

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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Theron E. Hughes,

Plaintiff-Appellant,

v

Arthur Timko,

Defendant-Appellee.

UNPUBLISHED

August 2, 2007

No. 255229

Washtenaw Circuit Court

LC No. 03-000598-NZ

ON REMAND

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Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

This case is once again before us on remand by the Michigan Supreme Court, with a directive to reconsider our prior ruling in light of *Garcetti v Ceballos*, 547 US \_\_\_; 126 S Ct 1951; 164 L Ed 2d 689 (2006). *Hughes v Timko*, 477 Mich 1086; 729 NW2d 226 (2007). Based on the language and reasoning of the Court in *Garcetti*, we affirm the trial court’s grant of summary disposition in favor of defendant.

**I. Background and Procedural History**

**A. Factual History and Lower Court Proceedings**

This case initially arose when plaintiff, Theron “Thayrone” E. Hughes, the host of a public radio program on WEMU, filed suit pursuant to 42 USC 1983, asserting that defendant, Arthur Timko, the general manager of the radio station, violated his right to free speech under the First Amendment through termination of his employment. WEMU is a non-commercial public radio station operated by Eastern Michigan University, and is also an affiliate of National Public Radio (NPR). Plaintiff served as the host of a musical program entitled “The Bone Conduction Music Show (BCMS),” which aired on WEMU on Sunday evenings. The BCMS was described by plaintiff as “your basic music slug-fest consisting of roots rock, hip-shakin’ soul music and the industrial strength rhythm and blues.” Historically, plaintiff was outspoken on a variety of topics and engaged in conservative political commentary during his program.

In March 1976, WEMU developed a statement of purpose. The station adopted a perspective, which sought to provide an educational outlet that presented variety in programming that would be inclusive of divergent views. The statement of purpose provided, in relevant part:

If WEMU is to achieve these broad, long-range goals, it must create an open environment in which everyone in the community feels welcome and comfortable. WEMU must provide the basic services of news, time, weather, and companionship for which listeners tune to a radio station. It must avoid making any group feel unwelcome, discriminated against, or unfairly treated. At the same time, WEMU must make everyone who tunes in a little uncomfortable by exposing them to new ideas, to other people they might not otherwise meet, and to new forms of expression. WEMU is confident that listeners will choose to endure the uncomfortable for the sake of the stimulation that it can bring and in the knowledge that all groups, tastes, and ideas are fairly treated in the program service.

\* \* \*

**NEUTRALITY:** WEMU and WEMU staff must maintain total neutrality in news and public affairs programs. This does not mean, however, that WEMU's output must be bland. Indeed, WEMU should jealously guard its neutrality and, hence, its vitality as a place where every view and taste is respectfully heard. Further, by making WEMU open to all views and all publics without discrimination or favor, it can maintain neutrality and vitality.

In October 2001, defendant forwarded an e-mail to WEMU employees emphasizing the station's policy of neutrality and requiring that on-air program hosts refrain from expressing personal opinions on controversial topics. The e-mail specifically identified the armed retaliation by the United States against terrorist groups as a controversial topic on which its hosts should refrain from comment. In addition, several months later, shortly after the initiation of the war in Iraq, defendant notified station employees via e-mail that hourly NPR newscasts would be included in all programming in which they would fit. The BCMS was identified in the list of programs that would include the newscasts. Although plaintiff asserted he did not receive this e-mail, his on air statements adequately demonstrate that he was aware of this directive from his employer.

Plaintiff refused to run the NPR newscasts during his show on March 30, 2003. In addition, during the show, plaintiff commented on the NPR newscasts, stating in relevant part:

I see right here we are supposed to be running news during the program. But that's not going to happen. Ah, we know for a fact that if you want a current and accurate assessment of what's going on, you sure as hell ain't listening to us. [O]k, you sure as hell ain't listening to us. You're going to go over to Fox News where they're not bending it one way or the other. That is a complete and accurate assessment of what's going on and they tell you right up front. They say hey man, we're pro-Americans but we're not going to lie to you. If something bad's happening over there we're going to tell you as opposed to 90% of the other reprehensible news coverage out there that's basically French. . . . The real deal if you want to get it is over at Fox News, ok? It ain't happening on NPR and it certainly ain't happening on CNN and all those other news broadcast[s] going on . . . . And it really ain't happening on the BBC. Oh, Lordy have mercy it ain't happening on the BBC . . . .

\* \* \*

When I said get over to the Fox News Network for your update on the news . . . don't say that I can't believe you're supporting Fox News. I get my news from. Well you know what man, it's all news okay[? G]o over C[N]N[,] NBC, MSNBC, I don't care where you go, get a big perspective on it. [O]k, don't just listen to the hammer heads to paint the picture that oh my God we made a mistake . . . we're gonna lose, we're gonna lose.

During this same broadcast, plaintiff made extensive comments expressing strong support for the United States military action being taken in Iraq.

Following the broadcast, defendant met with plaintiff and asserts that plaintiff stated he would refuse to run NPR newscasts during the BCMS and would continue to comment on controversial topics. Plaintiff counters that defendant did not indicate to him that running of the newscasts was required or mandated.

Defendant subsequently terminated plaintiff's employment. Internally, defendant cited plaintiff's refusal to run NPR newscasts as directed and his act of commenting on a controversial issue as the basis for terminating the employment relationship. WEMU publicly attributed dismissal of plaintiff to "creative differences and interpretation of station policy."

Plaintiff filed suit alleging his discharge was the result of his speaking out on a controversial issue of public concern, violating his First Amendment rights. Defendant responded that plaintiff's speech was not constitutionally protected under *Pickering v Bd of Ed of Twp High School Dist 205, Will Cty*, 391 US 563; 88 S Ct 1731; 20 L Ed 2d 811 (1968), because WEMU's interest in the efficiency of managing its station outweighed plaintiff's interest in free speech. In addition, defendant asserted that even if plaintiff's speech was subject to constitutional protection, defendant could demonstrate the existence of an alternative basis for the termination and was entitled to qualified immunity.

The trial court granted summary disposition in favor of defendant, noting it was undisputed that plaintiff's employment was terminated following his comments on March 30, 2003, and that defendant conceded that plaintiff's speech involved matters of public concern. The trial court determined plaintiff's failure to comply with defendant's directive that hourly newscasts be aired constituted meaningful interference with plaintiff's job duties. In addition, the trial court found that plaintiff's speech in support of the Iraqi war, coupled with his refusal to air the NPR newscasts, undermined WEMU's stated goal of maintaining neutrality. The trial court concluded that WEMU's interest in promoting the efficiency of the services it provided through its employees outweighed plaintiff's interest in speaking on a matter of public concern. As a result, the trial court determined that plaintiff's speech was not constitutionally protected.

## **B. Initial Appellate Proceedings**

In *Hughes v Timko*, unpublished per curiam opinion of the Court of Appeals, issued February 28, 2006 (Docket No. 255229), a majority of this Court (Borrello, J. and Sawyer, P.J., who concurred in the result only, with Talbot, J. dissenting), reversed the trial court's grant of summary disposition in favor of defendant. The majority determined that plaintiff's speech

addressed a matter of public concern, finding the trial court failed to view the evidence in a light most favorable to plaintiff when evaluating whether plaintiff's refusal to air the NPR newscasts interfered with plaintiff's job responsibilities. The majority also found that a factual issue existed because, despite plaintiff's comments during his radio show, a jury could conclude that plaintiff did not violate his job duties by failing to run the newscasts based on plaintiff's belief that the directive was not applicable to his show. *Id.*, slip op at 9.

In addition, the majority disagreed with the trial court's determination that WEMU's interest in running an efficient radio station and maintaining neutrality outweighed plaintiff's interest in freedom of speech. The majority determined that, based on conflicting evidence pertaining to whether plaintiff was supposed to run the NPR newscasts during his show, the question of whether plaintiff's conduct interfered with defendant's ability to discipline was not strongly implicated. The majority believed defendant was required to set forth a stronger showing of interference because plaintiff's speech "substantially involved matters of public concern." Finding that defendant's proofs were insufficient on this issue, the majority found plaintiff's interest in speech outweighed WEMU's interest in providing neutral coverage on controversial issues. *Hughes, supra*, slip op at 9-10. The majority also rejected defendant's assertion of qualified immunity. *Id.*, slip op at 12-15. Judge Talbot dissented, asserting that plaintiff's interest in speaking out on a matter of public concern did not outweigh the interest of WEMU in operating an efficient radio station and maintaining its policy of neutrality on controversial issues. The dissent believed that plaintiff's refusal to run the NPR newscasts, coupled with his critical comments pertaining to NPR and statements regarding the war in Iraq did serve to interfere with plaintiff's performance of his duties and was violative of WEMU's stated policy of neutrality. *Id.*, slip op at 1-4 (Talbot J., dissenting).

## II. Standard of Review

A motion for summary disposition made pursuant to MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court also reviews constitutional issues de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

## III. Analysis

Reviewing this case in light of the Supreme Court's ruling in *Garcetti*, we are compelled to affirm the trial court's grant of summary disposition in favor of defendant. Consistent with *Garcetti*, and prior precedent of the Court, our interpretation is guided by the initial inquiry, which "requires determining whether the employee spoke as a citizen on a matter of public concern," or was acting in accordance with his employment duties. *Garcetti, supra* at 1958. Specifically, the Court has ruled that:

When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. [*Id.* at 1960.]

Because we find that plaintiff's comments and refusal to run NPR broadcasts constituted part of his official job duties, he is not entitled to First Amendment protections.

In *Garcetti*, the defendant, Richard Ceballos, was employed as a deputy district attorney. Ceballos was contacted by a defense attorney in a pending case regarding issues pertaining to misrepresentations contained in an affidavit used to secure a search warrant. Ceballos conducted an investigation and recommended that the charges be dismissed based on discrepancies within the affidavit. The supervisor for Ceballos, contrary to his recommendation for dismissal, decided to proceed with the prosecution, pending the resolution of a motion challenging the warrant. Following the trial court's rejection of the motion challenge, Ceballos claimed that he was subjected to retaliatory employment actions, in part, based on his comments and in violation of the First Amendment. The court granted summary disposition in favor of the employer indicating that the comments by Ceballos were in accordance with his employment duties, precluding his entitlement to First Amendment protections. The Court of Appeals for the Ninth Circuit reversed finding the content of statements by Ceballos involved protected speech. *Garcetti v Ceballos*, 361 F3d 1168, 1173 (CA 9, 2004). The Supreme Court reversed the Court of Appeals, *Garcetti, supra* at 1957, and it is this ruling that we use to guide our review.

In *Garcetti*, the Court reaffirmed prior rulings “that public employees do not surrender all their First Amendment rights by reason of their employment,” finding the First Amendment does protect “a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” *Garcetti, supra* at 1957. However, the Court reiterated its prior decisions, which “sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.” *Id.* at 1959. The Court emphasized that although that the “First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance.’” *Id.*, citing *Connick v Myers*, 461 US 138, 154; 103 S Ct 1684; 75 L Ed 2d 708 (1983).

The Court identified the “controlling factor” to be whether a defendant’s speech was made “pursuant to his duties.” *Garcetti, supra* at 1959-1960. Finding that Ceballos spoke in conjunction with his duties as a prosecutor, the Court ruled that he was not entitled to First Amendment protections. *Id.* at 1960. Similar to Ceballos, when plaintiff “went to work and performed the tasks he was paid to perform” he was not acting as a private citizen. *Id.* When plaintiff refused to air and disparaged the NPR newscasts and specifically commented on issues, which he had been instructed by his employer to avoid, he was performing his official duties as a radio show host. It cannot realistically be asserted that plaintiff had access to the public airways to express his personal opinions other than through the mechanism afforded by his employment responsibilities as a radio show host. As noted by the *Garcetti* Court:

Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. [*Id.*]

Based on our finding that plaintiff was performing his official duties and not entitled to First Amendment protections, we need not evaluate whether the employer had adequate justification for its treatment of plaintiff.

The Court has routinely recognized that First Amendment protections are not unlimited based, in part, on the necessity of “affording government employers sufficient discretion to

manage their operations.” *Garcetti, supra* at 1960. Consistent with prior precedent, the Court has reiterated that:

Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission. [*Id.*]

In the circumstances of this case, plaintiff’s comments were expressly contrary to the stated purpose and mission of his employer. Although “employees retain the prospect of constitutional protection for their contributions to the civic discourse . . . [t]his prospect of protection . . . does not invest them with a right to perform their jobs however they see fit.” *Id.* Plaintiff contravened defendant’s policies and openly denigrated his employer’s integrity and authority by stating:

I see right here we are supposed to be running news during the program. But that’s not going to happen. Ah, we know for a fact that if you want a current and accurate assessment of what’s going on, you sure as hell ain’t listening to us. . . . The real deal if you want to get it is over at Fox News, ok? It ain’t happening on NPR.

Plaintiff made these comments during his radio show and, thus, they could be construed as an extension or authorized expression of the opinions of the employer.

Because plaintiff’s speech or commentary “was inflammatory or misguided,” defendant was vested with “the authority to take proper corrective action.” *Id.* at 1960-1961. Plaintiff improperly used the forum afforded as a consequence of his employment to publicly denigrate his employer, thereby subjecting himself to disciplinary action.

Further, although cases such as *Pickering, supra*, have recognized the need to protect and not suppress the exposition of information, which is of inherent value to public discourse, plaintiff’s statements do not appear to have been made in an effort to stimulate public dialogue. Rather, plaintiff’s comments could easily be construed as an expression of his own personal disputes and grievances pertaining to defendant’s imposition of new policies and procedures, with which plaintiff did not concur. Plaintiff was working as a radio host of a music show. His comments were not akin to the types of speech involving disclosure of mismanagement, fraud or other whistleblower-type wrongs, which are typically afforded First Amendment protections. Rather, plaintiff used the mechanism afforded by his employer as a bully pulpit to expound on his own opinions and grievances in response to the revised policies of his employer requiring him to curtail personal opinion and commentary and to run NPR news broadcasts. As noted by Justice Souter in his dissent:

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee’s speech gets to commenting on his own workplace and responsibilities. [*Garcetti, supra* at 1964 (Souter, J., dissenting).]

As such, the First Amendment does not shield plaintiff's comments and there exists no prohibition against "managerial discipline based on [plaintiff's] expressions made pursuant to [his] official responsibilities." *Id.* at 1961.

Affirmed.

/s/ David H. Sawyer  
/s/ Michael J. Talbot