

2021 Update – Public Employee Issues

Presenters:
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Some General Impressions of Last Year

- There were notably fewer interesting cases perhaps due to work interruptions caused by Covid crisis
- Qualified Immunity – Supreme Court has been quite active – recent federal court decision described impact as creating “an almost impenetrable shield.”
- Dismissal at Rule 12(b)(6) stage based on QI much more common, at least in 5th Circuit.

General Impressions [2]

- Garcetti – Sup Ct decision in *Lane* has not much slowed trend in 5th Circuit to dismiss any cases where speech at issue is job-related.
- Lane said that speech, to be unprotected, must be made *as part of* the employee's duties.
- 5th Circuit is dismissing claims where speech is related to employee's duties; where it is made up chain of command; where it concerns things learned through one's employment.

General Impressions [3]

- Even rpts. to outside law enforcement authorities unprotected if original rpt made up the chain of command.
- Whistleblowers at Risk? So *Garcetti* rule now is being used more and more to strip protection from claims of unlawful activity where employees try first to handle complaints in-house.
- Lesson? Whistleblowers, to be protected, need to go big right out of the box.

General Impressions [4]

- Recall *Janus* – Sup Ct said requiring public employees to pay “fair share” fees to unions constitutes “compelled speech” violating 1st Am.
- There continues to be litigation in federal courts attempting to allow employees who voluntarily signed dues deduction cards to rescind them before their expiration date.
- To date, all such attempts have been unsuccessful, and *Janus* remains limited to its facts.

General Impressions [5]

- BUT – Texas Attorney General now has entered the fray – has issued AG opinion ruling:
- 1st Amendment imposes upon public employers *affirmative obligation* to ensure voluntariness of dues deduction authorizations by requiring employees to submit directly to employer rather than through their union
- 1st Amendment prohibits dues authorizations that are not time-limited (but one-year authorizations pass constitutional muster)

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