ENVIRONMENT LAWS MAY NOT BLUNT HIGH COURT WHISTLEBLOWER RULING

Date: June 2, 2006 -

The recent Supreme Court opinion rejecting First Amendment claims for public employees who act as whistleblowers combined with ongoing Bush administration efforts to eliminate special whistleblower protections contained in environmental statutes may discourage EPA staff from discussing misconduct with supervisors, observers say. They note that although many environmental statutes are designed to shield EPA employees from retaliation, those protections may be inadequate in light of the ongoing assaults.

One source points out that statutes such as the Clean Air Act and Clean Water Act provide, for now, broader employee rights to free speech when revealing wrongdoing to supervisors, but warns that unless the trend of eroding such protections is reversed, "We will have to be reconciled to a bureaucracy of yes people."

The high court's 5-4 ruling in *Garcetti et al. v. Ceballos* May 30 marks the first decision the court has issued in a case it reconsidered following the retirement of Justice Sandra Day O'Connor. Her replacement, Justice Samuel Alito, sided with conservatives in reversing the long-held precedent that public employees enjoyed constitutional protections when speaking out as part of their job.

"We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job," Justice Anthony Kennedy wrote for the majority. *Relevant documents are available on InsideEPA.com.*

The decision sparked outrage from public employee advocates, including the National Treasury Employees Union (NTEU), which represents many EPA employees.

NTEU had filed an *amicus* brief in the case, urging the justices to protect employee speech. "Again and again, public employees, armed with their specialized expertise and data or other insights resulting from their work, have served the public interest by exposing wrongdoing or waste of government funds and by presenting unpopular but objectively sound conclusions and opinions. . . . This speech is entitled to constitutional protection."

NTEU argues against the "artificial distinction" made between "citizen speech" and "employee speech," but the high court endorsed such a distinction.

The court found, "Two inquiries guide interpretation of the constitutional protections accorded public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of

public concern. . . . If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech."

In response to the decision, NTEU said in a statement that it would have a "chilling effect on the ability of public employees at all levels of government to speak out on matters of public interest." NTEU President Colleen Kelly added, "When the voices of dissenting scientists, doctors, lawyers, financial or law enforcement professionals serving the public are silenced, the American people will ultimately suffer."

While employee advocates and legal experts acknowledge the opinion does not directly affect many EPA employees, it does remove the employees' ability to cite the First Amendment as a whistleblower defense should they claim they were retaliated against.

One legal expert says, "The decision takes away the First Amendment defense in any claim, regardless of other [protective] statutes." Employees would be "stuck" with using other statutory remedies, which are also under attack by the Bush administration and the courts, the source notes.

A source with the National Whistleblower Center says the administration's actions combined with the high court's ruling illustrate a larger trend restricting public employees' rights to blow the whistle.

For example, the Administrative Review Board (ARB) at the Department of Labor is considering a case, *Erickson v. EPA*, in which the Bush administration is seeking to remove the special whistleblower protections under the environmental statutes. EPA filed a brief last fall arguing that sovereign immunity prohibits federal employees from suing the government under environmental statutes. That brief follows an earlier ARB ruling finding that the environmental statutes' whistleblower protections do not extend to state employees (*Inside EPA,* Jan. 20, p14).

The Department of Justice (DOJ) filed an *amicus* brief in the *Garcetti* case urging the court to find against the employee, Richard Ceballos, who worked as a deputy district attorney in Los Angeles. While on duty, he wrote a memo to his supervisors questioning the validity of a search warrant. Ceballos was then demoted and transferred, though his employer denied those acts were retaliatory.

DOJ has also opposed legislation in the House and Senate that would clarify that employees covered by the Whistleblower Protection Act enjoy First Amendment protections for their official duties. The legislative effort is seeking to respond to earlier court rulings that have limited employees' speech.

A source with the Government Accountability Project, which advocates free speech rights for public employees, says that despite bipartisan passage of the bills by the relevant committees in the House and Senate the past two years, congressional leadership has not allowed the legislation to come to a floor vote due to DOJ opposition.

A source with Public Employees for Environmental Responsibility (PEER) adds that the environmental statute protections are already limited in terms of the employees they protect. For example, PEER is arguing in a case pending before the U.S. Court of Appeals for the 9th Circuit that the public employees of the Fish Passage Center -- which conducts research on salmon recovery -- have First Amendment

protections to discuss the results of their findings.

A district court ruled in the case, *National Wildlife Federation et al,. v. National Marine Fisheries Services et al.*, that the Bush administration had to increase water flows from hydroelectric dams to protect the salmon, in part based on the scientists' findings. That prompted protests from Sen. Larry Craig (R-ID), who last year successfully included language in an appropriations bill cutting funding for the Fish Passage Center. The 9th Circuit intervened and continued the funding while the case is pending.

The PEER source notes, "We have pending First Amendment litigation before the circuit, but we are seriously rethinking" our arguments in light of *Garcetti.*

PEER and other sources note that the ruling will likely prompt a host of litigation over what constitutes official duty, and may also persuade public employees to take their concerns directly to the media, rather than seeking to warn supervisors.

A Public Citizen attorney who litigated the case says the decision "creates a perverse incentive for employees to go public first with their information." But the attorney adds that the employee could still suffer retaliation for such action.

Source: Inside EPA via InsideEPA.com

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Issue: Vol. 27, No. 22