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Employment Law
Snelling v. City of Claremont:
Supreme Court Analyzes First Amendment Claim

Editor's note: This is the fourth NH Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). The topic is the New Hampshire Supreme Court decision in Snelling v. City of Claremont*, issued July 18, 2007, and affirmed, upon reconsideration, on September 10, 2007.*

In *Snelling*, the NH Supreme Court analyzed a First Amendment claim for the first time since the US Supreme Court issued its 2006 decision in Garcetti v. Ceballos (See "Less Protection for Government Whistleblowers," July 7, 2006 *Bar News*, by Nancy Richards-Stower), and held that Snelling's First Amendment rights had been violated even though the topic of his speech involved the subject matter of his government job. The case also involved issues of the pre-Garcetti Pickering balancing test (*Pickering v. Board of Ed. of Township High School Dist. 205, Will City, 391 U.S. 563 (1968)*), qualified immunity for government officials, jury instructions and remittitur. What follows is the debate between attorneys Nancy Richards-Stower and Debra Ford regarding the Snelling decision.

Debra: Nancy, the employee plaintiff won, but are you gloating this time?

Nancy: Yes! Once again, the New Hampshire Supreme Court provides a rational employment law decision. I shudder to think what would have happened to Mr. Snelling had his case been removed to the federal court. I can just see the summary judgment decision: "No reasonable mind could differ that Snelling's speech pertained to his job responsibilities and is thus unprotected under *Garcetti*."

Debra: And the federal court would have been right. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) held that a government employee has no First Amendment protection for discussing matters pertaining to his job duties while on the job. The big area of dispute after Garcetti is how to define the job duties.

Nancy: Yes, Deb, *Garcetti*: another one of those wonderful 5-4 United States Supreme Court decisions which eviscerated decades of evolving Constitutional protection. It vaporized the First Amendment for the many brave, honest and responsible government employees who speak out at work about wrongdoing they witness on the job and left them mostly defenseless, with only a loose network of loophole-ridden, mostly toothless whistleblower statutes, and lacking meaningful remedies. Before *Garcetti*, they could rely on the well-developed tests of *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Ed. of Township High School Dist. 205, Will City, 391 U.S. 563* (1968).

Those tests required the employee to prove that the speech sought to be protected (a) involved public policy (and not some personal gripe); and (b) was published without unduly disrupting the workplace (like hanging something provocative on a wall accessible to the public). After *Garcetti*, government employees lost protection for speech made pursuant to the employee's official duties.

In his *Garcetti* dissent, Justice Souter correctly predicted that the government would be inspired to create broad job descriptions just to minimize First Amendment protections. Those of us in the trenches knew that after Garcetti, the government would always argue that any speech uttered by a government employee, which speech angered the agency's major players, would be categorized as speech made pursuant to the job— and so it was with *Snelling*.

Debra: One of the first issues addressed in *Snelling* was whether or not *Garcetti* even applied, since *Garcetti* came down after the jury verdict in Snelling. Citing precedent, our Supreme Court ruled that *Garcetti* applied retroactively to all cases "alive" on its publication date.

Nancy: Yes. That's one of those jolts we lawyers dread. Argh! Winning a jury trial big time, only to have the United States Supreme Court change decades of precedent on the eve of the appeal deadline. Remember the ADA trilogy cases? The Supreme Court re-defined "disability" so that few workers could ever

meet the court's definition, knocking them out of contention for any "reasonable accommodation." About a third of my clients kissed away their civil rights on that morning. Thank goodness for state law and state courts!

Debra: Nancy, we can argue about the scope of the Americans with Disabilities Act another time, but the retroactivity issue is interesting. The controlling precedent was a 1993 tax case holding that a Supreme Court decision "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Supreme Court's] announcement of the [new] rule." (*Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993*).

Nancy: The good news for Mr. Snelling was that despite *Garcetti's* retroactive application, the New Hampshire Supreme Court held that the speech sparking retaliation against him was protected, as it was made apart from his official duties, despite the government's argument, reiterated on a motion for reconsideration, that Snelling's speech to a newspaper reporter was made pursuant to his official duties.

The argument went like this: Snelling was the tax assessor, the press interview took place at his office, the topic of his speech was the existence of inequities in Claremont's tax abatement procedures, gross inequities in the overall assessments, and the reporter had sought him out (and had not been in the midst of any "person on the street" survey), and the interview took place in Snelling's office. So why didn't *Garcetti* doom Snelling? Because speaking to the press was not one of Snelling's job duties, and the speech was not in furtherance of an internal grievance. This was one man giving his opinion to the press about his employer's tax policies.

Debra: Well, even Snelling himself indicated that his job responsibilities included providing information to the public, "to build a rapport with the taxpayers," and "to educate them." Plus, he thought he was speaking as part of his job.

Nancy: Yes, but the test is not what the employee thinks his job duties are; his duties must be viewed from the perspective of the employer: what tasks is he expected to perform in order to earn his paycheck. Nowhere in the record is there even one single hint that Snelling's job included expressing his opinion about the city's assessment policies. Even though he thought that the reporter had been sent to him by the city manager down the hall, when he spoke to the reporter, Snelling was clearly not speaking on behalf of Claremont; rather, he was attacking how Claremont dealt with property taxation (bringing to mind whether or not this decision should be entitled "Claremont 10" or "11" or "12"...).

His job duty to communicate to the public about property evaluations and assessments did not encompass a duty to provide his opinions as to the fairness of the assessment system. Also, his letting the public know that a city councilor took advantage of a little-known tax provision to reap a benefit is obviously a matter of public interest.

Debra: But the other half of the Pickering balancing test focuses on the disruptive effects the speech has to the government operation. One of the factors is whether the speech will have "a detrimental impact on a necessarily close working relationship" when public comments "may embarrass or even harass their government employers."

Nancy: Yes, that is true, but before this factor tips any scale, the government employer has to show "actual and significant harm." The court noted that a loss of trust by his boss wasn't enough to engage the *Pickering* disruption trigger, and the city councilor whom Snelling accused of taking advantage of the near-secret loophole, had no direct working relationship with Snelling.

Debra: The qualified immunity defense was raised, and had it been successful, Snelling would be out of luck. As the court noted, "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." As Claremont relied upon the advice of its legal counsel, it argued that Snelling's termination was objectively reasonable.

However, the record was clear that during those meetings with counsel, when the issue of Snelling's potential termination was discussed, no one discussed the issue of the First Amendment (although counsel thought about it), because counsel was under the impression that the newspaper article was unrelated to the reason for Snelling's termination. Accordingly, the court held that counsel's advice was not based on a full understanding of the facts and could not be relied upon.

Nancy: I was surprised at how easily the court determined that Snelling's First Amendment rights were clearly established under precedent, and, that defendant's actions were not objectively reasonable based on

any mistake about what the law requires, knocking out the qualified immunity defense. The court rejected Claremont's argument that "because the law is so unclear, there is no reasonable basis to conclude that the law on this issue has been clearly established." In so doing, the court focused on Pickering, i.e., that the subject matter of the fairness of the tax system was clearly a matter of public concern.

I remain confused, however, about why it was so clear that Snelling's speech wasn't part of his job. It certainly became clear to me, after reading the terrific arguments of Snelling's counsel, but those arguments weren't available to the decision makers. I think that this part of the ruling is the most important, and trumpets good news for New Hampshire government employees lucky enough to find themselves in state court after the lapse of the federal question removal period (usually 30 days following service of the complaint). Our New Hampshire Supreme Court has demonstrated a high respect for the importance of freedom of expression by government employees.

Debra: Well, future state court determinations will constitute only a small slice of First Amendment cases, won't they? Most defense attorneys would seek a speedy removal to federal court.

Nancy: (Sigh) Yes, that's true. Shall we debate the whole summary judgment trend in federal court employment cases now?

Debra: No, let's save that for another day….And on a final note, I think the significance of *Snelling* to employers is that an employer must first determine whether the comments made by an employee are matters of public concern and outside the official duties of the employee. The employer must then be able to show that these comments interfere with the employer's business operation. If an employer discharges an employee without being able to show such interference, then an employer will likely be subject to a viable claim for retaliatory termination.

Facts of the Case:

Steven Snelling was employed as the tax assessor for the City of Claremont for approximately seven years. He was terminated and he then filed claims against the city alleging that his First Amendment rights had been violated and that he had been wrongfully terminated. The decision set out the facts:

Soon after being hired as the city assessor, the plaintiff began to serve on the Tax Increment Finance (TIF) Committee, which was responsible for, among other things, preparing a report to submit to the State regarding the finances of the City's tax increment district. In July 2000, the plaintiff abruptly resigned from the TIF Committee. Additionally, during the early months of his employment, the plaintiff testified on behalf of a social acquaintance at a Claremont Zoning Board of Adjustment hearing in opposition to the official position of his department.

In August 2000, the plaintiff was contacted by a reporter from the Claremont Eagle Times newspaper. The plaintiff participated in a series of interviews with the reporter, and an article incorporating those interviews was published on August 27, 2000. In the article, the plaintiff is credited with "adding his voice" to those of others who had been claiming that the city's tax system was unfair, or otherwise flawed. Additionally, in the article the plaintiff indicated that certain members of the city council were taking unfair, but not illegal, advantage of the city's tax abatement system. Finally, the plaintiff was referenced as commenting on some of the efforts that had been made to correct the tax system's inequities and his role, or proposed role, in those changes.

Shortly after publication of this article, City Manager Robert Porter met with City Solicitor Jack Yazinski to discuss whether the plaintiff should be terminated. Yazinski asked Porter for a memorandum outlining why Porter believed the plaintiff ought to be terminated. After reviewing Porter's memorandum and conducting his own research, Yazinski informed Porter that there was no impediment to the termination. The plaintiff was terminated in September 2000. In the plaintiff's termination letter, Porter cited seven reasons for the termination: two concerned the plaintiff's testimony before the zoning board, one related to the TIF committee, and one concerned the plaintiff's comments in the newspaper article.

In September 2003, the plaintiff filed this action alleging wrongful termination against the city. The plaintiff also brought a claim against Porter under 42 U.S.C. § 1983 alleging that his termination violated his rights under the First Amendment. Following a trial, the jury found in favor of the plaintiff and awarded him $151,000 in past wages and benefits, $50,000 for mental and emotional distress, $151,200 in enhanced compensatory damages, and $3,780 in punitive damages. The jury awarded nothing on the plaintiff's claim for future lost wages and benefits. The Trial Court (Hollman, J.) denied the defendants' motions for remittitur and a new trial, as well as the plaintiff's motion for judgment notwithstanding the verdict.