OLR RESEARCH REPORT

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SUMMARIES OF RECENT CONNECTICUT SUPREME COURT CASES REGARDING CGS § 31-51q

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You asked for summaries of *Perez–Dickson v. City of Bridgeport*, 304 Conn. 483 (2012), and *Schumann v. Dianon Systems, Inc.*, 304 Conn. 585 (2012), focusing on the Connecticut Supreme Court's rulings regarding CGS § 31-51q.

SUMMARY

Both cases concern claims brought under CGS § 31-51q, which makes an employer liable to an employee they discipline or discharge for certain conduct protected by the First Amendment of the U.S. Constitution or the corresponding provisions of the Connecticut Constitution. Both cases concern speech that the plaintiff-employee claimed was protected under the First Amendment. *Perez-Dickson* concerned speech by a public employee and *Schumann* concerned speech by a private employee. The Connecticut Supreme Court issued opinions in both cases on the same day.

In *Garcetti v. Ceballos*, the U.S. Supreme Court ruled that "when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the [U.S.] Constitution does not insulate their communications from employer discipline" (547 U.S. 410 (2006)). The Connecticut Supreme Court in *Perez-Dickson* applied this rule to a suit by a public employee brought under CGS § 31-51q in which the employee claimed that her speech was protected by the First Amendment and did not dispute that

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her speech was made pursuant to her official duties. Because the speech was pursuant to official duties, the court directed a verdict for the defendant. The *Shumann* court extended the ruling in *Perez-Dickson* to cover a suit by a private employee who claimed his speech was protected by the First Amendment. Because the speech in this case was also related to the person's employment, the court directed judgment for the defendant. In both cases, the court declined to fully consider the reach of the state constitution's free speech protections.

We do not discuss the concurring opinions in these cases (Justice Palmer wrote separately concurring in both cases and Justice Zarella wrote separately concurring in *Schumann*).

EMPLOYER LIABILITY FOR DISCHARGE OR DISCIPLINE IN VIOLATION OF CERTAIN CONSTITUTIONAL RIGHTS (CGS § 31-51q)

Both Connecticut Supreme Court cases involved an employee's claim for discipline and discharge in violation of CGS § 31-51q. Under this statute public and private employers are liable to an employee they discipline or discharge for conduct protected by certain constitutional rights, unless the activity substantially or materially interferes with job performance or the employer-employee relationship. The rights are those guaranteed by the First Amendment to the U.S. Constitution (i.e. freedom of speech, press, religion, and assembly) and similar state constitutional provisions. Employers are liable for damages, including potential punitive damages and reasonable attorney's fees.

The statute also provides that, if a court finds that an employee's suit was not substantially justified, it can award the employer costs and reasonable attorney's fees.

PEREZ–DICKSON v. CITY OF BRIDGEPORT

Facts

This case involved a school principal who reported allegations of two teachers' abusive conduct toward students to school district administrators, the school board, and the Department of Children and Families. She also commented on the way the incidents were handled by the school board in the press. The principal was transferred to a smaller school, publically accused of sexually abusing a student (based on an unsubstantiated claim), and placed on administrative leave. She sued the board of education and school district administrators under CGS § 31-51q for, among other things, disciplining her for First Amendment protected speech that she was required to make as a mandated reporter of child abuse. At trial, she was awarded over $1 million in damages.

In reaching its judgment, the trial court denied the defendants' claim that the U.S. Supreme Court's ruling in *Garcetti*—that the First Amendment does not protect a public employee's statements made pursuant to their official duties—barred the claim under CGS § 31-51q. The defendants argued that the principal was under a duty to report abusive behavior by teachers and so could not claim First Amendment protections. The principal did not dispute that her statements were made pursuant to her official duties, either at trial or on appeal.

Issues

On appeal, the defendants claimed that the *Garcetti* rule applied to CGS § 31-51q and barred claims that sought to protect speech made pursuant to a public employee's official duties. The principal countered, arguing that (1) the defendant could not ask the court to apply the *Garcetti* rule to CGS § 31-51q claims for the first time on appeal and (2) state constitutional speech protections are broader than First Amendment protections and support a claim even if the *Garcetti* rule bars a First Amendment claim.

Analysis

The court ruled that the *Garcetti* rule applied to CGS § 31-51q claims based on First Amendment protections and barred claims based on speech made pursuant to a public employee's official duties. Applying this rule, the court found that the principal had undisputedly made statements pursuant to her official duties and had sued to protect those statements under the First Amendment. The court found that the defendants could present this argument on appeal because they had cited *Garcetti* in their motion for a directed verdict.

Furthermore, the court declined to consider the principal's state constitutional argument, finding that the claim was not properly preserved at trial and none of the exceptions to allow the court to consider the argument on appeal applied.

Conclusion

The court ordered the trial court to issue a directed verdict in favor of the defendant.

SCHUMANN v. DIANON SYSTEMS, INC.

Facts

This case involved a pathologist who specialized in cytology, the study of disease changes in individual cells or cell types, and worked for a medical testing laboratory. The laboratory launched a testing regime that used several techniques to find blood and diseased cells in patients' urine. One technique was initially developed by the pathologist; another was developed elsewhere and was unfamiliar to him. The new regime also established a new set of diagnostic categories, also unfamiliar to him. The pathologist spoke out against the new regime within the laboratory, questioning the regime's clinical validity and whether it would have an adverse effect on patients' health and safety. The laboratory terminated the pathologist for his statements, among other reasons. Among other claims, the pathologist sued the laboratory under CGS § 31-51q. He won a jury verdict for over $10 million.

In reaching its judgment, the trial court declined to apply the *Garcetti* rule to bar the pathologist's CGS § 31-51q claim.

Issues

On appeal, the defendant-laboratory claimed that the trial court improperly failed to apply the *Garcetti* rule, thereby subjugating the defendant's right to speech to the pathologist's right to speech. The plaintiff-pathologist countered, arguing, among other things, that (1) it is inappropriate to apply the *Garcetti* rule to a CGS § 31-51q claim regarding speech in a private context that was not made pursuant to the employee's official duties and (2) regardless of whether *Garcetti* applies to First Amendment speech, the state constitution provides greater speech protections than the First Amendment.

Analysis

The court stated that CGS § 31-51q on its face extends federal and state constitutional protections by providing coverage for private as well as government employees and imposing liability on private as well as government employers. The court stated that a "clear prerequisite" to the application of the statute is that the speech is constitutionally protected.

The court noted that case law on employees' First Amendment rights addresses claims against government employers because there is no First Amendment violation without state action. The court looked at the applicable principles governing employee speech which recognize the

government's interest as an employer in regulating its employees' speech and balance an employee's interests as a citizen to comment on matters of public concern with the state's interest as an employer in promoting efficiency in public services. In earlier cases, the U.S. Supreme Court stated that if a government employee's speech cannot be characterized as speech on a matter of public concern, it is unnecessary to scrutinize the reasons for discharge (*Connick v. Meyers*, 46a U.S. 138 (1983), *Pickering v. Board of Education*, 391 U.S. 563 (1968)).

The court stated that the ruling in *Garcetti* added a "threshold layer of analysis" that first requires a court to determine whether an employee is speaking pursuant to his or her official duties before considering any other parts of the analysis. The court determined that the *Garcetti* rule applied to private employment and disagreed with precedents that limited the rule to public employment, finding that such a limitation afforded private employees broader speech protection under the First Amendment than public employees. The court emphasized the "general rule that private employees are generally entitled to less First Amendment protection than public employees" and read *Garcetti* to affirm every employer's right to control its employees' official job-related speech. The court concluded that *Garcetti* applied to CGS § 31-51q claims brought on First Amendment grounds brought against private employers.

The court noted that applying the *Garcetti* rule mitigates the potential constitutional risks of bringing two competing sets of expressive rights (the employee's and the employer's) into conflict. The court stated that the *Garcetti* rule allows courts to avoid the "constitutionally untenable task" of choosing sides in a work-related viewpoint dispute between two private actors. Thus, the Garcetti rule is a "threshold matter" before considering the remainder of the analysis.

To determine whether an employee's speech falls within his or her official duties, the court considered whether the speech was in furtherance of the employee's duties or "part-and-parcel of his concerns about his ability to properly execute his duties." While, neither the court in *Perez-Dickson* or the U.S. Supreme Court in *Garcetti* relied on such a test, the *Garcetti* opinion suggested, and various circuit courts subsequently applied, such a test.

The court declined to consider whether the state constitution provided broader speech protections to employees than the First Amendment, finding that the pathologist's speech was not protected under the pre-*Garcetti* standard applicable to CGS § 31-51q claims brought on either First Amendment or state constitutional grounds. This standard requires

the court to balance the "interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs," when the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." Speech that is not on a matter of public concern is not protected, and the employee cannot sue to protect it. The court found that, while the pathologist's speech concerned the public, due to the pathologist's insubordination, among other things, the laboratory's interests outweighed the pathologist's.

Conclusion

The court ordered the trial court to enter a judgment for the defendant on the CGS § 31-51q claim.