a violation of the Connecticut Constitution.

In sum, the new rules are as follows. Free speech claims brought by both private and public employees under the federal constitution are analyzed under the *Pickering/Connick* test as modified by *Garcetti*. Therefore, if an employee was disciplined or discharged for speech that touches on their job, the speech will not be protected. Only if the employee is speaking as a

citizen on a matter of public importance that is not related to their job, and their right to speak outweighs their employer's interests, will the speech be protected.

In contrast, free speech claims brought by either private or public employees under the Connecticut Constitution will be analyzed under the *Pickering/Connick* test as modified by Justice Souter's dissent in *Garcetti*. Under this new test, an employee who speaks out on a matter of public concern, including work related concerns that involve official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety will be protected from discipline when making those comments, if the employee's right to make the comments outweighs the employer's interests in preventing the statements. Therefore, the Connecticut Constitution provides broader protections for public employees speaking out about serious job related concerns, and § 31-51q extends those same protections to private employees.