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Look inside for photos and highlights of the 2006 NHBA Annual Meeting on pages 8-10.

THE DOCKET

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Broderick: New Courthouse for Merrimack County Is Top Priority

By Beverly Rorick

"The Legislature has always been very supportive of the Judicial Branch en it comes to building new courthouses," said Supreme Court Chief Justice ın T. Broderick in a recent interview with *Bar News* in which he discussed ns for a new courthouse for Merrimack County Superior Court. On the list of ırthouse projects, Merrimack has, for the last decade or so, been second or rd. However, the gravity of its situation has become so apparent that both derick and Superior Court Chief Justice Robert Lynn have asked the Legisla- e to place Merrimack County Superior Court at the top of the list of needs.

Broderick, who chairs the Court Accreditation Commission which oversees ırt facilities, asked the Commission on June 23 to make construction of a new ırthouse for Merrimack County Superior Court the top priority in requesting ıding from the state for capital projects. "For a long time the Hampton and eter District Courts have held that position," Broderick said, but recent moves hose courts to temporary quarters (Hampton's court has moved to Seabrook d the Exeter court to the Brentwood complex) have lessened the urgency of ir relocations.

In addition to cramped building space, Merrimack County Sheriff Chet

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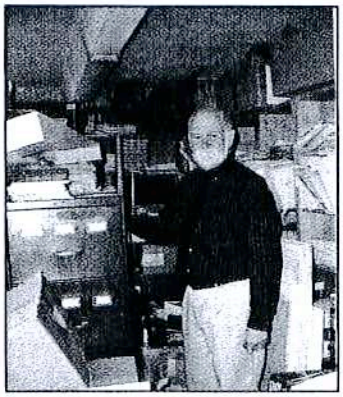

Bill McGraw stands in the Merrimack County Superior Court's crowded evidence room, located off the employee lunchroom.

Citizens Commission Issues Final Report

The NH Citizens Commission on the State Courts has ued its findings to the NH Supreme Court after more than ear of intensive effort and study by a commission of mostly n-lawyers.

The report proposes 30 recommendations, ranging from tiatives to improve the "customer service" orientation of e courts; more rapid implementation of technology for th court processing and to provide more information; case nagers to assist litigants in family courts; greater use of ntencing alternatives and more resources for substance use treatment; and continued cooperation and informa- n-sharing between the branches of government.

Commission co-chairs Will Abbott and Katharine eguess pledged to continue working with the court system follow up to ensure that the report's recommendations are nsidered for implementation.

ase turn to page 24 for details on the report or, for the full text, it www.courts.state.nh.us.

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'Did you know?" is a recurring feature from the NHBA Member Services Department, providing answers to questions about your Bar that you didn't even know to ask. See page 11 for details.

Employment Law

***Garcetti et al v. Ceballos:* An Employee Advocate's Perspective**

Less Protection for Government Whistleblowers

by Nancy Richards-Stower

On May 30, 2006, the United States Supreme Court handed down *Garcetti et al v. Ceballos*, on appeal from the Ninth Circuit. Justice Sandra Day O'Connor had been on the court when the case was originally argued last October, but off the court when the case was reargued this March. To paraphrase Robert Frost in "The Road Not Taken," that probably made all the difference. In another sea-change 5-to-4 decision, the court rolled back First Amendment protections for government employees. Justices John Roberts, Antonin Scalia, Clarence Thomas and Samuel Alito joined the opinion, written by Justice Anthony Kennedy. Justices John Paul Stevens, Stephen Breyer and David Souter (whose opinion was joined by Justices Stevens and Ruth Bader Ginsburg) issued separate dissents.

Under *Garcetti*, government employees can no longer look to the First Amendment to protect them from retaliation if the subject of their "free speech" falls within their job duties. Thus, Richard Ceballos, a government attorney demoted for reporting the falsification of a search warrant, can't count on the Constitution in his search for workplace justice. The fallout? A new constitutional litigation battleground, to be fought over the parameters of job descriptions of government employee whistleblowers.

Public employees now asserting First Amendment protection must demonstrate not only that the subject of their speech met all the pre-*Garcetti* criteria for protection (see *infra*), but also that the speech fell outside their job responsibilities. This means that those with the most and best information about government waste and corruption, environmental hazards, military crimes, misconduct, pharmaceutical drug efficacy, national security and space policy have become First Amendment orphans if their reports or dialogue take place at work. Why? Because a majority of the court agreed that without the (new) job duty barrier to the First Amendment, every dispute between a public employee and the employing agency would become a federal constitutional case. The majority ignored the fact that no such First Amendment floodgate had earlier burst.

The Ceballos Story

Richard Ceballos was a deputy district attorney for Los Angeles County and a supervisor. In February 2000, a defense attorney told Ceballos that a critical search warrant pertaining to his client was based on lies. Ceballos investigated and concluded that a deputy sheriff's underlying affidavit did contain lies. At issue were the deputy's claims that he followed tire tracks to the premises covered by the warrant although the road surface made that unlikely; and the sheriff's description of one

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long driveway didn't jibe with what Ceballos viewed as two separate roads. His second interview of the deputy sheriff solved nothing, so, on March 2, 2000, he issued a memo to his bosses recommending dismissal of the case.

Next came a meeting among Ceballos, his bosses and the deputy sheriff (with a few of his sheriff's department colleagues). It was no tea party. "*The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.*" (Opinion, p. 2). Imagine the real dialogue. Ceballos' bosses sided with the deputy sheriff, deciding to proceed with the case, pending the court's ruling on the defendant's related motion. At the motion hearing, the defendant called Ceballos, who testified to his concerns about the warrant. Even so, the court rejected the defendant's challenge to the warrant. Like many whistleblowers, Ceballos' career was doomed.

He was denied a promotion, presented with an option to transfer to another courthouse hours away in drive time ("Freeway Therapy") or prosecute misdemeanors (quite a comedown from murder prosecutions). Ceballos filed an internal grievance based on retaliation, lost and sued under the First and Fourteenth Amendments. The County argued that the alleged retaliatory acts were really solutions for legitimate staffing needs, and, anyway, Ceballos' memo was not protected speech under the First Amendment, *because the memo was just part of his job*.

The Courts Below

The trial court granted summary judgment to the government, ruling that since the memo was written as part of his job, Ceballos had no First Amendment protection for its contents.

The Ninth Circuit Court of Appeals reversed the trial court, ruling that the memo *did* constitute protected speech based on *Connick v. Myers*, 461 U.S. 138 (1983), which requires an employee prove that the relevant speech was made by the employee "*as a citizen upon matters of public concern.*" (*Connick*, 461 U.S. 146-147) The Appeals Court rejected "*the idea that 'a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility.*" (Opinion, p.7)

Background on *Connick*: In keeping with the district attorney theme, Connick was an assistant D.A. in New Orleans who opposed her supervisor's decision to transfer her by distributing a survey at work with topics on employee morale and whether her co-employees had confidence in several named supervisors. One question pertained to whether they felt pressure to work on political campaigns, but, that one question did not save the day for Connick or her insubordinate survey, for the Supreme Court held that the survey was more personal than public policy speech.

Back to *Garcetti*: After deciding that Ceballos' speech was about public policy, the Ninth Circuit addressed the *Pickering* balancing test, which strips First Amendment protection from otherwise protected speech if that speech impermissibly disrupts the workplace. (*Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.* 391 U.S. 563 (1968). *Pickering* involved a teacher whose somewhat inaccurate letter to the editor about school funding policies got him fired. But his job was saved by the First Amendment when the court held that because school funding was a matter of public concern, and the letter didn't interfere with the teacher's classroom abilities, or the school district's responsibilities, the speech was protected, if the inaccuracies were not made knowingly or recklessly.

"Freeway Therapy"

Over the years, *Pickering* and *Connick* weeded out cases brought by government employees whose speech was less about public policy and more about, or in reaction to, their performance problems, personality clashes, rudeness, partiality and/or creation of office chaos. Few disagree that the *government as employer* has the right to restrict more severely the speech of its own employees than the *government as government* can restrict the speech of Joan Q. Public. The reason is obvious.

If the speech flows from an employee's incompetence, biases, output, or boundary issues, it's probably not about public policy; and, even if it is, Constitutional protection evaporates if the actual manner and circumstance of the speech disrupts the agency's ability to provide its services. This has been clear for years. But, now, there's a new test in town: "*Garcetti*," and it gives a whole new meaning to the chant, "But it's not my job!" (Note: the court did allow for some workplace First Amendment protections – so long as communicating about the issue was not part of the employee's job responsibilities, citing *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979), where a teacher spoke out about the racial composition of the school staff.

Ceballos' speech passed the *Connick* public concern test and the *Pickering* balancing test. Yet, it became kindling for alleged (and now Constitutionally permissible) retaliation, including the option to add several hours to a whistleblower's commute on the infamous L.A. freeway. Message to public servants: Speak up only after work if you're discussing your job, because, "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." (Opinion, p. 12). But, "...the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline." (Id.)

So, what protections did the majority envision for whistleblowers? Whistleblower protection statutes; but not the Constitution.

The Dissents

Justice Stevens opened with a zinger: "The proper answer to the question whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties...is 'Sometimes,' not 'Never'.

Of course a supervisor may take corrective action when such speech is 'inflammatory' or 'misguided'...But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?" (Stevens dissent, p. 1)

Justice Souter (joined by Justices Stevens and Ginsberg) proposed a new test: "an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it...and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor. If promulgation of this standard should fail to discourage meritless actions premised on 42 U.S.C. §1983 (or *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)) before they get filed, the standard itself would sift them out at the summary-judgment stage." (Souter dissent, p. 8)

He noted that Bessie Givhan, the teacher of *Givhan v. Western Line Consol. School District, supra*, who complained about the racial composition of her school's workforce, might still have her speech protected under *Garcetti*, if, when speaking, she remained a teacher; but, she could be fired for the exact same speech, if when speaking, she was the school's personnel director.

Justice Souter predicted serious public policy fallout from *Garcetti*: it will inspire the government to create broadly written job descriptions just to minimize First Amendment protections; it will dissuade from government service the very professionals the country needs, like doctors and scientists; it threatens academic freedom, and the public will be deprived of important information, quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004): "'Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers...which are of substantial concern to the public...The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.' This is not a whit less true when an employee's job duties require him to speak about such things." (Souter Dissent, p. 7)

As to the whistleblower statutes celebrated by the majority as the answer to Ceballos' problems, Justice Souter emphasized their jurisdictional, substantive and geographic variations, as well as their obvious—and significant—loopholes.

Justice Breyer, also in dissent, criticized Justice Souter's test for failing to give sufficient weight to "the serious managerial and administrative concerns that the majority describes." (Breyer dissent, p.4) And while he agreed that Ceballos should win under *Pickering*, he urged that Constitutional protections be reserved only for employees who are required to speak out by the Constitution and/or professional conduct rules.

Conclusion and Prediction

Democracy is safeguarded by its government workforce: employees who implement public policy while sacrificing the wealth and prestige available in the private sector. Their constitutional right to speak truth to power about their jobs while at their jobs is gone. And that will make all the difference.

On remand, however, Richard Ceballos will win. The appeals court will focus on his other First Amendment counts, like the one involving his speech to the Mexican-American Bar Association about misconduct by the sheriff's department and related policy failures of the D.A., a speech he gave just two days before his grievance was dismissed.

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