A Case of First Impression in the Second Circuit: Court Rules *Garcetti* Defense Not Applicable to Professor's Claim of Academic Freedom

Freedom of speech in the public employment arena presents a double-edged sword; on the one hand, freedom of speech is one of the most cherished values that undergirds the proverbial marketplace of ideas in a university setting but can also cause a public university to wade into a thicket of unsettled case law when it comes to denying tenure or otherwise undertaking any type of adverse employment action against an outspoken faculty member.

A major defense available to most public employers in a First Amendment retaliation case is the so-called "*Garcetti* defense." In *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), the Supreme Court held that when public employees engage in speech as part of their official duties, such speech is not protected by the First Amendment. This happens, for example, when a high school department chair makes an internal complaint about school curriculum. *See Schulz v. Commack Union Free Sch. Dist.*, No. 21-CV-5646-RPK, —– F.Supp.3d ——–, ——–, 2023 WL 2667050, at *7 (E.D.N.Y. Mar. 28, 2023).[1]

The *Garcetti* case arose in the context of a deputy district attorney's claim that he had faced retaliation for complaining in an official memo about a prosecution brought by his own office. *See Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. Although the case involved a fact pattern outside of the university setting, there was an interplay between the majority and dissenting opinions about whether, hypothetically, the *Garcetti* holding should be applied "in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425, 126 S.Ct. 1951. The Court expressly left that question for another day. That day came in the Second Circuit on August 30, 2023, with its decision in *Heim v. Daniel*, 2023 WL 5597837 (2d Cir. 2023).

In *Heim*, an adjunct professor brought a lawsuit against the State University of New York at Albany (SUNY Albany) alleging that he was denied three full-time opportunities in the Economics Department, two of which were tenure track, in retaliation for his free speech. At its core, Heim claimed that his teaching methodology, which was based largely on "Keynesian" economics, was protected under the First Amendment and that the university's decision not to consider him for the desired positions because of his Keynesian-based teaching methodology violated the Constitution. The Second Circuit framed the issues as:

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1 The *Heim* court left open whether Garcetti applies in the K-12 setting. The District Court in *Commack, supra*, suggests that it does. The author of this client memo, and Bond, defended the Commack school district in the Schulz case.

> The merits of that debate are not for us to assess; judges are neither qualified nor commissioned to resolve academic debates among scholars in any particular discipline. What matters is that the debate exists at all, and that Heim – who practices traditional Keynesian economics – is on one side of it, while his colleagues at SUNY Albany – who do not – are on the other.

Under a typical *Garcetti* inquiry if Heim's teaching from a Keynesian framework was part of his "official duties" as a professor, Heim's First Amendment claim would be dismissed outright. But the Second Circuit held that *Garcetti* does not apply to classroom speech by a public university professor. The Court held that: "The problem with applying that reasoning here is that professors at public universities are paid – if perhaps not exclusively, then predominantly – to speak, and to speak freely, guided by their own professional expertise, on subjects within their academic discipline." *Heim*, 2023 WL 5597837, at *11. Finding agreement with the Fourth, Sixth and Ninth Circuits, the Court concluded:

> We agree that "[t]he need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings," we agree that a professor's academic speech is "anything but speech by an ordinary government employee," *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021), and therefore, fundamentally, we agree that " 'given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment,' ... *Garcetti* does not – indeed, consistent with the First Amendment, cannot – apply to [a public university professor's] teaching and academic writing," *Demers v. Austin*, 746 F.3d 402, 411-12 (9th Cir. 2014), quoting *Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

The ruling that *Heim*'s teaching methodologies were not subject to the *Garcetti* defense, did not, however, mean that *Heim* won the case. To the contrary, SUNY Albany still had, and was able to prevail on, the *Pickering* balancing test (*Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)), which looks to whether an employer's interests in promoting the efficiency of its services outweighs an employee's right to comment on matters of public concern. On this issue, the Court held that it must defer to the educational expertise of the university:

> If the academic enterprise is to remain an engine of progress, decisions about the value of academic work must be left to academics. Though, in nearly all contexts, government officials are barred from discriminating among speakers based on their own judgments of the quality or content of the speech, in this exceptional context where professors' advancement necessarily depends on the quality of their work, and where the evaluation of that quality necessarily depends on evaluators' assessments of the work's content, the First Amendment operates differently. It *must* operate differently. Much as importing *Garcetti*'s rationale from typical public employment settings into this atypical setting – effectively stripping professors at public universities of much of their First Amendment protection in the process – would be inconsistent with the core function of those universities, so too would any interpretation of the First Amendment that bridles the efforts of experts at those universities to foster high-quality scholarship with content-neutral constraints imposed by lay courts.

Heim, 2023 WL 5597837, at *16 (emphasis in the original). In ruling in SUNY Albany's favor, the Court concluded: "If the Supreme Court's (and this Court's) enthusiastic endorsement of the First Amendment principles supporting a university's academic freedom is to be given any practical bite, decision-makers within a university must be permitted to consider the content of an aspiring faculty member's academic speech, and to make judgments informed by their own scholarly views, when making academic appointments." *Id.* at *17.

Like other cases of first impression, the *Heim* decision will likely spawn legions of would-be litigants seeking to test the outer margins of the Court's holding, including in private university settings where First Amendment protections have been adopted in employment policies and handbooks. Consequently, we suggest that when First Amendment concerns arise in the context of an employment decision, universities consult legal counsel on the front-end of the decision. The *Pickering* balancing test will surely provide comfort in the process, but the *Heim* court cautioned: " nor do we suggest that the decision not to hire an applicant based on the applicant's views on academic debates can *never* prevail over the employer's interests under *Pickering*." Id. (emphasis in the original).

For any questions about the information presented in this memo, please contact Howard M. Miller, any attorney in Bond's higher education practice or the attorney at the firm with whom you are regularly in contact.

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