



Posted on Tue, May. 30, 2006

Supreme Court limits protections for government whistleblowers

By Stephen Henderson
Knight Ridder Newspapers

WASHINGTON - The Supreme Court made life a bit tougher for government whistleblowers Tuesday, saying the First Amendment doesn't protect public employees who disclose waste and fraud as part of their jobs.

By a 5-4 margin, the justices said that the government's interest in effectively managing operations outweighs the interests that protect employee speech, even in cases where employees may be reporting inefficiencies or wrongdoing.

The ruling leaves public employees - about 20 million at the local, state and federal levels - significantly more prone to retaliation from their employers if they speak out in ways that displease their bosses.

In a departure from previous court rulings, Tuesday's decision focused on the role that employees play when whistle-blowing, rather than the content of their speech. Writing for the court, Justice Anthony Kennedy said employees who speak out while acting in an official capacity essentially forfeit the First Amendment rights they have as citizens, no matter what they say.

Kennedy's opinion was joined by Chief Justice John G. Roberts Jr., and justices Antonin Scalia, Clarence Thomas and Samuel Alito Jr.

In a dissent, Justice David Souter said the court had unnecessarily abandoned its traditional balancing test, which measured the public value of the employee's speech against a government interest in maintaining a disciplined workplace.

Souter agreed that the government's interests may be compelling, but he rejected a categorical rule that denies protection to employees who speak out in an official capacity.

He noted previous cases in which the court "realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job."

Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer also dissented.

Kennedy wrote that the decision didn't prevent public employees from participating in discussions about matters of public concern; it simply "does not invest them with a right to perform their jobs however they see fit."

The case was argued twice at the high court - once with Justice Sandra Day O'Connor there and a second time with Alito, who took her place. The justices apparently couldn't reach a resolution before O'Connor left, and the remaining eight justices were split 4-4. Alito, therefore, cast the decisive vote.

Some advocates say the ruling puts public employees who seek to report wrongdoing in an untenable position.

"It's a devastating decision that, in practice, obliterates protections for about 90 percent of public workers," said Stephen Kohn, board chairman for the National Whistleblower Center. Kohn, who has handled whistleblower suits for 25 years, said the majority of employees who expose wrongdoing do so through official channels. And for federal employees, he said, doing so is part of their job requirement.

"So what are they supposed to do?" Kohn asked. "It's their job to do it, but the court says they have no constitutional protection for it."

Kohn also said that many other efforts to protect whistleblowers, such as the federal Whistleblower Protection Act, have been interpreted to stop short of shielding employees who expose wrongdoing as part of their jobs.

"So now they have little protection at all," he said.

The case, *Garcetti v. Ceballos*, involved a deputy district attorney in Los Angeles who, in an official internal memo, reported what he believed were misrepresentations in a search warrant prepared by a sheriff's deputy. Defense lawyers used the memo to challenge the warrant's validity.

Richard Ceballos, the deputy district attorney, claimed his bosses then mistreated him in a number of ways, including denying him a promotion. He sued, saying his bosses had violated his civil rights by punishing him for speaking out.

A federal court originally dismissed Ceballos' claim, but an appeals court reversed that decision, saying Ceballos' memo was a matter of public concern, so it was protected.

Kennedy said the appeals court got it wrong by stopping its analysis at the content of Ceballos' memo. The lower court, he said, also needed to determine whether Ceballos' comments in the memo were related to his job.

"When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," Kennedy wrote. "The Constitution does not insulate their communications from employer discipline."