Lane v. Franks: Public Employee Testimony and the First Amendment

By Michael Lorden

Introduction

The First Amendment states "Congress shall make no law… abridging the freedom of speech…"[1] The First Amendment restricts the government, and its extensions, from controlling the speech of its citizens. However, like most laws, there are exceptions to that general rule and the First Amendment does not protect *all* speech from government intervention. For example, courts have found that the following types of speech may not be protected: speech used in a criminal conspiracy; speech that amounts to treason or spying; speech that defames or libels someone; and speech that is obscene or hostile.[2]

The First Amendment plays a particularly interesting role in the public workplace. When the government employs a citizen as an employee, such as a police officer, firefighter, teacher, or countless other professions, what role does the First Amendment play in the employer-employee relationship? This issue is even more intriguing when considering the fact that in 2012 there were nearly 22 million government employees.[3]

The Supreme Court did not recognize that public employees had a right to First Amendment Protection until 1960.[4] Eight years later, the Court again addressed the issue of a public employee's right to free speech in the case of *Pickering v. Board of*

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[1] U.S. CONST. amend. I.
[2] Ronald K.L. Collins, *Exceptional Freedom-the Roberts Court, the First Amendment, and the New Absolutism*, 76 Alb. L. Rev. 409, 465 (2013). The list provided above is not exhaustive.
[3] Mike Patton, *The Growth of the Federal Government: 1980 to 2012*, FORBES (Jan. 24, 2013), http://www.forbes.com/sites/mikepatton/2013/01/24/the-growth-of-the-federal-government-1980-to-2012/.
[4] David L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, FIRST AMENDMENT CENTER (Dec. 2002), http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.PublicEmployees.pdf; *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 87 S. Ct. 675 (1967).

Education.[5] In *Pickering*, a teacher wrote a letter to the editor of the local newspaper criticizing his employer, the school district.[6] The board of education in turn fired the teacher.[7] The teacher sued the district claiming his First Amendment Freedom of Speech rights had been violated.[8] The Court ruled in his favor, 8-1, and held that a public employee's right to free speech must be balanced with the employer's efficiency interests.[9]

Most recently the Supreme Court addressed this issue in *Garcetti v. Ceballos*.[10] In *Garcetti*, a district attorney wrote a memorandum recommending that a case be dismissed because of alleged governmental misconduct surrounding a search warrant.[11] The district attorney met with his supervisors to discuss the memorandum, but the two sides argued about the case.[12] The district attorney's supervisor decided to move forward with the case.[13] The court held a hearing on the search warrant, and the defense called the district attorney as a witness.[14] Ultimately, the court upheld the warrant and the district attorney was reassigned.[15] He then claimed retaliation in violation of his First Amendment rights.[16] The Supreme Court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens, and the First Amendment does not insulate their communications from employer discipline.[17] The Court further ruled

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[5] *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 88 S. Ct. 1731, (1968).
[6] *Id.* at 1732-1735.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1738.
[10] *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).
[11] *Id.* at 1955-1957.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*

that the district attorney was not speaking as a citizen when he wrote his memorandum, and therefore, the First Amendment did not protect him.[18]

On January 17, 2014, the Supreme Court granted certiorari in the case of *Lane v. Franks,*[19] a case that involved an employee of a public university that testified against a public official and was subsequently fired. This case delves into the sphere of public employee free speech rights. In particular, the Court will decide whether a public employee who is subpoenaed to testify is protected from retaliation under the First Amendment. The Court's ruling will: (1) build upon the precedent set forth in *Pickering* and *Garcetti*; and (2) guide public employers (including school districts) on how they can respond to sworn testimony from an employee.

Facts and Procedural History

Edward Lane worked as a program director of the Community Intensive Training for Youth ("CITY") program under the authority of the Central Alabama Community College (CACC).[20] In his capacity as a program director, Lane supervised State Senator Suzanne Schmitz who was also a CITY program employee.[21] Shortly after Lane was hired, he discovered that Schmitz was rarely in her office and she did not have any timesheets.[22] Lane confronted Schmitz on her failure to attend work and she informed him that she received her job through a connection with a high-powered state official.[23]

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[18] *Id.*
[19] *Lane v. Franks*, 134 S. Ct. 999 (2014).
[20] Brief for Respondent Susan Burrow at 6, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 844600.
[21] *Id.*
[22] *Id.*
[23] *Id.*

Schmitz even threatened to call the state official after Lane confronted her lack of work.[24] Eventually, Lane fired Schmitz.[25]

Schmitz was a part of a broad corruption scheme that paid state employees for work they were not actually performing.[26] Federal prosecutors charged Schmitz with mail fraud and theft after she was paid from the CITY program for little or no work.[27] In 2006 and 2008, Lane testified against Schmitz, but her first trial resulted in a hung jury.[28]

In 2009, Lane's supervisor, Steve Franks of the CACC, terminated all of the CITY program's probationary employees, including Lane, due to claimed financial restraints.[29] However, then Franks brought all the probationary employees back, except for Lane and one other person.[30] Franks claimed that he realized that civil service laws protected all of the employees except for Lane.[31] Shortly thereafter, the CITY program dissolved, Franks retired and Susan Burrow replaced Franks at the CACC.[32] Lane then sued Burrow in her official capacity as President of the CACC, and Franks (in his individual capacity) for wrongful termination in retaliation for testifying against Schmitz.[33]

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[24] *Id.*
[25] *Id.* at 5.
[26] *Id.* at 3.
[27] *Id.* at 7.
[28] *Id.* at 7-8. Schmitz was retried and convicted. Lane testified at her second trial even though CACC terminated his employment with the CITY program.
[29] *Id.* at 9.
[30] *Id.* at 9. Franks claimed that his understanding was that Lane and the other employee were not protected by civil service laws because they had not been employed long enough.
[31] Reply Brief for the Petitioner at 4, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 1410446.
[32] Brief for Respondent Susan Burrow at 9, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 844600.
[33] *Id.* at 10.

The District Court granted the defendant's summary judgment motion based on sovereign and qualified immunity.[34] The court held that the Eleventh Amendment[35] barred Lane from bringing claims against the community college and from Franks.[36] The Eleventh Amendment, and the doctrine of sovereign immunity, essentially bar suits against the state and its instrumentalities, including community colleges.

The court further held that even if the Eleventh Amendment did not bar Lane's claims, that Lane's right to free speech under the First Amendment was not clearly established to defeat Frank's qualified immunity.[37] Qualified immunity protects government officials from suits when the officials are performing discretionary functions in their individual capacities.[38] However, qualified immunity does not extend to officials that violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[39] First, the court held that Lane did not testify as an ordinary citizen, but instead in his capacity as Director of the CITY program.[40] This distinction is important because the Supreme Court ruled in *Garcetti* that public employers may restrict the speech of public employees so long as that employee is speaking in their official capacity and not as an ordinary citizen.[41] The court also ruled that Frank was protected by qualified immunity because he had no reasonable reason to believe that Lane's speech was protected by the First Amendment.[42]

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[34] *Id.*
[35] The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
[36] *Lane v. Cent. Alabama Cmty. Coll.*, 2012 WL 5289412, 12 (N.D. Ala. Oct. 18, 2012).
[37] *Id.*
[38] *Id. at 8*
[39] *Id.*
[40] *Id.* at 10.
[41] *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006).
[42] *Id.* at 12.

The Eleventh Circuit affirmed the District Court's ruling.[43] The Eleventh Circuit agreed that since Lane testified in his official capacity, he could not state a claim for retaliation under the First Amendment.[44]

Issue Presented to the Supreme Court

The following issues were presented to the Supreme Court on Lane's petition for a writ of certiorari to review the judgment of the Eleventh Circuit:

1. 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?[45]

2. Does qualified immunity preclude a claim for damages in such an action?[46]

Petitioner Lane's Argument

Lane presents two main arguments to the Court: (1) that his speech was protected by the First Amendment; and (2) that Franks' conduct was not protected by qualified immunity. First, Lane argues that his speech was protected by the First Amendment.[47] Not surprisingly, the two sides have different interpretations of what public employee speech should be covered by the First Amendment. In essence, Frank argues that an employee that speaks publicly about information he or she gleaned from work is speaking per his or her official duties, and thus can be terminated for such speech.[48]

Instead, Lane advocates for a rule that only gives public employers the right to punish speech when the employee speaks pursuant to his or her official duties.[49] As can be expected, Lane believes his testimony against Schlitz was private speech not related to

[43] *Lane v. Cent. Alabama Cmty. Coll.*, 523 F. App'x 709, 712 (11th Cir. 2013).
[44] *Id.*
[45] Lane v. Franks, 2013 WL 5652570 (U.S.), i.
[46] *Id.*
[47] Reply Brief for the Petitioner at 4, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 1410446.
[48] *Id.* at 4-5.
[49] *Id.* at 6.

his position with the CITY program. In particular, he argues that his speech, subpoenaed testimony, was an obligation of citizenship, or at the very least an act of private citizenship similar to writing a letter to the local newspaper.[50]

Second, Lane argues that Frank was not covered by qualified immunity. Lane and Frank present two different inquiries into the issue. Frank believes he was protected by qualified immunity because the law did not clearly state that public employees were protected when they gave subpoenaed testimony.[51] Conversely, Lane argues that Frank was not covered by qualified immunity because the law *was clear* that an employee is protected by the First Amendment when he testifies outside of his official duties on a matter of public concern.[52] Lane argues that his speech fell within well-established Supreme Court and Eleventh Circuit precedent.

Respondent Franks' and Burrow's Arguments

Lane brought suit against Franks in his individual capacity, and against his replacement, Susan Burrow, in her official capacity. Franks' general proposition to the Court is that the Eleventh Circuit's ruling in his favor properly harmonized the balance between free speech, the importance of citizen testimony, and government efficiency.[53] Franks argues that Lane's speech, when viewed in the light of *Pickering* and *Garcetti*,[54] was not protected. Franks believes that the need for government efficiency outweighed Lane's free speech rights, and further that Lane was speaking pursuant to his official

[50] *Id.* at 10.
[51] *Id.* at 14.
[52] *Id.* at 14.
[53] Brief for Respondent Franks at 17, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 1348478.
[54] *Id.* at 20-21.

duties.[55] Finally, Franks argues that he was protected by qualified immunity because it was not clear that Lane's speech was protected at the time of his dismissal.[56]

Respondent Burrow, in a separate brief, argued that Lane's speech was protected because he was not testifying in his official capacity, per *Garcetti*.[57] Further, Burrows argues that since the case can be settled by using the *Garcetti* standard, then the Court should not adopt a rule that specifically allows for, or bans, retaliation against an employee for subpoenaed speech.[58] Instead, she argues that courts should apply the test set forth in *Garcetti* and examine whether the speech was related to their official duties.[59] However, Burrow does not fully side with Lane because she also argues that qualified immunity should absolve Franks.[60] Burrow believes that Franks was acting consistent with Eleventh Circuit precedent.[61]

Amici Curiae

Several amici curiae filed briefs in support of Lane, but Franks and Burrow only received one amicus brief. The First Amendment Coalition filed a brief in support of Lane, arguing that, "truthful speech is at the apex of the constitutional safeguard; that truthful speech about matters of public concern and the conduct of public officials is especially protected and that truthful testimony in court, in particular, may not serve as the basis for public sanction."[62] The Alliance Defending Freedom also filed a brief in support of Lane arguing that, "A public employee should receive full First Amendment

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[55] *Id.* at 20-24.
[56] *Id.* at 36.
[57] Brief for Respondent Susan Burrow at 11, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 844600.
[58] *Id.* at 12.
[59] *Id.* at 12-13.
[60] *Id.* at 13-14.
[61] *Id.*
[62] Brief for the First Amendment Coalition as Amicus Curiae Supporting Petitioner at 2, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 975501.

protection when speaking on matters of public concern, unless the employer can demonstrate that such speech disrupts implementation of the employer's business operations."[63] Further, The National Whistleblower Center argued in its amicus brief that a government employee has a duty to communicate to his government, possibly through sworn testimony, information about potential crimes.[64] At least six other organizations filed amici briefs in support of petitioner as well.[65]

Respondents, on the other hand, only had one amicus brief in their support, filed by the International Municipal Lawyers Association and the International Public Management Association for Human Resources. Their brief argued that public employees have free speech rights and should not be retaliated against for asserting those rights; *however*, the groups argue that per *Garcetti*, public employees should not be protected when they are testifying pursuant to their official duties.[66] The amici argue that a ruling in favor of Lane would burden local governments.[67]

Finally, the United States filed a brief supporting affirmance in part and reversal in part.[68] The U.S. argued that, "Public employees do not uniformly lack First Amendment protection for testimony, pursuant to subpoena, about information learned

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[63] Brief for the Alliance Defending Freedom as Amicus Curiae Supporting Petitioner at 3, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 891769.
[64] Brief for the National Whistleblower Center as Amicus Curiae Supporting Petitioner at 3, Lane v. Franks, 134 S. Ct. 999 (2014) (No.13-483), 2014 WL 950815.
[65] The additional amici in support of Petitioner include: the AFL-CIO (on behalf of government service unions); the American Federation of Labor and Congress of Industrial Organizations; the American Civil Liberties Union; the Government Accountability Project; the National Associate of Police Organizations; and Law Professors as Amici Curiae.
[66] Brief for the International Municipal Lawyers Association, Inc. and the International Public Management Association for Human Resources as Amici Curiae Supporting Respondent Franks at 3, Lane v. Franks, 134 S. Ct. 999 (2014) (No. 13-483), 2014 WL 1478064.
[67] *Id.*
[68] Brief for the United States as Amicus Curiae Supporting Affirmance in Part and Reversal in Part, Lane v. Franks, 134 S. Ct. 999 (2014) (No.13-483), 2014 WL 950814.

through their work for the government."[69] However, the U.S. opined that Franks was protected by qualified immunity "[b]ecause the constitutional status of such speech was not clearly established at the time of petitioner's dismissal."[70]

The Potential Impact of the Decision

Teachers, as a unique subset of public employees, testify in a variety of scenarios. Some of that testimony is subpoenaed while some is not. For example, recently teachers and school officials have testified about: curriculum;[71] teacher intimidation;[72] teacher preparedness;[73] testing;[74] alleged cheating;[75] and a host of other issues. The Supreme Court's decision in *Lane v. Franks* could greatly impact how often teachers testify, the testimony's topic, and even the testimony's candidness.

First, the Supreme Court could rule that when a public employee is subpoenaed to speak, he or she is covered by the First Amendment, regardless of the nature of the testimony. This would undoubtedly protect teachers and other public employees from retaliation from their employer for testimony that may or may not harm the employer's image. However, such a ruling would also greatly restrict a public employer's ability to control the way their employees speak about the organization. There are also concerns about burdening local and state governments with litigation. In a previous decision, the

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[69] *Id.* at 7.
[70] *Id.*
[71] *Local Teacher Testifies on MMC Legislation*, MICHIGAN HOUSE REPUBLICANS (Apr. 2014) http://gophouse.org/local-teacher-testifies-on-mmc-legislation/.
[72] *Sikeston Teacher Tearfully Describes Bullying and Intimidation She Suffered for Opposing Common Core*, THE MISSOURI TORCH (Mar. 2014), http://themissouritorch.com/blog/2014/03/27/sikeston-teacher-tearfully-describes-bullying-intimidation-suffered-opposing-common-core-video/.
[73] Whitney Ogden, *ASU Dean Testifies to Senate Panel Considering Teacher Preparedness*, CRONKITE NEWS (Mar. 2014), http://cronkitenewsonline.com/2014/03/asu-dean-testifies-to-senate-panel-considering-teacher-preparedness/.
[74] *Bridgewater-Raritan H.S. Teacher Testifies at State Board of Education*, NEWJERSEY.COM (Mar. 2014), http://www.nj.com/messenger-gazette/index.ssf/2014/03/bridgewater-raritan_hs_teacher_testifies_at_state_board_of_education.html.
[75] *Cleared Teacher Testifies Against APS Co-Worker*, WSB TV-2 Atlanta (Apr. 2014), http://www.wsbtv.com/videos/news/cleared-teacher-testifies-against-aps-co-worker/vddxX/.

Supreme Court recognized that "government offices could not function if every employment decision became a constitutional matter."[76] Such a decision could upset the balancing of interests (free speech v. government efficiency) that the Court recognized in *Pickering*.

Second, the Court could choose to extend their holding in *Garcetti* to also cover subpoenaed testimony. Therefore, any testimony that was related to the employee's official duties would not be protected, but any subpoenaed testimony outside of his or her official duties would be protected by the First Amendment. Such a ruling could balance the interests of both public employees and government employers. Schools would be able to discipline their employees for (negatively) testifying about matters related to their official duties, while employees would still be free to testify about matters unrelated to their position. While this would restrict some speech that could possibly benefit the public, it would also allow school districts more freedom in dealing with their personnel and ultimately running an efficient district. As the Court has noted, both free speech and government efficiency interests are valid and must be balanced.

Conclusion

The *Lane v. Franks* decision will help settle the issue of free speech rights in regards to the subpoenaed testimony of public employees. The case will also add to the case law on public employee free speech rights in general. With over 20 million people working as public employees, this case is sure to have significant consequences in the future and could sway the balance between the right to free speech and an efficient government-employer.

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[76] *Engquist v. Oregon Dep't of Arg.*, 128 S. Ct. 2146 (2008).