

CLIENT NEWS BRIEF

First Amendment May Protect Public Employees' Testimony

Under *Garcetti v. Ceballos* (2006) 547 U.S. 410, the First Amendment does not protect a public employee's speech made pursuant to the employee's official job duties and, thus, does not insulate the employee from discipline for such speech. In *Lane v. Franks* (June 19, 2014) __ U.S. __ 2014 WL 2765285, the United States Supreme Court recently held that a public employee's sworn testimony, beyond the scope of the employee's ordinary job duties, is subject to First Amendment protection. A public employer may therefore be limited from taking adverse employment action against an employee based upon such testimony. *Franks* signals to public employers that a public employee's sworn testimony, even if it relates to the employee's public employment, or concerns information the public employee learns through his or her employment, may qualify for First Amendment protection.

Edward Lane was the director of a program for underprivileged youth at Central Alabama Community College (CACC) when he discovered that Alabama State Representative Suzanne Schmitz was on the program's payroll, even though she did virtually nothing. After Ms. Schmitz refused to report for work, Mr. Lane terminated her position with CACC. A federal investigation into the matter followed, during which Mr. Lane testified under subpoena before a federal grand jury. Soon after Mr. Lane's testimony, CACC President Steve Franks laid off 29 probationary employees, including Mr. Lane. Mr. Franks later rescinded all but two of the 29 layoffs, leaving only Mr. Lane and one other employee's layoff in effect. Mr. Lane sued Mr. Franks for damages and equitable relief, alleging that Mr. Franks fired him in retaliation for his testimony before the federal grand jury against Schmitz, and that such termination violated his First Amendment free speech rights. The trial court granted summary judgment in Mr. Franks' favor, and the U.S. Eleventh Circuit Court of Appeals affirmed.

The Supreme Court reversed the decisions. The Court held that "(t)ruthful 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." The Court also held that Mr. Lane's testimony regarding corruption and misuse of public funds in a public program constituted speech of a public concern.

The Court then balanced Mr. Lane's right to speech as a citizen on a matter of public concern against CACC's interest in promoting efficiency and maintaining proper discipline. The Court held that CACC and Mr. Franks failed to identify any justification for actions against Mr. Lane that would tip the balance in the employer's favor. For example, Mr. Lane's testimony was not false or erroneous, and it did not unnecessarily disclose sensitive, confidential or privileged information. Thus, the Court held that Mr. Lane's testimony was deserving of First Amendment protection.

The Court also held, however, that Mr. Franks was entitled to qualified immunity (meaning that he was shielded against liability and the payment of damages)

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as to Mr. Lane's claim against him in his individual capacity. The Court reached this holding because at the time Mr. Franks ended Mr. Lane's employment, there was no existing judicial opinion that made it clear that dismissal of an employee for testimony related to, but not required by, the employee's job duties, was unlawful.

Franks highlights the fact that the First Amendment may offer protection for a public employee's speech as a citizen relating to or concerning the employee's public employment where such speech is not within the scope of the employee's official job duties (such as when subpoenaed to testify under oath regarding corruption or fraud that the employee has been a witness to through his public employment), and the lack of such protection when the speech is part of the employee's official job duties and therefore not speech as a citizen (such as when an employee makes written or oral statements that are part of the employee's responsibilities). *Franks* also confirms the importance of the qualified immunity defense for public officials where they make reasonable mistakes in judgment "about open legal questions."

If you have questions regarding *Franks*, employee free speech rights, or the qualified immunity defense for public officials, please contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).