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CLIENT NEWS BRIEF

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CALIFORNIA COURT OF APPEAL REAFFIRMS LIMITS TO FREE SPEECH IN THE WORKPLACE

In a recent case, Kaye v. Board of Trustees of the San Diego County Public Law Library (2009) 179 Cal.App.4th 48 ("Kaye"), the California Court of Appeal held that an employee's email criticizing his superiors was not protected speech under the California Constitution's free speech clause.

Kaye involved a former law librarian, Michael Kaye, an "at-will" employee for the San Diego County Public Law Library ("Library"), who was discharged after he sent a scathing email criticizing his superiors. The dispute between Mr. Kaye and his superiors arose over Mr. Kaye's failure to follow the chain of command when requesting permission to speak on behalf of the Library at a public event. Mr. Kaye had sought permission from his supervisor's superior because his supervisor was unavailable. When Mr. Kaye's supervisor investigated the breach in protocol, Mr. Kaye felt insulted and wrote a lengthy email to the Library staff and management blasting the library's inquiry into his conduct as "vindictive, retaliatory . . . disgusting, degrading, and utterly unprofessional." Mr. Kaye also accused his superiors of inappropriate conduct and autocratic management. Mr. Kaye was terminated shortly thereafter for "insubordination and serious misconduct."

Following his termination, Mr. Kaye brought suit. Among his claims, Mr. Kaye alleged a violation of his free speech rights under the California Constitution, which states, "[e]very person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (Cal. Const., art. I, § 2, subd. (a).) The court was faced with balancing a public employee's interest as a citizen in commenting on matters of public concern against a public employer's interest in managing the operations of a public agency. The court determined that the threshold question in this balance is whether the employee spoke as a citizen on a matter of public concern. The court opined that if the answer to the question is yes, the question then becomes whether the public employer had an adequate justification for treating the employee differently from any other member of the general public.

The Court of Appeal applied the reasoning in Garcetti v. Ceballos (2006) 547 U.S. 410 ("Garcetti"), in which the United States Supreme Court held that an employer may restrict speech in the workplace when it arises in the context of the public employee's professional

responsibility. The Garcetti Court reached this conclusion because such speech does not infringe on the liberties that the employee might enjoy as a private citizen, and the employer is simply exerting control over an employment relationship that the employer itself created. The court in Kaye referenced Garcetti and explained, "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." Accordingly, Mr. Kaye had no First Amendment cause of action based on his employer's reaction to the speech.

Although this case provides valuable insight into when certain workplace speech is not protected, we strongly advise working with legal counsel when considering the discipline of a public employee based on speech. If you have any questions regarding employee speech rights or other matters involving discipline related to employee speech, please contact one of our seven offices located statewide.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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