

Connecticut Employment Lawyers Association

www.ctnela.org

connecticutnela@gmail.com

2012-2013 Executive Board:

April 1, 2013

Nina Pirrotti, President
Nicole Rothgeb, Vice President
Stephanie Dellolio, Treasurer
Karen Baldwin Kravetz, Secretary

Good morning afternoon Senators Coleman and Kissel, Representatives Fox and Rebimas and members of the committee.

My name is Deborah McKenna. I am an attorney at Emmett & Glander in Stamford CT and I practice in the area of plaintiff's side employment law. I am testifying today on behalf of the Connecticut Employment Lawyer's Association (known as CELA) in support of **Section 17 of Raised Bill No. 6667 "An Act Concerning The Establishment of Benefit Corporations and The Liability of An Employer Who Disciplines or Discharges An Employee On Account of Exercise of Certain Constitutional Rights."**

CELA is a voluntary membership organization whose members are attorneys from throughout Connecticut who devote at least 51% or more of their employment related practice to representing employees. As such, CELA attorneys represent individual employees in all types of employment related matters including, but not limited to, discrimination, wrongful termination, and claims involving state and federal FMLA and related leave of absence issues. In addition, many of our members' practice also involve cases in which employees have suffered retaliation for exercising constitutional rights, such as the right to free speech, in their workplace.

CELA supports Section 17 of Raise Bill No. 6667 for the following reasons. Connecticut has a strong history of protecting employees who exercise their state and federal constitutional rights to free speech in the workplace. Indeed, the Connecticut General Assembly solidified this protection when it enacted Conn. Gen. Stat. Section 31-51q in 1983. Section 31-51q provides in

relevant part,

any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amended to the United States Constitution or section 3, 4, or 14 article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge.....

Of course, as with any of the laws that provide employees with protections within the employer-employee relationship, the protections set out in 31-51q were not without limitation. Indeed, at the time of 31-51q's creation, it was well settled under federal law that, for an employee's speech to be protected, that speech must first be determined to be on a matter of public concern. Specifically, for the speech at issue to be protected, it must be on a matter of political, social or other concern to the community. Speech that is about a matter that is personal to the employee, if it did not have a clear connection to a broader political, social or community issue, has traditionally not been protected.

Unfortunately, in 2006, the United States Supreme Court decided *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 1960 (2006) and held that when an employee engages in speech, even speech that could be considered to be on a matter of public concern, that speech is not protected if the employee made the speech pursuant to the employee's job duties. For example, in *Garcetti*, the employee was prosecutor who prepared a memo to his supervisor regarding his concern that an affidavit used to obtain a search warrant contained misrepresentations and alleged that he was retaliated after raising these concerns. The Supreme Court concluded that because his complaint was made as part of his job duties, his speech was not protected, and the subsequent retaliation that he claimed to have suffered was not legally actionable. This decision effectively eliminated protection for employees to be free from

retaliation by their employers for speaking out on a matter of public concern, when the employee was expected to engage in the speech at issue as part of his or her job.

Between 2006 and 2012, plaintiffs' attorneys argued that Conn. Gen. Stat. 31-51q provided broader protections for employees in this regard than federal law. This is certainly consistent with Connecticut's past practice in other areas of employment law, such as disability, pregnancy and age discrimination, where state law affords employees greater protection against discrimination than federal law does. However, in the fall of 2012, the Connecticut Supreme Court extended the rationale of *Garcetti* to two cases brought pursuant to Conn. Gen. Stat. Sec. 31-51q, *Schuman v. Dianon Systems, Inc.* 304 Conn. 585, 43 A.3d 111 (2012) and *Perez-Dickson v. City of Bridgeport*, 304 Conn. 483; 43 A.3d 69 (2012). The Connecticut Supreme Court's decision to extend the rationale of *Garcetti* to 31-51q claims dramatically limits the protections that have existed for the past twenty years, protecting Connecticut employees from retaliation by their employers for engaging in speech on a matter public concern. Unfortunately, the loss of this protection will cause employees to think twice before speaking out on matters that they discover during their employment because they will be afraid of the possibility of retaliation, often by the very individuals who they may be speaking out against. For example, a payroll clerk who discovers financial improprieties by her supervisor as part of her duties and raises those concerns with her supervisor, only to be disciplined by that same supervisor after raising those concerns would not have any protection against this type of behavior. It also means that employees who witness the very type of conduct that we as a community typically want employees to be able to bring to light, such as financial malfeasance; unsafe working conditions; unsafe health care practices; abuse of power by public officials; and treatment of children, will be fearful to do so because they will be risking not only retaliation but their very livelihoods.

This was not the intent of the General Assembly when it first enacted 31-51q. Therefore, we support the passage of Section 17 of Raised Bill 6667 so that all employees have protection against retaliation and are not forced to choose between acting on their conscience by speaking out on matter of public concern and their livelihood.