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ANNUAL LEGAL UPDATE

Developments in the Law of Academic Freedom

Frederick P. Schaffer

I. Secondary Materials

Frederick P. Schaffer, *A Guide to Academic Freedom*, **http://www.nacua.org/documents/GuideAcademicFreedom.doc or** http://www1.cuny.edu/mu/vc_la/2012/01/02/a-guide-to-academic-freedom/

Rachel Levinson-Waldman, "Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship, http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief_0.pdf.

II. Cases

A. Free Speech – *Garcetti*

1. *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550(4th Cir. 2011).

This is an action brought by an associate professor of criminology alleging discrimination based on his religion and exercise of free speech rights, as well as retaliation, in connection with the denial of his application for promotion to full professor. The district court granted summary judgment for defendants on all claims. The court of appeals affirmed in part and reversed in part and remanded.

Plaintiff's application for promotion cited some external writings and appearances since his religious conversion, in addition to non-refereed publications and informal advising to Christian groups. When his application was denied, he sued. The district court dismissed his claim of religious discrimination on the ground of insufficient evidence and the court of appeals affirmed that holding. The district court also dismissed his free speech claims, holding that all of plaintiff's statements cited in his application for promotion were made pursuant to his official duties and therefore enjoyed no First

Amendment protection under *Garcetti*. The district court reasoned that when plaintiff listed his columns, non-scholarly publications and public appearances in his application, he implicitly acknowledged that they were made pursuant to his professional duties as a faculty member. The court of appeals reversed on this point, holding that the district court had misread *Garcetti*. The court summarized its ruling as follows:

> The district court's decision rests on several fundamental errors including its holding that protected speech was converted into unprotected speech based on its use after the fact. In addition, the district court applied *Garcetti* without acknowledging, let along addressing, the clear language in that opinion that cases doubt on whether the *Garcetti* analysis applies in the academic context of a public university. See *Garcetti*, 547 U.S. 425, 126 S. Ct. 1951. Nor did the district court take into consideration the only Fourth Circuit case addressing a similar issue, *Lee*, 484 F.3d at 694 & n. 11 [where the court applied the *Pickering-Connick* standard, not *Garcetti*, to a high school teacher's speech related to classroom teaching].

640. F.3d at 561.

The court of appeals went on to hold, most significantly, that *Garcetti* does not apply in the academic context of a public university under the facts of this case. Its reasoning is worth quoting in full:

> There may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply to the specific instances of the faculty member's speech carrying out those duties. However, that is clearly not the circumstance in the case at bar. Defendants agree Adams' speech involves scholarship and teaching; indeed,, as we discuss below, that is one of the reasons they say *Garcetti* should apply – because UNCW paid Adams to be a scholar and a teacher regardless of the setting for his work. But the scholarship and teaching in this case, Adams'speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams' assigned teaching duties at UNCW or any other terms of his employment found in the record. Defendants concede none of Adams; speech was undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties.

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> Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. In light of the above factors, we will not apply *Garcetti* to the circumstances of this case.

640 F.3d at 563-64. The court then went on to explicitly reject defendants' argument that *Garcetti* should apply because plaintiff's position as an associate professor required him to engage in scholarship, research and service to the community and that the resulting statements were therefore pursuant to his official duties. The court quoted from both the majority and dissenting opinions in *Garcetti* that its holding does not fully account for the additional constitutional interests related to academic scholarship or classroom instruction. The court of appeals in *Adams* therefore concluded:

> Put simply, Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields. For all the reasons discussed above, that thin thread is insufficient to render Adams' speech "pursuant to [his] official duties: as intended by *Garcetti*.

640. F.3d at 564. Accordingly, the court of appeals went on to state that a review of plaintiff's speech must utilize "the P*ickering-Connick* analysis for determining whether it was that of a public employee, speaking as a citizen upon a matter of public concern." *Id*. Its review of the record led the court to the conclusion that plaintiff's speech was clearly that of a citizen speaking on matters of public concern because his columns addressed topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion and morality.

Finally, the court of appeals remanded the case to the district court to decide the two issues that it had not reached: (1) whether plaintiff's interest in speaking on matters of public concern were outweighed by the government's interest in providing effective and efficient service; and (2) whether plaintiff's speech was a substantial factor in the decision not to promote him.

B. Discovery of Scholarly Materials

1. *United States v. Trustees of Boston College*, __ F.Supp.2d __, 2011 WL 6287967 (D. Mass., Dec. 16, 2011).

The court denied the motions of Boston College to quash subpoenas but granted its request for an *in camera* review of the responsive materials. The subpoenas were issued by a commissioner pursuant to the United Kingdom Mutual Legal Assistance Treaty and sought confidential interviews and records from an oral history project known as the "Belfast Project".

The goal of the project was to document in taped interviews the recollections of members of the Provisional Irish Republican Army, the Provisional Sinn Fein, the Ulster Volunteer Force and other paramilitary and political organizations involved in the "Troubles" in Northern Ireland. Boston College sponsored the Project, and its agreement with the Project director required him, the interviewers and the interviewees to sign a confidentiality agreement forbidding them to disclose the existence or scope of the Project without the college's permission. In addition, In addition, the contract also required the adoption of a coding system to maintain the anonymity of the interviewees; only the College Librarian and the Project Director would have access to the key. Each interviewee was given a contract guaranteeing confidentiality "to the extent that American law allows".

Much of the opinion is taken up with an analysis of the Treaty and the meaning of a federal statute called the Foreign Evidence Request Efficiency Act. The court concluded that under those authorities, it had discretion to review a motion to quash a subpoena under a standard of reasonableness, while giving appropriate deference to the compelling government interests inherent in the Treaty. Turning to the countervailing interest in confidentiality, the court reaffirmed the prior holdings of the First Circuit, which, almost alone among federal circuits, affords protection for confidential academic research materials (similar to the limited protection afforded to a reporter's materials from a confidential source). The court recognized the significant interests on both sides -- the obligations of the United States under the Treaty and the public's interest in legitimate criminal proceedings, on the one hand, against the Project's interest in confidentiality and the potential chilling effects of disclosure on academic research, on the other. Accordingly, it denied the motion to quash but granted Boston College's request for an *in camera* reviews of the responsive materials before rendering a final decision.

2. *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, 2011 WL 5547133 (S.D. Ill., Nov. 15, 2011).

The court denied the motion of Bayer HealthCare Pharmaceuticals to compel discovery of certain materials relating to the report of plaintiffs' expert witness. (Despite the fact that plaintiffs had withdrawn him as a testifying expert, Bayer argued that Seventh Circuit precedent required the production.) The materials in dispute consisted of peer review comments of published papers. The court ruled that the disclosure of peer review comments would impose a far greater burden on the academic and scientific community than the probative value to the defendant in this case and therefore denied the motion to compel.

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The court's recognition of the value of peer review is worth quoting in full:

> The peer review process is vital to academic quality. In the scientific community, peer review material identifies strengths and weaknesses in a researcher's material. This helps ensure integrity and reliability in scientific activity and reporting.
>
> The pillars of a successful peer review process are confidentiality and anonymity; anything less discourages candid discussion and weakens the process. Accordingly, peer review material has traditionally been protected from public disclosure.

The court went on to rely on the decision in *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982), where the Seventh Circuit quashed a subpoena issued to university researchers seeking research material, including research notes, reports, working papers and raw data (but not peer reviews) relating to ongoing studies on the ground that disclosure of such materials could interfere with the researchers' academic freedom and could have a chilling effect on scientific research generally. Interestingly, the court did not cite, much less discuss, the Supreme Court's unanimous decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), holding that the EEOC did not violate academic freedom in requiring a university to turn over confidential peer review materials pursuant to a subpoena issued in its investigation of a discrimination claim filed by a faculty member who had been denied tenure.