CONNECTICUT GENERAL STATUTE SECTION 31-51Q

(Testimony of Attorney Josephine S. Miller)

I provide this testimony in support of a favorable recommendation from this committee to maintain and strengthen the protections given to all employees to speak out about matters of public concern in their places of employment. I provide a few examples to illustrate the need for enhancing and insuring public employee free speech rights.

Suppose an employee who works caring for disabled clients in a residential facility witnesses serious physical abuse by a supervisor of a patient. The employee makes a report of the abuse only to be terminated herself a few days later. If this is a public employee and the abused client was in state care, the state could be subject to liability to the client for the abuse. If the abuses had been previously known and ignored, the extent of liability by the state or municipality would be enhanced because of a known pattern of abuse.

Suppose another employee learns of fraudulent misuse of $40,000 in school program funds by paraprofessionals in a school district. Further, assume the program funds were state and federal dollars. The employee reports the theft and fraud but is later terminated under circumstances that are retaliatory. There could be jeopardy to the continued receipt of those federal funds and additionally the fraudulent loss of state funds cannot be accounted for to the public.

Suppose an employee in aviation services at Bradley Airport, after making multiple reports to his immediate supervisor who fails to react, reports an on-going security breach at the airport. The immediate supervisor terminates him in retaliation for having made the report to upper management. Disclosure of the security breach results in an investigation that corrects the problem saving untold numbers of lives from possible aviation disaster such as 911.

Each of these scenarios illustrate the reason why public employees must be fully protected when they engage in speech that is regarding a matter of public concern.

Firstly, they illustrate that there is something about human nature that seems to retaliate even in bizarre circumstances. Experience shows that employees who seek to do and say the right thing are often penalized and retaliated against for doing so. There are those who brook no dissent even when their own actions or inactions are improper.

Secondly, these examples illustrate that public employees are often loyal to the mission of their employing organizations and conscientious about their duties often at high cost to themselves. Rank and file employees are often in better position to witness when there are problems in government that require attention, problems that those in higher up positions make seek to ignore.

Thirdly, they illustrate that state and municipal governments should welcome disclosures from employees who may be their only eyes and ears to make government more transparent, and more careful in the discharge of their functions. Fraud, abuse, safety concerns, all have potential ***costs to government*** when such conduct goes unreported or unchecked. There is no basis for creating two classes of employees within the state, one group that is protected and another group that is not.

The legislative intent for enacting 31-51q, as is evident in the plain language of the statute and in the discussion amongst legislators at the time the act was formally contemplated, is that it was to protect all employees, whether employed by public or private employers, from retaliation for engaging in first amendment related speech, as long as such speech can be

classified as being related to a public concern and as long as that speech does not interfere with the employers legitimate business.

In General Assembly proceedings conducted on May 25, 1983, Senator Owens moved for the acceptance of the Judiciary Committee's favorable report of the predecessor bill to 31-51q which had been amended by the House. After the assembly voted favorably for passage of the amended bill, discussion ensued in part as follows:

> "Senator Owens: This bill, Mr. President, would make any employer, *including the state or any municipality*, liable to any employee who is disciplined or discharged because such employee exercises under rights guaranteed by the First Amendment to the United States Constitution unless such activity substantially interfered with the employee's bona fide job performance, the liability would be for damages including punitive damages and reasonable attorney's fees.

Clearly, the assembly understood and accepted that the bill in question was to apply to the protection of *public employees, both municipal and state*.

During the regular session held on June 6, 1983, Senator Harp moved for acceptance of the Committee on Labor and Public Employee's favorable report on the predecessor bill to 31-51q and its passage. She made the following remarks:

> "Senator Harper: . . . The bill would make any employer, including the state or any municipality, liable to any employee who is disciplined or discharged because such employee exercised any right guaranteed by the first amendment of the United States, that being freedom of speech, crafts, religion and assembly or of sections 3, freedom of religion, 4, freedom of speech and press or 14, right to assembly for redress of grievances and other proper purposes of the first article of the Connecticut Constitution unless such employee, unless such activity, substantially or materially interfered with the employee's bonafide [sic] job performance or the working relationship between the employee and the employer. This liability would be for damages including punitive damages and for reasonable attorney's fees. The bill furthermore would apparently, would not require an employer to rehire an employee who was wrongfully discharged. The bill would

> authorize the court to award costs and reasonable attorney's fees to the employer if it determined that the law suit was filed without substantial justification. . . "

Again, Senator Harper's remarks clearly indicate the legislative intent to incorporate the entire body of public employees into the pool of individuals who would benefit from the protections afforded by section 31-51q.

Finally, on May 19, 1983, Representative Tulisano made a statement while an argument took place amongst the members of the House of Representatives regarding the bill. The argument concerned suggestions made by Representative Miscikoski that the bill be amended to include requirements that editors of newspaper or other media be required to fully disclose the names of editors/reporters who write or contribute to news articles. Representative Tulisano made the following comments (in part):

> "It's really kind of strange that with a bill which we are trying to *enhance First Amendment rights*, on the other hand we're attempting to take some of them away. . . "

Of course, Tulisano's comment that regarding the enhancement of First Amendment rights is a remarkable or noteworthy comment concerning the nature of the protections proposed by the predecessor bill to section 31-51q. Simply put, 31-51q must be seen to provide *greater protections* than those which are proposed by the First Amendment of the federal constitution.

In sum, the clear intent of 31-51q is to provide blanket protections to public and private employees working in the State of Connecticut from retaliation and discharge on account of engaging in speech as long as the speech does not entire with the employer's legitimate business concerns. Moreover, the legislative body specifically and intentionally sought to protect employees who engage in speech that consists of reports of wrongdoing. The only logical conclusion is that the protections contemplated by the state legislators specifically included

protections for public employees who engage in the type of speech that Garcetti found to be unprotected.

The restrictive holding of Garcetti , which seeks to eliminate federal First Amendment protections to public employees where the suspect speech actually constitutes conduct which is performed in the course of carrying out their normal employment responsibilities, is not applicable to 31-51q claims. The legislative intent was to protect ALL employees, public and private. This State's legislative body intentionally chose to grant more protection inasmuch as the statutory scheme has been interpreted as specifically protecting public employees.

Of course states can give more constitutional protections to its citizens than those that are granted by the federal constitution. This position was clearly embraced by the federal district court in *Zamore v. Dyer*, 597 F.Supp , 923, 930.

> "A state may grant its citizens greater protection than Congress has granted in Title VII,42 U.S.C. § 2000e-7. *See also Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) (absent preemption, states may impose stricter standards than do the federal statutes). The state statute on its face indicates that Connecticut has exercised this prerogative."

In Zamore, the district court recognized that the State of Connecticut has the right to grant greater constitutional protections to its citizens incorporated in the Connecticut Fair Employment Practices Act, (in this case protections to a plaintiff making a sex/pregnancy discrimination claim,) than what was available pursuant to the statutory scheme found in Title VII. In Zamore, the court dealt with the fact that under FEPA the defendant, as a public employer, unlike private employers was unable to claim the defense of change in business/financial circumstances to plaintiff's charge that the elimination of her position, the shortly before she was scheduled to return to work from a maternity leave, was a pretext for

discrimination based on her gender. In addition, FEPA, unlike Title VII, required that a successful plaintiff could be ordered to be reinstated. The district court upheld the validity of the more generous state provisions, finding that the State of Connecticut had the right to guarantee more expanded protections to its citizens than those guaranteed by federal law.

The Connecticut retaliation statute reads 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 amendment to the United States Constitution **or** section 3, 4 or 14 of article first of the Constitution of the state…shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages." C.G.S. § 31-51q.

This statute is to be read in the disjunctive regarding the right of free speech that is guaranteed to the employee. The right allegedly causing the adverse employment action may be under the free speech clause of the First Amendment to the U. S. Constitution or alternatively it may be the free speech right guaranteed to employees under Article First of the Connecticut Constitution.

The holding in Garcetti v. Ceballos, 547 U.S. 410,421,126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), was that "[w]e hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. 547 U.S. at 421. However, the inquiry does not end there.

"It is well established that federal constitutional and statutory law establishes a *minimum* national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights." State v. Oquendo, 223 Conn. 635, 649

(1992), State v. Geisler, 222 Conn. 672, 684 (1992). "Although we have often relied upon decisions of the United States Supreme Court interpreting the fourth amendment to define the protections provided by related provisions or our state constitution, we have at times determined that the state constitution affords greater protection to the citizens of Connecticut than does the federal constitution as interpreted by the United States Supreme Court." State v. Oquendo, id. at 649; see also State v. Marsala, 216 Conn. 150 (1990); State v. Dukes, 209 Conn. 98 (1988). "We have stated, moreover, that [t]he Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." State v. Oquendo, supra; State v. Dukes, supra, at 115. Thus, "'the law of the land' may not, in [the] state constitutional context, also be 'the law of the state of Connecticut' " State v. Oquendo, supra.; State v. Dukes, supra, at 114.

In Cologne v. Westfarms Associates, 192 Conn 48 (1984), the supreme court was asked to direct that the rights of free speech and petition under this State's Constitution may be exercised under circumstances where the Supreme Court of the United States had rejected that contention under the First Amendment to the United States Constitution in Lloyd Corporation v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972). The supreme court in Cologne recognized that federal law, whether based upon statute or constitution, establishes a minimum national standard and does not inhibit state governments from affording higher levels of protection for such rights. Cologne, Id. 192 Conn. at 57, citing Mesguite v. Alladin's Castle, Inc., 455 U.S. 283, 293, 102 S. Ct. 1070, 71 L. Ed, 2d 152 (1982); Paris Adult Theater, Inc. v. Slaton, 413 U.S. 49, 64,93 S. Ct. 2628, 37 L. Ed. 2d 446, reh. denied 414 U.S. 881, 94 S. Ct. 27, 38 L. Ed. 2d 128 (1973); State v. Ferrell, 191 Conn. 37, 45 n. 12 (1983); Griswold Inn, Inc. v. State,

183 Conn. 552, 559 n. 3 (1981); Fasulo v. Arafeh, 173 Conn. 473, 475 (1977); Horton v. Meskill, 172 Conn. 615, 641-642 (1977). In recognition of this principle, the United States Supreme Court has held that state courts are at liberty to construe their state constitutional guarantees of freedom of speech to situations where it has held there is no guaranty under the First Amendment to the United States Constitution. Pruneyard Shopping Center v. Robins, 447 U.S.74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

This was a clear invitation to the state supremes court in Cologne to construe the guarantees of free speech and assembly set forth in Sections 4, 5 and 14 of Article First of the Connecticut Constitution in a manner to enhance those freedoms to a level above the federal constitutional level. The supreme court, although recognizing its well established right to do so and that it was not bound by Lloyd Corporation v. Tanner, supra, declined to do so, but only because the free speech rights of the plaintiffs in Cologne had to be balanced against the private property rights of the defendants. Because private property does not lose its status as private property merely because the public is invited to use it for designated purposes and its essentially private status does not change by virtue of its being large or clustered with many other stores comprising a large shopping center, it should not be the function of the courts where there are competing constitutional rights of private parties "to carve out in the immutable form of constitutional adjudication the precise configuration needed to reconcile the conflict." Id. 192 Conn. at 65. "If, as the plaintiffs claimed, the development of large suburban shopping centers has greatly diminished opportunities for political advocacy in the public streets of downtown areas and other public places, the problem should be presented to the legislature." Id. 192 Conn. at 65-66.

Twenty years after deciding Cologne, the supreme court revisited the issue in United Food & Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associates, LP, 270 Conn. 261 (2004). The plaintiff, a labor union, appealed from a trial court judgment denying its application for an injunction to enjoin the defendants from prohibiting its entry into the common areas of the defendant's privately owned shopping mall, for the purpose of distributing literature and speaking on issues of employee rights. The trial court determined that the defendant was a private actor, and therefore, not subject to the guarantees afforded by the State Constitution. On appeal, the plaintiff urged this court to adopt a fact-specific, flexible approach. It argued that in the twenty year period after Cologne, several other jurisdictions had interpreted their state constitutional free speech provisions as conferring broader protection than the federal constitution. The court concluded that, even if it were to interpret our state constitution in a more expansive way, the facts were still essentially no different from Cologne. There was inadequate state action to trigger state constitutional protection.

Even though the state supreme court did in fact adopt a fact-specific, flexible approach in State v. Linares, 232 Conn. 345, 379-381 (1995) and held that Sections 4 and 5 of Article First of the Connecticut Constitution were not subject to the same stringent limitations as would be required under federal first amendment analysis, the essentially private character of a store and the land in a modern shopping center does not transform the actions of the defendant into those of public officials. While the state supreme court declined to depart from its holding in Cologne, nevertheless it recognized the possibility that a proper interpretation of the Connecticut Constitution could lead to the conclusion that it is more expansive than its federal counterpart. "Thus, should an appropriate case present itself, we may reconsider the issue." United Food & Commercial Workers Union, supra., 270 Conn. at 288. "We therefore leave for another day the

determination of the exact contours of our state action doctrine, and thus, whether to deviate from the federal model." Id. at 289.

In State v. Linares, supra, the supreme court held that the defendant's freedom of speech claims implicated various sections of the Connecticut Constitution, particularly Sections 4 and 5 of Article First and compared those sections to the corresponding language of the First Amendment to the United States Constitution, noting in particular that Section 4 contains the word "publish," a term not found in the United States Constitution and that other courts construing that term have held that it creates expanded communicative rights. Id. 232 Conn. at 380; citing Tate v. Akers, 409 F. Supp. 978, 981-982 (D. Wyo. 1976), affd. 565 F. 2d 1166 (10th Cir. 1977); South Holland v. Stein, 373 Ill. 472, 479-480, 26 N.E. 2d 868 (1940).

The state supreme court heard State v. Linares on appeal, upon the granting of certification, from the Appellate Court, State v. Linares, 32 Conn. App. 656 (1993) and declined to follow the modern, forum based approach employed to resolve first amendment claims under the United States Constitution, adopting the reasoning of the concurring opinion of Judge [now Justice] Schaller's analysis of free speech claims occurring on public property. Id., 32 Conn. App. at 676-686. Judge Schaller first turned to the text of the Connecticut Constitution and noted that the framers of our state constitution drafted the free speech provisions in considerably broader language than that of the first amendment of the United States Constitution and noted that effect must be given to every part of and each word. Id., at 677-678, citing Stolberg v. Caldwell, 175 Conn. 586, 597-598 (1978) and then noted the significant fact that the framers of the Connecticut Constitution chose free speech language considerably different from the first amendment:

> Article first sec. 4 of the Connecticut Constitution provides that "[e]very citizen may freely speak, write and publish his sentiment *on all subjects,* being responsible for the abuse of that liberty." [Emphasis added.] By contrast, the first amendment does not include language protecting free speech "on all subjects." Article 4 states that "[n]o law shall *ever* be passed to curtail or restrain the liberty of speech or of the press." [Emphasis added.] Unlike the first amendment which provides that "Congress shall pass no law" the use of "ever" in our state constitution offers additional emphasis to the force of the provision. Finally, article first, sec. 14, provides that citizens have a right, inter alia, "to apply to those invested with the powers of government, for redress of grievances by petition, address or *remonstrance."* [Emphasis added.]. Again, our state constitution offers language, i.e., "remonstrance," that sets forth free speech rights more emphatically than its federal counterpart. While I am not prepared to hold that these textual differences create an *absolute* right to free speech *anywhere at any time,* in my view, these differences warrant an interpretation separate and distinct from the first amendment.

Id. at 678.

Judge Schaller, in State v. Linares, cited several other states that have interpreted similar provisions in their state constitutions as providing greater free speech rights than the first amendment: Immune AG v. Moor-Janowski, 77 N.Y. 2d 235, 248, 567 N.E. 2d 1270, 566 N.Y.S. 2d 906 (1991), redefining libel, holding that free speech under the New York constitution did not mirror federal law as determined by the United States Supreme Court; Spiritual Psychic Science Church v. Azusa, 39 Cal. 3d 501, 519, 703 P. 2d 1119,217 Cal. Rptr. 225 (1985); and People v. Seven Thirty-Five East Colfax, Inc., 697 P. 2d 348, 353 n. 3 (Colo. 1985), both providing enhanced free speech protection under state constitutions. State v. Linares, id., at 681.

Finally, Judge Schaller turned to Connecticut's history to further support the viability of an independent constitutional analysis of free speech rights in this state. Prior to 1818, civil liberties were in their infancy, particularly freedom of speech and the press. Id., citing C. Collier, "The Connecticut Declaration of Rights Before the Constitution of 1818." 15 Conn. L. Rev. 87,

97 (1982). "These were protected neither by statute nor by a well-articulated set of common law principles." Id. Thus, the Connecticut constitutional convention "overrode the protestations of the Federalist old republicans who still clung to their faith in legislative supremacy and the common law to uphold [speech rights in Connecticut]" Id.

Judge Schaller concluded his historical analysis with the events culminating in the convention adopting the Constitution of 1818:

> ... Connecticut citizens embraced a philosophy of greater tolerance, moving toward a more culturally diverse society. R. Purcell, Connecticut in Transition: 1775-1818 (Wesleyan Univ. Press 1963) pp. 211-315; W. Horton, "Annotated Debates of the 1818 Constitutional Convention." 65 Conn. B.J., 8-1, 8-4 (1991). This is particularly evident in the struggle to separate church and state. Between 1812 and 1818, the issue of church and state deeply divided political factions. R. Purcell, supra, pp. 320-21. The Federalists continued to support established institutions both religious and secular. Id. The Tolerationists gained a major victory with the election of Governor Wolcott in 1817 and a year later, with the overwhelming placement of their representatives in both houses of the legislature. Id., p. 360. By 1818, it was apparent that the political tide in Connecticut had shifted in the direction of greater tolerance and cultural diversity. Ultimately, these views culminated in the enactment of the Connecticut constitution. I am convinced, therefore, that our constitution's speech provisions reflect a unique historical experience and a move toward enhanced civil liberties, particularly those liberties designed to foster individuality.

State v. Linares, supra, at 382-383.

Since State v, Linares, the supreme court has, on more than one occasion, noted that free speech protection under sections 3 and 4 of Article First of the Connecticut Constitution is greater and more expansive than under the First Amendment of the United States Constitution. Ramos v. Vernon, 254 Conn. 799, 814 (2000); Leydon v. Greenwich, 257 Conn. 318, 347-348 (2001); Perricone v. Perricone, 292 Conn. 187, 212 (2009).

Now is the time to give full effect to the enhanced free speech protection in the Connecticut Constitution. Unlike Cologne and United Food there is no compelling private property constitutional right to be balanced against the free speech rights of the plaintiff and the state action requirement has been met. It is submitted that the free speech as guaranteed by Section 4 of the Connecticut Constitution includes expressions made in carrying out a public employee's official mandated duties, rather than as a private citizen speaking out on a matter of public concern. The United States Supreme Court's 5-4 decision in Garcetti, supra, has answered that question in the negative but only within the confines of the First Amendment to the United States Constitution. The analysis set forth in State v. Linares, supra, should be applied and full protection given to employee's free speech rights under Article First, section 4 of the Connecticut Constitution.

Another writer addressing the effects of Garcetti, claims that government employees "will just have to grin and bear the evisceration of their constitutional rights and stay silent at work." P. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, First Amendment Law Review, Vol. 7, No. 1, 2008, Marquette University Law School Legal Studies Paper No.08-14. Secunda's argument is that Garcetti "drastically cuts down on public employees' First Amendment expression rights while such employees are working pursuant to their official duties. In the name of managerial prerogative, federalism, and separation of powers, ***it has the effect of making government less transparent, accountable, and responsive because public employees are less secure in their ability to speak out against government fraud, corruption, abuse, and waste, without facing retribution from their public employers."*** Id. Secunda's conclusion is that "[c]ollectively as citizens we are all the poorer for tolerating this undemocratic state of affairs." Id.

The legislative and judicial analyses makes clear that the rights of public and private employees should be given maximum protection. The statute in its present form is intended to be remedial and serves the laudable purpose of making employees partners with their employers, ensuring that government is more accountable and responsive.

I urge this body not repeal the protections of 31-51q for public employees but rather to favorably recommend maintaining and indeed strengthening the rights of public and private employees. I urge this body to modify the present language of C.G.S. § 31-51q as set forth below:

> "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 amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, <u>including speech or activity regarding matters within the scope of the employee's job duties that consitute allegations of misconduct</u>, 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, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer."