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INTRODUCTORY REMARKS

For this installment of the Recent Developments, we examine three recent United States Supreme Court decisions and one recent Florida Supreme Court decision. Note One examines *Hamdan v. Rumsfeld*,¹ where the U.S. Supreme Court addressed the authority of the military commission convened to try a captured Yemini national and what role the Geneva Conventions would play in that proceeding.² Note Two examines *Burlington Northern & Santa Fe Railway Co. v. White*,³ where the U.S. Supreme Court addressed the correct interpretation of the language of Title VII's antiretaliation provision.⁴ Note Three examines *Garcetti v. Ceballos*,⁵ where the U.S. Supreme Court addressed the First Amendment rights of a public employee within the scope of that employee's employment.⁶ Finally, Note Four examines *In Re: Amendment to the Rules Regulating the Florida Bar—Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct*,⁷ where the Florida Supreme Court addressed whether client waiver is allowed concerning a recent controversial constitutional amendment that capped attorney's fees in medical malpractice actions.⁸

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1. 126 S. Ct. 2749 (2006).
 2. Brian Sites contributed this Note.
 3. 126 S. Ct. 2405 (2006).
 4. Roland Hermida contributed this Note.
 5. 126 S. Ct. 1951 (2006).
 6. Rick Englebright contributed this Note.
 7. 939 So. 2d 1032, 1036-37 (Fla. 2006).
 8. Stephanie Tañada contributed this Note.

CONSTITUTIONAL LAW—THE POWER OF THE PRESIDENT TO ESTABLISH
MILITARY COMMISSIONS: A QUESTION OF NECESSITY—*Hamdan v.*
Rumsfeld, 126 S. Ct. 2749 (2006).

The September 11th attacks on the Twin Towers and the Pentagon set in motion some of the most controversial legal issues of this century. Among them is the power of the President in establishing military commissions—a type of tribunal that differs from courts-martial courts—and what procedural requirements exist for such commissions under the Constitution and other laws. *Hamdan v. Rumsfeld*⁹ marked the close of the most recent chapter in this debate, though the questions *Hamdan* left unanswered signals that further litigation of these issues is likely.

Salim Ahmed Hamdan, a Yemeni national, was captured by militia forces during hostilities between the Taliban and the United States in November 2001. Hamdan was transferred to an American prison in Guantanamo Bay, Cuba, in June 2002, and was deemed by the President as triable by military commission in July 2003. He was appointed military counsel in December, who two months later filed demands for charges and a speedy trial under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 810. The legal adviser denied the request in February 2004, and Hamdan filed petitions for writs of habeas corpus and mandamus in the U.S. District Court for the Western District of Washington.¹⁰ He was charged in July 2004 in a thirteen-paragraph, unsigned charging document which alleged that (1) he acted as Osama bin Laden's bodyguard and personal driver, (2) he arranged for and transported weapons for al Qaeda and used such weapons himself, (3) he drove Osama bin Laden to various events at which bin Laden encouraged attacks against America, and (4) he was trained in weapons use at al Qaeda-sponsored training camps.¹¹

Upon the issuance of the formal charge, the District Court for the Western District of Washington transferred Hamdan's writ petitions to the U.S. District Court for the District of Columbia.¹² Meanwhile, Hamdan was designated in a separate military proceeding as an "enemy combatant."¹³ The District Court thereafter granted Hamdan's habeas corpus petition and the Court of Appeals for the District of Columbia Circuit subsequently reversed.¹⁴ The U.S. Supreme Court granted certiorari to address "whether the military commission con-

9. *Id.* at 2759-60.

10. *Id.*

11. *Id.* at 2760-61.

12. *Id.* at 2761.

13. *Id.*

14. *Id.* at 2761-62.

vened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.”¹⁵

The Court first addressed the Government’s motion to dismiss, in which the Government argued that the Detainee Treatment Act of 2005 (DTA), sections 1005(e)(1) and 1005(h), stripped jurisdiction from the Court for Hamdan’s habeas petition.¹⁶ The Court noted that the language of section 1005(e)(1) and its subparts specifically removed jurisdiction for future claims and proceeded to consider whether it also removed jurisdiction for habeas petitions pending at the time of the DTA’s enactment.¹⁷ The Court observed that the effect of the DTA on pending habeas petitions was specifically addressed under section 1005(h): “Paragraphs (2) and (3) of subsection (e) apply . . . to any claim . . . that is pending on or after the date of the enactment of this Act.”¹⁸ Noting that § 1005(h) specifically omitted reference to section 1005(e)(1), the paragraph that the Government alleged stripped jurisdiction, the Court concluded that Congress plainly intended section 1005(e)(1) to apply only to actions undertaken after the DTA was enacted.¹⁹ The Court supported its conclusion by observing that sections 1005(e)(2) and 1005(e)(3) were expressly specified in section 1005(h), but no mention of section 1005(e)(1) was made,²⁰ and that Congress rejected earlier proposed versions of the DTA that included paragraph (1) along with paragraphs (2) and (3) in section 1005(h).²¹ The Court also rejected the Government’s argument that this jurisdiction-creating statute raised special retroactivity concerns, as “subsections (e)(2) and (e)(3) . . . cannot conceivably give rise to retroactivity questions under our precedent.”²² It then rejected the Government’s assertion that the Court’s reading of section 1005(h) “produces absurd result[s]” by granting dual jurisdiction over detainee cases because, at least for Hamdan, no dual jurisdiction existed.²³ Leaving open the questions of whether Congress could permissibly strip courts of habeas jurisdiction and whether the type of suspension the DTA employs is constitutional, the Court held Congress intended no removal of jurisdiction for pending habeas claims under section 1005(h) of the DTA.²⁴

15. *Id.* at 2762.

16. *Id.* at 2762-63.

17. *Id.* at 2762-64.

18. *Id.* at 2763.

19. *Id.* at 2769.

20. *Id.* at 2766.

21. *Id.*

22. *Id.* at 2768.

23. The Court also dismissed Justice Scalia’s argument that section 1005(e)(1) plainly indicated an intent to strip jurisdiction in pending cases and also rejected the Government’s argument that Congress would have no reason to leave jurisdiction in place for pending claims if it was stripping jurisdiction for future claims. *Id.*

24. *Id.* at 2769.

Next, the Court addressed the Government's argument that, under its prior decision in *Schlesinger v. Councilman*,²⁵ the Court should abstain "as a matter of comity . . . from intervening in pending [military] proceedings."²⁶ The Court distinguished *Councilman's* applicability to *Hamdan* on the grounds that *Councilman* stood only for two comity/abstention principles: first, the military discipline of the Armed Forces is more efficient, and thus the branch of military itself is more efficient, if it operates without frequent civilian-judicial interference; and second, courts should "respect the balance that Congress struck between military preparedness and fairness to individual service members" in creating military tribunals.²⁷ Petitioner Hamdan, the Court reasoned, was not a member of the U.S. military, and the military commission that would otherwise have tried him is not part of the "integrated system of military courts, complete with independent review panels, that Congress has established."²⁸ Thus, *Councilman* and its dual comity considerations did not favor abstention. Instead, *Ex Parte Quirin*²⁹ applied and demonstrated clearly that the Court could entertain challenges to already-commenced military commissions.³⁰ Thus, there was no need to defer to the military commissions. Having addressed the procedural arguments, the Court proceeded to the merits of Hamdan's challenge.

The Court began by reviewing the history of military commissions, tracing their roots to situations of "military necessity."³¹ Again leaving the most intriguing questions open—including whether the President may convene military commissions without Congress' sanction in times of "controlling necessity"³²—the Court noted that the power of the President to convene military commissions was expressly conditioned on the President complying with the law of war.³³ It found no congressional authorization for military commissions in the Authorization for Use of Military Force (AUMF)³⁴ or the DTA, nor was the Court persuaded that either intended to expand the

25. 420 U.S. 738 (1975).

26. *Hamdan*, 126 S. Ct. at 2770 (discussing *Councilman*).

27. *Id.*

28. *Id.* at 2771.

29. 317 U.S. 1 (1942).

30. *Hamdan*, 126 U.S. at 2771.

31. *Id.* at 2772-73.

32. *Id.* at 2774 ("Whether . . . the President may constitutionally convene military commissions without the sanction of Congress in cases of controlling necessity is a question this Court has not answered definitively, and need not answer today.") (internal quotation marks omitted).

33. *Id.* (citing *Ex Parte Quirin*, 317 U.S. 1, 28-29 (1942)).

34. The AUMF provides authorization to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.* at 2760.

President's ability to form military commissions under the Uniform Code of Military Justice (UCMJ).³⁵ The proper inquiry, then, was whether the commission convened to try Hamdan was justified under "the Constitution and laws, including the law of war."³⁶

Hamdan's commission contained several elements the Court considered fatal defects under the Constitution and law of war: (1) Hamdan and his counsel could be excluded from any hearing that was deemed "close[d]";³⁷ (2) Hamdan and his counsel could be precluded from ever learning what evidence was presented during closed proceedings;³⁸ (3) "any evidence that, in the opinion of the presiding officer, would have probative value to a reasonable person" could be admitted, including testimonial hearsay and testimony obtained through coercion;³⁹ and (4) civilian counsel and/or Hamdan could be denied access to certain evidence if the evidence was probative and if deprivation of access to the defendant would not result in the denial of a "full and fair trial."⁴⁰

The Government defended that Hamdan's challenge to these alleged defects was precluded by the abstention doctrine of *Councilmen*; that Hamdan could raise these challenges after the "final decision" of the commission; and that there was no reason to assume that the trial, once commenced, would not "be conducted in good faith and according to the law."⁴¹ The Court was not persuaded by any of the three arguments.⁴² The Court held that, though the President has the authority to promulgate rules of procedure for military commis-

35. *Id.* at 2774-75.

36. *Id.* at 2775 (internal quotation marks omitted).

37. *Id.* at 2786. Proceedings could be deemed "close[d]" on the following grounds: the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.

Id. (quoting Commission Order No.1 § 6(B)(3), Aug. 31, 2005) (internal quotation marks omitted). The Court noted the "accused may also be excluded from the proceedings if he engages in disruptive conduct." *Id.* at 2786 n.42 (quoting Commission Order No. 1 § 5(K)) (internal quotation marks omitted). Appointed military counsel may be privy to closed sessions but may be forbidden from disclosing what occurred. *Id.*

38. *Id.* at 2786.

39. *Id.* (quoting Commission Order No.1 § 6(D)(1)).

40. *Id.* at 2787 (quoting Commission Order No.1 § 6(D)(5)(b)). The Court discussed several other elements of the commission's methods disapprovingly, but, beyond the above enumerated elements, it is unclear what role they played, if any, in the Court's ultimate disposition.

41. *Id.* at 2787 (quoting the Government's brief).

42. First, the Court dismissed the *Councilmen*-abstention claim for the same reasons discussed above. *Id.* at 2787-88. Next, it concluded that, in reality, Hamdan might not be able to contest a final order, as only death sentences or those equal to or greater than ten-year imprisonment were reviewable by right. *Id.* Finally, the Court concluded that there was a basis for assuming the commission's proceedings would depart from the requirement of law because Hamdan had already been excluded from his trial. *Id.*

sions, his power to do so was restricted by the UCMJ. First, the President cannot adopt procedural rules contrary to the UCMJ, and second, the rules he adopts must be uniform, as much as is practicable, for both military commissions and courts martial.⁴³ The Court then rejected the Government's provided explanations for why the military commissions and courts-martial courts differed. Further, the Court avoided the question of whether any provision of Commission Order No. 1 was contrary to the UCMJ by concluding that the President had not provided a sufficient explanation of why uniformity between courts-martial and military commission proceedings was not practicable.⁴⁴ In particular, the Court focused on the exclusion of the defendant as "the jettisoning of so basic a right [that it] cannot lightly be excused as 'practicable' " and, as no explanation for the discrepancy had been given, that discrepancy was not justified.⁴⁵ Noting further that the procedures of the military commission adopted to try Hamdan violated the Geneva Convention, the Court held that the commission convened to try Hamdan was insufficient.⁴⁶

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer (in a plurality opinion that Justice Kennedy did not join) also noted that the charge of conspiracy brought against Hamdan was not brought in a theater of war, involved events that did not occur during any war, and involved "overt acts" not in violation of the law of war.⁴⁷ Justice Stevens wrote that, as military commissions only have jurisdiction if the offenses charged take place during a war and in a theater of war and are violations of the law of war, Hamdan's commission "lacks authority to try [him]."⁴⁸ Unpersuaded by the Government's offered precedent that it believed established conspiracy as an offense

43. *Id.* at 2790 (quoting the UCMJ, Article 36(a) and (b)).

44. *Id.* at 2791. The Government suggested that the simple fact of danger to the U.S. from international terrorism rendered uniformity impracticable. The Court rejected this argument out of hand, "[w]ithout for one moment underestimating that danger." *Id.* at 2792.

45. *Id.*

46. *Id.* at 2798. In considering the Geneva Conventions, the Court addressed three arguments advanced by the Government. First, it rejected the Government's claim that abatement under *Councilmen* was appropriate. *Id.* at 2793. Second, the Court concluded that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), though advanced by the Government as the controlling precedent, was not applicable to *Hamdan* because at a minimum the Geneva Conventions are a part of the law of war and thus the commissions must comply with its terms. *Id.* at 2793-94. On this same point, the Court rejected the holding of the court of appeals that the war with al Qaeda is one that the Geneva Conventions do not reach. *Id.* at 2795. Citing Common Article 3 of the Conventions as an example of one provision the Court considered clearly applied, the Court quoted its requirement of a trial that affords "all the judicial guarantees which are recognized as indispensable by civilized peoples" by a "regularly constituted court." *Id.* at 2795-97. Because military commissions did not constitute "regularly constituted court[s]," they did not comply with the Geneva Conventions. *Id.* Finally, having shown that the Conventions had application, the Court rejected that they were not judicially enforceable. *Id.*

47. *Id.* at 2777-78.

48. *Id.* at 2785.

under the laws of war, the plurality concluded that the Government failed “to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for [the] establishment of military commissions: military necessity.”⁴⁹ Justice Stevens, writing for the same plurality later, also expressed the belief that, “absent express statutory provisions to the contrary, information used to convict a person of a crime must be disclosed to him”⁵⁰ or else the commission fails to afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁵¹

Justice Breyer, joined by Justices Kennedy, Souter, and Ginsburg, rebuffed the claims of the dissenting Justices that the Court’s holding would “sorely hamper the President’s ability to confront and defeat a new and deadly enemy.”⁵² Instead, Justice Breyer wrote, “[t]he Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ . . . Nothing prevents the President from returning to Congress to seek the authority he believes necessary [to create military commissions].”⁵³

Justice Kennedy, joined by Justices Souter, Ginsburg, and Breyer, expressed his belief that the Military Commission Order No. 1 exceeded limits enacted by Congress. Justice Kennedy went on to reiterate the Court’s conclusion that uniformity between courts-martial and military commissions was required⁵⁴ and the the requirement of Common Article 3 of the Geneva Conventions of “regularly constituted court[s] [that afford rights] . . . recognized as indispensable by civilized peoples.”⁵⁵

Justice Scalia, joined by Justices Thomas and Alito, dissented, characterizing the majority’s holding as transforming the DTA’s “no court, justice, or judge [shall have jurisdiction]” language into something allowing “every ‘court, justice, or judge’ . . . to hear, consider, and render judgment.”⁵⁶ Citing “[a]n ancient and unbroken line of authority,” Justice Scalia argued that “statutes ousting jurisdiction unambiguously apply to cases pending at their effective date.”⁵⁷ Chiding the majority for “apparently believ[ing] that the effective-date provision means nothing at all”⁵⁸ and stating that the Court “cannot cite a *single* case in the history of Anglo-American law . . . in which a jurisdiction-stripping provision was denied immediate ef-

49. *Id.*

50. *Id.* at 2798.

51. *Id.* at 2797 (citation omitted).

52. *Id.* at 2799 (quoting *id.* at 2838 (Thomas, J., dissenting)).

53. *Id.*

54. *Id.* at 2801.

55. *Id.* at 2802.

56. *Id.* at 2810 (Scalia, J., dissenting).

57. *Id.*

58. *Id.* at 2812 n.1.

fect.” Justice Scalia pointed to “the cases granting . . . immediate effect [to such provisions, which are] legion.”⁵⁹ The distinction, Scalia argued, comes in part from that, “[f]or better or for worse, our recent cases have contrasted jurisdiction-*creating* provisions with jurisdiction-*ousting* provisions . . . [and have] strongly indicat[ed] that the former are typically retroactive.”⁶⁰ As “[t]he exclusive-review provisions of the DTA . . . confer *new* jurisdiction (in the D.C. Circuit),” the “dazzling clarity” that the Court concluded exists as to its retroactivity jurisprudence missed, according to Scalia, important points.⁶¹ Closing off with a criticism of the majority’s reliance on and use of legislative history⁶² and a brief salvo aimed at the flood of habeas petitions the majority’s holding potentially allows,⁶³ Justice Scalia then turned to the majority’s remaining procedural holdings.

First, Scalia concluded that Hamdan “has no [habeas] rights under the Suspension Clause” because he is detained “outside the sovereign ‘territorial jurisdiction’ of the United States.”⁶⁴ Next, Scalia attempted to close one of the questions the majority left open⁶⁵ by stating that “[i]t is not clear how there could be any . . . lurking questions [as to Congress’ ability to impinge on the Court’s appellate jurisdiction] in light of the aptly named ‘*Exceptions Clause*’ of Article III, § 2 [which allows for such impingement].”⁶⁶ Finally, Scalia wrapped up by criticizing the majority’s refusal to abstain from considering Hamdan’s habeas petition and its attempts to distinguish the most on-point case, *Councilman*.⁶⁷ On these procedural grounds, he reiterated, Justice Scalia strongly dissented.

Justice Thomas, with whom Justices Scalia and Alito joined in part, also dissented, but to address the majority’s substantive, non-jurisdictional arguments.⁶⁸ First, Justice Thomas noted the historical roles of the three branches “in the conduct of war”⁶⁹ and argued that “the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated.”⁷⁰ In sum, Justice Thomas argued the Court

59. *Id.* at 2812.

60. *Id.* at 2813.

61. *Id.* at 2813-14.

62. *Id.* at 2814-17.

63. *Id.* at 2817-18.

64. *Id.* at 2818.

65. “[T]he Government’s preferred reading’ would ‘rais[e] grave questions about Congress’ authority to impinge upon this Court’s appellate jurisdiction, particularly in habeas cases.” *Id.* at 2819 (quoting *id.* at 2764 (majority opinion)).

66. *Id.* at 2819.

67. *Id.* at 2820-21.

68. *Id.* at 2823.

69. *Id.*

70. *Id.* at 2823-24.

should give “a heavy measure of deference” to the President’s decisions in this case.⁷¹ Turning often to this thread of deference, deference to either the President or to military commissions generally, Justice Thomas then went on to criticize the plurality’s and majority’s analysis of the four requirements for a military commission’s valid exercise of jurisdiction.⁷² In particular, Thomas argued that “[f]or well over a century it has been established that ‘to unite with [enemy forces] is a high offense against the law of war’”⁷³ and therefore the Government’s charges against Hamdan consist of “war crime[s] chargeable before a military commission.”⁷⁴ After citing various examples in support of his argument,⁷⁵ Justice Thomas pointed out that Hamdan was also charged with not just membership in an enemy group organized to “kill [and] disabl[e] . . . peaceable citizens or soldiers”⁷⁶ but also with “aid[ing] and assist[ing] al Qaeda’s top leadership by supplying weapons, transportation, and other services”⁷⁷ and, more generally, with “conspir[ing] . . . to commit . . . offenses triable by military commission.”⁷⁸ Finally, Justice Thomas concluded by criticizing the majority’s conclusion that the President failed to justify the departure from the terms of the UCMJ and the Geneva Conventions, decrying the majority’s position as “untenable.”⁷⁹

Lastly, Justice Alito, joined in part by Justices Scalia and Thomas, also dissented. Justice Alito disagreed with the majority that, under the Geneva Convention, a military commission is not a “regularly constituted court” as the Convention requires.⁸⁰ Reading “regularly constituted” to be synonymous with “properly constituted,” Justice Alito concluded that military commissions are “established in accordance with the domestic law of the appointing country.”⁸¹

71. *Id.* at 2824.

72. *E.g., id.* at 2826 (criticizing “[t]he plurality’s willingness to second-guess the Executive’s judgments in this context”); *id.* at 2830 (criticizing the majority’s failure to recognize “the presumption we acknowledged in *Quirin*, namely, that the actions of military commissions are ‘not to be set aside by the courts without the *clear conviction* that they are’ unlawful”) (citations omitted); *cf. id.* at 2835 (“The civil War experience provides further support for the President’s conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions.”).

73. *Id.* at 2831-32.

74. *Id.* at 2831.

75. One such example Justice Thomas cites that “confirm[s] by experience” that “membership in an organization whose purpose is to violate the laws of war is an offense triable by military commissions” is the military tribunals convened at Nuremberg. *Id.* at 2833.

76. *Id.* at 2832.

77. *Id.* at 2833.

78. *Id.* at 2834.

79. *Id.* at 2839, 2844.

80. *Id.* at 2850.

81. *See id.* at 2850-51 (finding that “regularly constituted” requires “properly constituted” and reciting the text quoted above); *id.* at 2851-55 (finding that the commissions are “regularly constituted” and otherwise legitimate).

Drawing sharp lines in the sand on questions of fundamental importance, *Hamdan v. Rumsfeld* sets the stage for inquiry into now-essential functions of the government. In an era where the United States is increasingly aware of terrorism threats within and without its borders, the roles of the President, the Judiciary, and military courts generally are firmly under the spotlight. *Hamdan* will almost certainly not be the final chapter of these underlying issues.

EMPLOYMENT LAW—THE CORRECT INTERPRETATION OF TITLE VII'S ANTIRETALIATION PROVISION—*Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).

The U.S. Supreme Court recently decided the case of *Burlington Northern & Santa Fe Railway Co. v. White*,⁸² an employment law case. Shelia White brought a Title VII claim alleging employee discrimination and retaliation against Burlington. The Supreme Court's primary task in its review of the case was determining the correct interpretation of the language of Title VII's antiretaliation provision.⁸³

The facts surrounding White's claims began in June 1997, when she interviewed with roadmaster Marvin Brown for a job at Burlington's Tennessee Yard.⁸⁴ During the interview, Brown expressed interest in White's previous experience operating a forklift.⁸⁵ Burlington eventually hired White as a track laborer. A track laborer's duties included "removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way."⁸⁶ Shortly after her hiring, the forklift operation position became available when the worker holding the position asked for a reassignment of his responsibilities.⁸⁷ Upon his transfer to another job for Burlington, Brown assigned White to forklift duty.⁸⁸

In September 1997, White complained that her immediate supervisor, Bill Joiner, continually made comments to her that women should not be allowed to work for the railway and also made other insulting comments to her in front of her male coworkers.⁸⁹ Burlington suspended Joiner for ten days based on White's complaints.⁹⁰ Shortly after Joiner's suspension, Brown informed White that she was being relieved of her forklift operating duties to return to her du-

82. 126 S. Ct. 2405 (2006).

83. *Id.* at 2409 (reviewing 42 U.S.C. § 2000e-3(a)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

ties as a track laborer.⁹¹ The supervisor explained that White's co-workers, all male, complained that the forklift job should go to a more "senior man."⁹²

Upon her return to the track laborer position, White filed a complaint with the Equal Employment Opportunity Commission (EEOC) on October 10, 1997, alleging that her reassignment to the track laborer position was gender-based discrimination and retaliation for the complaints she made regarding Joiner's harassment.⁹³ In December, White filed a second retaliation charge with the EEOC, claiming that Brown placed her under surveillance and was monitoring her daily activities.⁹⁴ Shortly after White filed her EEOC charge, White and her immediate supervisor Percy Sharkey had a disagreement, the details of which are in dispute, regarding which truck White should use in her transportation to and from different areas of the job site.⁹⁵ After the disagreement occurred, Sharkey informed Brown that White was insubordinate and, as a result, Brown suspended White without pay.⁹⁶

White sought relief through Burlington's internal grievance procedures for the railway. Through those procedures, Burlington eventually found that White was not insubordinate in her disagreement with Sharkey.⁹⁷ Burlington then reinstated White and reimbursed her for the thirty-seven days she went without pay. Despite her reinstatement with back pay, White filed another retaliation claim with the EEOC based on her suspension.⁹⁸ After exhausting all of her administrative remedies with the EEOC, White filed her Title VII claim against Burlington in federal district court, alleging that Burlington's actions in changing her position and duties, as well as her thirty-seven-day suspension, constituted unlawful retaliation in violation of Title VII.⁹⁹ After a trial, the jury found in favor of White on both retaliation claims and awarded her \$43,500 in compensatory damages.¹⁰⁰ The district court also denied Burlington's motion for judgment as a matter of law.¹⁰¹ Burlington appealed the district court's decision to the Sixth Circuit Court of Appeals.¹⁰²

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*; 42 U.S.C. § 2000e 3(a) (2000).

100. *White*, 126 S. Ct. at 2409.

101. *Id.* at 2410.

102. *Id.*

The divided Sixth Circuit originally reversed the district court's decision, finding that actions taken by Burlington in regard to White's employment did not amount to the "adverse employment action" required to sustain a retaliation claim under Title VII.¹⁰³ In so finding, the court stated that the "fact that forklift duty is less physically demanding than track maintenance work does not make White's reassignment a cognizable adverse employment action."¹⁰⁴ Further, the court found that the district court erred in finding White's suspension without pay was an adverse employment action.¹⁰⁵ The court cited the fact that White's suspension was not an "ultimate employment decision."¹⁰⁶ Rather, it was only "the first step in the employment decision making process," which ultimately resulted in White receiving reimbursement for any and all lost pay and benefits she suffered during the suspension.¹⁰⁷

Shortly after its reversal of the district court's decision, however, the full court of appeals abandoned the decision and decided to hear the appeal en banc.¹⁰⁸ After the rehearing, the court affirmed the district court's decision as it pertained to both of White's retaliation claims. In its reexamination of the district court's decision, the Sixth Circuit focused its efforts on defining "adverse employment action" as it appears in the language of Title VII's antiretaliation provision.¹⁰⁹ The pertinent language of the antiretaliation statute, which the Sixth Circuit cited in its en banc decision, states, "It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."¹¹⁰ The phrase, "discriminate against," as used in the statute, is undefined. However, as the court cited in its decision, case law shows that not every act of discrimination falls under that definition.¹¹¹ Thus, the statute requires a "tangible" discriminatory act.¹¹²

103. *White v. Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443, 451 (6th Cir. 2002).

104. *Id.*

105. *Id.* at 451-53.

106. *Id.* at 453.

107. *Id.* at 454.

108. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789 (6th Cir. 2004).

109. 42 U.S.C. § 2000e-3(a) (2000) (section 704(a) of Title VII).

110. *Id.*; *White*, 364 F.3d at 795.

111. *White*, 364 F.3d at 795 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (listing cases requiring a "tangible employment action" to support a Title VII claim)).

112. *Id.*

The first retaliation case decided on the adverse employment element in the Sixth Circuit involved a temporary job reassignment.¹¹³ In that case, the court found that such an action, which did not result in any pay loss or decrease, did not constitute an adverse employment action.¹¹⁴ Ten years later, the Sixth Circuit addressed the issue again. In that case, the court stated that an employment action must be “a materially adverse change in the terms of her employment” and not just a “mere inconvenience or an alteration of job responsibilities.”¹¹⁵ Further, the court stated that the *Kocsis* opinion is the leading case for defining an adverse employment action in the Sixth Circuit and also noted the Supreme Court’s adoption of the case.¹¹⁶ Thus, it appears that under the Sixth Circuit’s definition of an adverse employment action, there must be some direct, tangible harm to the employee usually resulting in monetary harm.

However, the Sixth Circuit’s interpretation of adverse employment action differs from that of the EEOC. The EEOC’s interpretation takes a literal approach to the “any discriminatory act” language of Title VII.¹¹⁷ Under such an interpretation, any discriminatory act, including de minimis ones not recognized by the Sixth Circuit, would violate Title VII’s retaliation statute.¹¹⁸ However, the EEOC’s guidelines, while significant in interpreting Title VII, are merely guidelines and not binding on courts.¹¹⁹ Thus, the Sixth Circuit found its interpretation of the language of Title VII sufficiently captures the meaning that Congress intended in drafting the statute.¹²⁰

After determining the proper definition of “adverse employment action,” the Sixth Circuit applied the definition to both of White’s retaliation claims. In applying the definition to the White’s claim arising out of her suspension without pay, the court compared the facts of White’s claim to a similar case decided by the court in 1999.¹²¹ In that case, the court examined whether a Vanderbilt University professor suffered an adverse employment action when the dean denied the professor tenure and informed her that her position would terminate on August 31, 1995.¹²² Before her contract expired, the professor

113. *Id.* at 797 (citing *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.1987)).

114. *Id.* (citing *Ferguson v. C.I. du Pont de Nemours and Co.*, 560 F. Supp. 1172, 1201 (D. Del. 1983)).

115. *Id.*

116. *Id.* (citing *Ellerth*, 524 U.S. at 761 (finding that “[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”).

117. *Id.* at 799.

118. *Id.* at 800.

119. *Id.* at 798.

120. *Id.* at 798-99.

121. *See Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542 (6th Cir.1999).

122. *Id.* at 543.

filed a Title VII action.¹²³ In November 1995, while her lawsuit was pending, the university's board of trustees met and reversed the dean's decision to fire the professor.¹²⁴ In doing so, the board rehired her as a tenured professor and reimbursed her for the losses suffered because of her delay in promotion and her unemployment. Based on the board's actions, the court found that no adverse employment action occurred. The court reasoned that the board's rehearing of the professor's firing was the "ultimate employment decision" and that the firing was only an intermediate decision.¹²⁵ However, nothing in the language of Title VII restricts its application to "ultimate employment decisions." Thus, the court noted that most circuits now reject any interpretation of Title VII limiting the reach of the statute to ultimate employment decisions and joined that majority.¹²⁶

Furthermore, the court noted that the actions taken against White were not those that court meant to exclude from the reach of Title VII by reading the adverse employment action requirement into the statute.¹²⁷ The court explained that while White was reimbursed for her suspension, that is not enough to remove the case from the reach of Title VII's protections.¹²⁸ That is, if White's suspension was motivated by discriminatory intent, it is a violation of Title VII, whether or not they ultimately reimbursed her.¹²⁹

The Sixth Circuit also examined whether White's job transfer was a violation of Title VII's retaliation provision. The court agreed with the district court and found that it did.¹³⁰ Essentially, the court found that while the transfer from the forklift position to the track laborer position did not result in a change in pay, the duties of the jobs are significantly different.¹³¹ The court cited the fact that the track laborer position is widely considered by the other Burlington employees to be a "dirtier" job than that forklift position.¹³² The court further noted that the forklift position required more qualifications which it believed added "prestige" to the position.¹³³ The court also rejected Burlington's claim that there was insufficient evidence to support the jury's finding that Burlington's "reasons" for transferring White's job and suspending her.¹³⁴ Thus, the court affirmed the dis-

123. *Id.* at 543-44.

124. *Id.*

125. *Id.* at 545 (stating that " 'intermediate' tenure decisions that are appealable through a tenure review process cannot form the basis of a Title VII claim").

126. *White v. Burlington N. & Sante Fe Ry. Co.*, 364 F.3d 789, 801 (6th Cir. 2004).

127. *Id.* at 801-02.

128. *Id.* at 802.

129. *Id.*

130. *Id.* at 803.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 804.

strict court's denial of Burlington's motion for judgment as a matter of law.¹³⁵

Upon granting the certiorari on the case, the Supreme Court examined the Sixth Circuit's decision. Much like the Sixth Circuit, the Court focused primarily on interpreting the language of Title VII's antiretaliation provision. In doing so, the Court first addressed the scope of the provision.¹³⁶ Burlington's contention in its appeal of the Sixth Circuit decision is that in order to sustain a retaliation claim, the alleged retaliation must affect the terms, conditions, or status of the employee's employment.¹³⁷ Essentially, Burlington suggests that the Court should read the antiretaliation provision with the antidiscrimination provision in mind.¹³⁸ Thus, Burlington suggests that the antiretaliation provision should be limited to conduct that "affects the employee's 'compensation, terms, conditions, or privileges of employment.'" ¹³⁹

The Court disagreed, finding that the language of the antiretaliation and antidiscrimination provisions differed and reasoned that this difference was not an accident.¹⁴⁰ Thus, the Court held that they could not read the two provisions in the same way, as Congress likely intended the differences in the two provisions.¹⁴¹ The Court stated that, along with the differences in the language, the two provisions also differed in purpose and therefore were meant to apply to different situations.¹⁴² Thus, unlike the antidiscrimination provision which prohibits actions by an employer based on an employee's status, the antiretaliation provision prohibits actions by an employer based on an employee's actions.¹⁴³ Further, the Court argued that applying the antiretaliation provision in the same way the language of the antidiscrimination provision applies would not fulfill the purpose of the antiretaliation provision, as "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."¹⁴⁴

The Court then addressed the relevant standard for what type of conduct falls within the scope of the antiretaliation provision. The Court stated that the alleged retaliation must be a materially ad-

135. *Id.*

136. *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411 (2006).

137. *Id.*

138. *Id.*

139. *Id.* (quoting Brief for United States as Amicus Curiae at 13, *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (No. 05-259), 2006 WL 622123).

140. *Id.*

141. *Id.* at 2412.

142. *Id.*

143. *Id.*

144. *Id.*

verse action as viewed by a reasonable employee.¹⁴⁵ Applying that standard to the facts of White's case, the Court found that there was sufficient evidence presented for a jury to find that Burlington violated the antiretaliation provision in its actions against White.¹⁴⁶

Burlington further argued that White's job reassignment cannot constitute retaliation when the job description remains the same.¹⁴⁷ The Court quickly dismissed that argument, explaining that all jobs are defined by the duties required by the position. As such, there are always some job duties that are more or less desirable than others.¹⁴⁸ Thus, insisting that an employee perform the less desirable duties of a job is "one good way" of encouraging the employee to refrain from filing a complaint.¹⁴⁹ The Court further stated that, in the case at issue, there was sufficient evidence before the jury that track laborer position duties are widely considered "more arduous and dirtier" than those duties associated with the forklift position.¹⁵⁰

The Court also rejected Burlington's argument that White's thirty-seven-day suspension is outside the realm of Title VII's antiretaliation provision. Burlington's argument centered upon the reinstatement of White and the back pay provided to her for the time missed. Burlington argued that such actions removed the suspension from the type of actions Congress intended to stop when it enacted the antiretaliation provision.¹⁵¹ The Court deemed Burlington's argument less than convincing in light of case law finding injunctions to "bar like discrimination in the future" to be a sufficient remedy under the antiretaliation provision.¹⁵²

Finally, the Court rejected Burlington's claim that there was insufficient evidence to support the retaliation claim for the suspension.¹⁵³ The Court reasoned that a reasonable employee in White's position would view a thirty-seven-day suspension without pay as a hardship, particularly as White did not know when the suspension would end.¹⁵⁴ Such uncertainty, the Court found, would inevitably lead to the emotional and physical stress that White suffered here.¹⁵⁵ Thus, the Court had no problem upholding the jury's finding that the thirty-seven-day suspension was a materially adverse action toward

145. *Id.* at 2415.

146. *Id.* at 2416.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 2417.

151. *Id.*

152. *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

153. *Id.*

154. *Id.*

155. *Id.*

White.¹⁵⁶ Therefore, in finding that there was sufficient evidence for a jury to find that Burlington violated the antiretaliation provision of Title VII by transferring White's job and suspending her for thirty-seven days without pay, the Court affirmed the Sixth Circuit's decision.¹⁵⁷

While Justice Alito agreed with the majority's ultimate decision to affirm the Sixth Circuit's ruling, he took issue with its interpretation of the antiretaliation provision.¹⁵⁸ In his concurring opinion, Alito stated that the majority's interpretation was incompatible with the language of the statute and would likely prove problematic in later applications.¹⁵⁹ Alito suggests the problem arises in trying to interpret the word "discriminate" in section 704(a).¹⁶⁰ Reading section 704(a) by itself, Alito stated that "discriminate" takes on a literal meaning: "to treat differently."¹⁶¹ However, when read in light of section 703(a), he believes the meaning becomes less clear.¹⁶² That is, reading section 704(a) literally suggests that section 703(a) applies to a more narrow scope of actions than section 704(a), which Alito found problematic. Therefore, Alito advanced that the proper interpretation of "discriminate" in section 704(a) requires that that section and section 703(a) be read together.¹⁶³ He stated that such an interpretation "provides an objective standard that permits insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees who are subjected to real retaliation."

Alito further stated that the majority does not adopt either of interpretations of section 704(a) that he discussed.¹⁶⁴ Instead, Alito explained, the majority adopted another interpretation of the provision which does not apply to all retaliatory actions, but only those that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."¹⁶⁵

CONSTITUTIONAL LAW—A PUBLIC EMPLOYEE'S FIRST AMENDMENT
RIGHTS—*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

The United State Supreme Court recently decided *Garcetti v. Ceballos*.¹⁶⁶ The case arose out of a § 1983 complaint filed by a deputy

156. *Id.* at 2418.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* Section 703(a) prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C § 2000e-2(a)(1).

163. *Id.* at 2419.

164. *Id.*

165. *Id.* at 2420 (quoting *id.* at 2415 (majority opinion)).

166. 126 S. Ct. 1951 (2006).

district attorney, Richard Ceballos, in the United States District Court for the Central District of California.¹⁶⁷ The complaint alleged that Ceballos suffered adverse employment actions in retaliation for a memorandum written in which he advised the dismissal of a case on the basis of purported government misconduct.¹⁶⁸ Ceballos claimed that such action by his employer violated his First Amendment right to free speech.¹⁶⁹ The Supreme Court granted certiorari to determine whether a government employer's discipline for speech in the course of his duties violated the employee's First Amendment rights.¹⁷⁰

Richard Ceballos was employed as a deputy district attorney in the Los Angeles County District Attorney's Pomona branch office.¹⁷¹ He worked as a calendar deputy, where he exercised supervision over other lawyers.¹⁷² In February 2000, Ceballos was contacted by a defense attorney who claimed that there were inaccuracies in an affidavit used to obtain a critical search warrant in a pending criminal case.¹⁷³ In a not unusual custom, the defense attorney asked Ceballos to review the case as he had filed a motion to traverse, or challenge, the warrant.¹⁷⁴ After investigation, Ceballos determined the affidavit contained serious misrepresentations and informed his supervisors Carol Najera and Frank Sundstedt of such, as well as prepared a disposition memorandum expressing his recommendation of dismissal.¹⁷⁵ After Ceballos submitted the memo on March 2, Ceballos, Najera, and Sundstedt, along with the warrant affiant and other sheriff's department employees, held a meeting to discuss the affidavit.¹⁷⁶ The meeting reportedly became "heated," with a lieutenant criticizing Ceballos' handling of the case.¹⁷⁷ Sundstedt proceeded with the case over Ceballos' concerns.¹⁷⁸ At a hearing for the defense's motion to traverse, Ceballos testified for the defense about the affidavit.¹⁷⁹ The court denied the defense attorney's motion to traverse.¹⁸⁰

Ceballos claims that subsequent to his testimony at the hearing, "he was subjected to a series of retaliatory employment actions," in-

167. *Id.* at 1956.

168. *Id.*

169. *Id.*

170. *Id.* at 1951.

171. *Id.* at 1955.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1955-56.

176. *Id.* at 1956.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

cluding a demotion to a trial deputy position, transfer to another courthouse, and promotion denial.¹⁸¹ After a denial of an employment grievance (which found he had not suffered any retaliation), he filed a § 1983 claim¹⁸² in the United States District Court for the Central District of California, alleging that his First and Fourteenth Amendment rights had been violated in retaliation for the March 2 memorandum.¹⁸³

In response to his suit, the Petitioner filed a motion for summary judgment.¹⁸⁴ In ruling on the motion for summary judgment, the district court determined whether Ceballos' complaint alleged that a constitutional right had been violated and, if so, whether the right was "clearly established."¹⁸⁵

The district court stated that determining whether speech is protected by the First Amendment was a matter of law for the courts to decide.¹⁸⁶ The court found that "[i]n determining whether a public employee's speech is protected by the First Amendment, the threshold inquiry is whether the statements at issue substantially address a matter of public concern. [If not,] the First Amendment is not triggered and it is unnecessary to scrutinize the reasons for the employer's action."¹⁸⁷ If the threshold inquiry is met, the court will engage in a balancing test, weighing "the interests of the employee in commenting on matters of public concern with the interest of the State, as an employer, in promoting the efficiency of the public services it performs."¹⁸⁸ In determining whether an employee's speech addresses a matter of public concern, the courts must address the content, form, and context of the speech.¹⁸⁹

In applying this test to Ceballos, the court found that while the memorandum did address a "matter of public" concern, Ceballos prepared and submitted the memorandum as part of his duties as a calendar deputy.¹⁹⁰ Citing *Gonzalez v. City of Chicago*, the court agreed with the Petitioner that the speech Ceballos engaged in was "not merely as a concerned citizen but within the scope of [his] employment" and consequently did "not address a matter of public concern, even if the incident that triggered the speech may itself be a matter

181. *Id.*

182. 42 U.S.C. § 1983 (2000).

183. *Garcetti*, 126 S. Ct. at 1956.

184. *Id.*

185. *Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL 34098285, at *4 (C.D. Cal. 2002)

186. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983)).

187. *Id.* (citing *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 978 (9th Cir. 1998)).

188. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

189. *Id.* at *5 (citing *Connick*, 461 U.S. at 146 (1983)).

190. *Id.*

of public concern.”¹⁹¹ Therefore, due to the context in which Ceballos uttered his speech, he was not protected by the First Amendment.¹⁹²

The district court further found that even if Ceballos’ speech was protected under the First Amendment, his right was not “clearly established.”¹⁹³ For a right to be clearly established, “ ‘the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.’ ”¹⁹⁴ The court found that Ceballos’ speech was not protected by the First Amendment because it was not clearly established that his March 2 memorandum addressed a matter of public concern.¹⁹⁵

Due to these findings, the court declined to engage in a balancing test of whether Ceballos’ interests outweighed the interests of the state and granted the Petitioner’s motion for summary judgment.¹⁹⁶

Ceballos appealed the district court’s decision, and the Ninth Circuit reversed.¹⁹⁷ The Ninth Circuit followed the analysis set forth in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*¹⁹⁸ and *Connick v. Myers*¹⁹⁹ in determining whether Ceballos’ speech was protected.²⁰⁰

First, the Ninth Circuit found that Ceballos’ memo, which addressed possible government misconduct, was “inherently a matter of public concern.”²⁰¹ Moreover, the court found “that a public employee’s speech is [not] deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility.”²⁰² The court rejected a per se rule that stripped a public employee of First Amendment protection for speech made within his or her employment duties, citing the adverse affect such a rule would have on whistleblowers.²⁰³

Next, the Ninth Circuit balanced Ceballos’ interest in making the speech against the petitioner’s interest in protecting the workplace

191. *Id.* (citing *Gonzalez v. City of Chicago*, 239 F.3d 939, 941 (7th Cir. 2001) (holding that plaintiff’s ordinary duties of writing reports on police misconduct did not involve matters of public concern)).

192. *Id.* at *6.

193. *Id.*

194. *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

195. *Id.* at *7.

196. *Id.* at *7 n.6.

197. *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004).

198. 391 U.S. 563 (1968).

199. 461 U.S. 138 (1983).

200. *Ceballos*, 361 F.3d at 1173.

201. *Id.* at 1174.

202. *Id.* at 1174-75 (citing *Roth v. Veterans Admin. of Govt. of U.S.*, 856 F.2d 1401, 1406 (9th Cir. 1988). In *Roth*, an employee uncovered corruption and mismanagement in the Veteran Administration as part of his job as troubleshooter. The Ninth Circuit held that he would not be denied his First Amendment protections simply because the corruption was included in reports written pursuant to his employment duties).

203. *Id.* at 1176.

against inefficiency and disruption, finding for the former.²⁰⁴ The court found that the Petitioner failed to show how Ceballos' memo created any disruption in the workplace.²⁰⁵ Moreover, it found that Ceballos' speech addressed concerns about possible corruption or unlawfulness in the sheriff's department, which was an area of great public concern.²⁰⁶

Finally, the court found that Ceballos' First Amendment rights were clearly established and that the Petitioner's actions were not objectively reasonable.²⁰⁷ Therefore, the Ninth Circuit reversed the district court's grant of summary judgment and remanded the case.²⁰⁸

The U.S. Supreme Court granted certiorari to review the Ninth Circuit's reversal.²⁰⁹ The Court first noted that the "First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."²¹⁰ In explaining the Court's doctrine, Justice Kennedy used *Pickering*²¹¹ to illustrate.²¹²

In *Pickering*, a teacher wrote a letter to a local newspaper which, *inter alia*, attacked the school board's funding policies.²¹³ In establishing a balancing test to determine to what extent the school board could control the speech of its employees, the Court stated that it needed to strike "a balance between the interests of the teacher, 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 through its employees."²¹⁴ The Court ultimately found that the teacher's actions did not interfere with the teacher's performance of his duties or operation of the school generally.²¹⁵ In finding for the teacher, the Court found that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."²¹⁶ The Court used the analysis set forth in this decision to evaluate the Ninth Circuit court's decision.²¹⁷

204. *Id.* at 1178.

205. *Id.* at 1179-80.

206. *Id.* at 1180.

207. *Id.* at 1181-82.

208. *Id.* at 1185.

209. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

210. *Id.* at 1957.

211. 391 U.S. 563 (1968).

212. *Garcetti*, 126 S. Ct. at 1957.

213. 391 U.S. at 566.

214. *Id.* at 568.

215. *Id.* at 572-73.

216. *Id.* at 573.

217. *Garcetti*, 126 S. Ct. at 1958.

The Court stated that analysis first requires a determination of whether “the employee spoke as a citizen on a matter of public concern.”²¹⁸ If not, the employee has no First Amendment protection against an employer’s reaction to the speech.²¹⁹ If so, then the relevant question becomes whether the “government entity had an adequate justification for treating the employee differently from any other member of the general public.”²²⁰ The Court found that the government had broad discretion to limit speech when acting as an employer, but that such restriction “must be directed at speech that has some potential to affect the entity’s operations.”²²¹

In its analysis, the Court first determined whether Ceballos spoke as a citizen on a matter of public concern.²²² The Court found that neither the fact that Ceballos stated his views within the office (rather than publicly) nor the fact that the memo concerned a matter of Ceballos’ employment were dispositive factors.²²³ Rather, the Court found the controlling factor to be that Ceballos’ “expressions were made pursuant to his duties as a calendar deputy.”²²⁴ Specifically, the Court held “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.”²²⁵ The Court rationalized that such restriction was reasonable because it gave an employer exercise to discipline an employee over speech that he “commissioned or created.”²²⁶ The Court further noted the interests that a government employer has in managing its employees, especially when considering that actions by government employees can affect official communications.²²⁷

The majority further found that the contrary rule proposed by the Ninth Circuit and Ceballos would “commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.”²²⁸ The Court cited both federalism and separation of power concerns as reasons for the Court to avoid intruding upon the province of government employers.²²⁹

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 1959.

223. *Id.*

224. *Id.* at 1959-60.

225. *Id.* at 1960.

226. *Id.*

227. *Id.* at 1960-61.

228. *Id.*

229. *Id.*

In addressing the Ninth Circuit's concern about government employers insulating their entity from whistleblowers, the Court found that adequate protection existed in legislative enactments, such as whistleblower protection and labor statutes. In the case of attorneys, the Court found further solace in the safeguards provided by rules of conduct and constitutional obligations apart from the First Amendment.²³⁰

Justice Souter, joined by Justice Stevens and Justice Ginsburg, dissented from the majority opinion.²³¹ Justice Souter disagreed with the Court's finding that speech made pursuant to a public employee's official duties is not protected by the First Amendment.²³² Justice Souter found no adequate justification for the line drawn by the majority denying protection to speech made in the course of official duties.²³³ He states that to do so, "the community [is] deprived of informed opinions on important public issues," which he cites as the underpinning of the Court's decision in *Pickering*.²³⁴ Rather, Justice Souter suggests a modified *Pickering* balancing test in which "an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."²³⁵

Justice Breyer, in a separate dissenting opinion, similarly found the majority's per se rule too restrictive, but would apply the *Pickering* balancing test in this case, without any modification as Justice Souter advocates.²³⁶

Justice Stevens filed a separate dissenting opinion as well, finding that speech made by a government employee pursuant to his official duties should not always be denied First Amendment protection.²³⁷

230. *Id.* at 1962.

231. *Id.* at 1963 (Souter, J., dissenting).

232. *Id.*

233. *Id.* at 1965.

234. *Id.* at 1966 (citing *San Diego v. Roe*, 543 U.S. 77, 82 (2004)).

235. *Garcetti*, 126 S. Ct. at 1967.

236. *Id.* at 1975-76 (Souter, J., dissenting).

237. *Id.* at 1963 (Stevens, J., dissenting).

PROFESSIONAL CONDUCT—FEES AND COSTS—MEDICAL LIABILITY
CLAIMANTS MUST BE INFORMED OF CONSTITUTIONAL RIGHTS TO A
PERCENTAGE OF DAMAGES IN CONTINGENCY FEE ARRANGEMENTS,
ALTERNATIVE TERMS FOR ATTORNEY REPRESENTATION, AND THE
RIGHT TO WAIVE THE PERCENTAGE IN WRITING AND UNDER OATH—*In
Re: Amendment to the Rules Regulating the Florida Bar—Rule 4-
1.5(f)(4)(B) of the Rules of Professional Conduct*, 939 So. 2d 1032,
1036-37 (Fla. 2006).

The Florida Supreme Court recently adopted an amendment to Rule 4-1.5(f)(4)(B) of the Rules Regulating the Florida Bar, concerning fees and costs in medical liability cases.²³⁸ In doing so, the Court acknowledged a 2004 amendment to the Florida Constitution providing that claimants in medical liability claims would receive at minimum 70% of the first \$250,000.00 of damages and 90% of damages thereafter.²³⁹

After voters originally approved the constitutional amendment in 2004, attorney Stephen H. Grimes, along with fifty-five other attorneys, presented an amendment to Rule 4-1.5(f)(4)(B), proposing that attorney's fees should not exceed 30% of the first \$250,000.00 of damages and 10% of damages thereafter.²⁴⁰ The Florida Bar then filed a response in opposition, objecting to the absence of a provision for claimants to waive this right.²⁴¹ After oral argument, the court requested that the Florida Bar propose its own amendment with an acknowledgement of the new provisions in the Florida Constitution, an obligation to notify potential medical liability clients of the new provisions, and a procedure where medical liability claimants could waive their rights under the new provisions.²⁴² After submitting the proposal to the court, the Bar published it in the *Florida Bar News*, where it received negative comments from Grimes on behalf of the

238. *In Re: Amendment to the Rules Regulating the Florida Bar—Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct*, 939 So. 2d 1032, 1036-37 (Fla. 2006) [hereinafter *Rule 4-1.5(f)(4)(B) Amendment Adoption*].

239. *Id.* The full version of the amendment reads:

In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

FLA. CONST. art. I, § 26.

240. *Rule 4-1.5(f)(4)(B) Amendment Adoption*, *supra* note 238, at 1036-37.

241. *Id.*

242. *Id.* at 1037.

other fifty-five petitioners.²⁴³ The court heard oral arguments again and ultimately accepted the Bar's proposal with modifications.²⁴⁴

Most of the negative comments to the proposal focused on the waiver provisions.²⁴⁵ Opponents claimed the personal rights in article I, section 26 could not be waived because of policies not controlled by claimants.²⁴⁶ However, the court sided with the Bar and noted that "most personal constitutional rights may be waived," including the right to remain silent,²⁴⁷ the Sixth Amendment right to counsel,²⁴⁸ and Florida's constitutional right to homestead protection.²⁴⁹ The court specifically stated that the language in article I, section 26 did not specifically prohibit waivers for the rights therein.²⁵⁰

Additionally, the court considered complaints by other opponents of the Florida Bar that the draft did not mandate judicial approval for waivers.²⁵¹ Opponents contended judicial approval was necessary because of the conflict of interest between lawyers discussing fee limitations with potential clients.²⁵² However, the court disliked Grimes' alternative approval provision.²⁵³ The court noted Grimes' provision put the burden upon potential clients to prove they undertook a "reasonable effort" to find counsel to represent them without a waiver. Ultimately the court rejected the provision so as to not restrict a "competent adult" client's right to waive article I, section 26 rights and held that the Bar's proposal balanced both the interests of attorneys and potential clients during negotiation for representation.²⁵⁴ The waiver form the court accepted included the exact language of article I, section 26, but also required clients to acknowledge waiver of a constitutional right and an increase in attorney's fees, the right to have the waiver explained by another attorney or a court, and the right to cancel the waiver within three business days.²⁵⁵ It also required clients to acknowledge that they "knowingly and voluntarily" waived their constitutional rights and did so because the attorney or firm of choice could not be retained without waiving his or

243. *Id.*

244. *Id.* at 1037-38.

245. *Id.* at 1038.

246. *Id.*

247. U.S. CONST. amend. V.

248. U.S. CONST. amend. VI.

249. Rule 4-1.5(f)(4)(B) Amendment Adoption, *supra* note 238, at 1038 (citing *In re Shambow's Estate*, 15 So. 2d 837, 837 (Fla. 1943); *City of Treasure Island v. Strong*, 215 So. 2d 473, 479 (Fla. 1968)).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1037-39.

254. *Id.* at 1039.

255. *Id.*

her constitutional rights.²⁵⁶ Additionally, the court adjusted the form to require clients to specifically acknowledge the exact percentage fees listed in Rule 4-1.5(f)(4)(B).²⁵⁷ In adopting a modified version of the Bar's provisions, the court relied on the Bar's representation that the judiciary received no complaints of "overreaching" with the current waivers for fees²⁵⁸ and stressed that potential clients could still request judicial approval of the waiver even though it was not mandatory.²⁵⁹ The court noted that other courts could still inquire as to whether the waiver was "knowingly and voluntarily" made.²⁶⁰

Although all seven justices agreed to adopt the Bar's proposal, Justice Wells and Justice Bell dissented to one provision concerning judicial review.²⁶¹ Both justices preferred that trial judges review all clients' waivers to make sure all clients understood what rights they were waiving, how the waivers affected each client's individual case, and that the waivers were truly voluntary.²⁶² Justice Wells noted that many clients in medical liability claims "are not legally sophisticated" and in an unequal bargaining position when negotiating with a lawyer due to the stress of their physical and mental injuries.²⁶³ Justice Wells recognized that most clients would sign forms and documents with long blocks of text, even without reading or comprehending the material within them.²⁶⁴

Additionally, Justice Wells did not agree with the majority's report that the judicial review already in place by Rule 4-1.5(f)(4)(B) was, in essence, "form over substance."²⁶⁵ Justice Wells drew from his experience as a trial judge, the Florida courts' history of judicial review of other waivers, and United States Supreme Court decisions in determining that clients *must* understand their constitutional rights before voluntarily and effectively waiving them.²⁶⁶ In his dissent, Justice Wells stated that individual judicial review "ensures that an individual's constitutional rights are protected" and that it "logically must follow" the constitutional limitation.²⁶⁷ While recognizing that judicial review would place an extra burden on attorneys, Justice

256. *Id.* at 1039-40.

257. *Id.*

258. *Id.* at 1040 n.4.

259. *Id.* at 1040.

260. *Id.*

261. *Id.* at 1040-41.

262. *Id.* at 1041.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 1042.

267. *Id.* at 1042-43.

Wells noted that attorneys are under an obligation to “go the extra step” to protect the public’s constitutional rights.²⁶⁸

268. *Id.* at 1043.