AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Adams v. University of North Carolina-Wilmington, 640 F.3d 550** (4th Cir., 2011)

*In 1993, the University of North Carolina at Wilmington hired Michael Adams as an assistant professor in its Department of Sociology and Criminal Justice. In 1998, he was promoted to associate professor with tenure. In 2000, he had a religious conversion to Christianity that also reshaped his political commitments. He began to appear regularly as a commentator in the conservative media, but continued to receive strong teaching evaluations. As his public profile increased, however, both members of the general public and of the university community began to complain to university officials about Adams’ political opinions. In 2004, Adams applied for promotion to full professor. A majority of the full professors in his department voted against his promotion, apparently regarding his record of scholarly research since his last promotion as too thin to justify promotion to full at that time.*

*Adams filed suit in federal district court against the university, complaining of religious and viewpoint discrimination. The district court granted summary judgment in favor of the university. On appeal, a federal circuit court affirmed that ruling in part. Although the circuit court agreed that Adams had provided no evidence that he had been discriminated against, the circuit court thought the trial court had made an error in treating Adams’ scholarly and non-scholarly writings as if they were unprotected by the First Amendment because they were produced as part of his work duties as a government employee. The circuit court found that in the academic context, the writing of professors on matters of public concern were entitled to First Amendment protection even if they became part of a promotion file. The trial court would need to do further analysis to determine whether that constitutionally protected speech became the basis of improper employment retaliation against Adams.*

JUDGE AGEE.

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Before undertaking our analysis, it is important to underscore the context in which we consider Adams' claims. Following the Supreme Court's directive, courts have been reluctant

to trench on the prerogatives of state and local educational institutions [because of the courts'] responsibility to safeguard their academic freedom, a special concern of the First Amendment. If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking. *Regents of the University of Michigan v. Ewing* (1985).

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For this reason

[u]niversity employment cases have always created a decisional dilemma for the courts. Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the courts review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason. *Smith v. Univ. of North Carolina* (4th Cir. 1980).

It is with this well-established understanding of the limited review courts may undertake in cases involving employment decisions of academic institutions that we consider Adams' claims.

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Having reviewed the record in the light most favorable to Adams, we agree with the district court that he failed to set forth direct evidence of religious discrimination. To do so, Adams was required to show that religion was a “motivating factor” in the decision not to promote him. Adams did not make such a showing on this record, and his arguments demand pure speculation. There is simply no direct evidence that the Defendants treated Adams differently based on his religious beliefs.

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The district court did not err in concluding Adams failed to satisfy the fourth prong of establishing his prima facie case—that he was denied a promotion under circumstances giving rise to an inference of unlawful discrimination. Adams contends such an inference arises from the fact that “he is the only Christian conservative in his Department” and “the only professor in the past twenty-five years to be denied the rank of full professor at the Department level with teaching awards and ten or more refereed publications on his application.” As the district court observed, this argument fails in several respects. Although Adams contends he is the only “conservative Christian,” his Title VII claim rests on evidence of religious discrimination rather than political or social ideology and Adams “forecasts no evidence that he is the [D]epartment's only Christian.” Furthermore, Adams' comparison of his qualifications to those of others in the Department cannot, by itself, meet his burden. There must be some additional tie to a religious motive for the decision not to promote him and Adams failed to make that showing. Although some of his writings contained religious content and were considered during the decisionmaking process, that fact, in and of itself, does not give rise to an inference of discrimination. Adams' conjecture links the two, but nothing more substantial does.

But even if we assume that Adams had established a prima facie case, the Defendants satisfied their burden to “articulate a legitimate nondiscriminatory reason for the adverse employment action.” The Defendants offered numerous legitimate reasons for the decision not to promote Adams, including the small number of peer-reviewed single author publications since Adams' last promotion.

. . . . Due to the nature of Adams' promotion, i.e., he was not competing against someone else who got the position, he cannot show he was more qualified than another applicant who was promoted. Adams posits instead that he was as qualified as other individuals who had previously been promoted to full professor. Adams' attempt to compare qualifications ignores “the inevitable element of subjectivity” involved in promotion decisions in the university setting. Subjectivity in such promotion decisions is permitted so long as it lacks discriminatory intent. Purely numerical comparisons are thus insufficient to demonstrate pretext in this context. . . .

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The First Amendment protects not only the affirmative right to speak, but also the “right to be free from retaliation by a public official for the exercise of that right.” While government employees do not lose their constitutional rights at work, the Supreme Court has repeatedly held that the government may impose certain restraints on its employees' speech and take action against them that would be unconstitutional if applied to the general public. . . .

In *Pickering v. Board of Education* (1968), and *Connick v. Myers* (1983), the Supreme Court analyzed the competing interests at play between the public employee, “as a citizen, in commenting upon matters of public concern” and the government, “as an employer, in promoting the efficiency of the public services it performs through its employees.” In *McVey v. Stacy* (4th Cir. 1998), we explained that *Pickering* and *Connick* balance those competing interests in the context of a claim for retaliation by requiring the court to determine:

(1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's [adverse employment] decision.

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The district court's initial error lies in its conclusion that Adams' speech, which the Defendants agree was protected First Amendment speech when initially given, was converted into unprotected speech based on factors that came into play only after the protected speech was made. Although the district court framed the issue properly by noting it must focus “not on the content of the speech but on the role the speaker occupied when he said it,” the court's subsequent analysis ignores the role Adams occupied when he “spoke.” Instead, the court's basis for determining the First Amendment did not protect Adams' speech was Adams' subsequent inclusion of past protected speech as part of his promotion application. In effect, the district court held that Adams' speech in his columns, books, and commentaries, although undoubtedly protected speech when given, was somehow transformed into unprotected speech because Dr. Cook and others read the same items from a different perspective long after Adams' speech was uttered.

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In *Garcetti v. Ceballos* (2006), the Supreme Court conducted a specific analysis associated with the first prong of the *McVey* test and the *Pickering–Connick* factors, to determine whether a public employee spoke as a citizen on a matter of public concern. The plaintiff, Ceballos, wrote a memorandum as part of his official duties as a deputy district attorney asserting various perceived inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case. Ceballos' employer, the county district attorney's office, subsequently altered Ceballos' duties, and Ceballos sued alleging retaliation based on his memo. The Supreme Court determined that Ceballos' claim failed because he was not speaking as a citizen when he wrote the memo. In so doing, the Court concluded, “[r]estricting 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.” Accordingly, the Supreme Court held the First Amendment does not “protect[ ] a government employee from discipline based on speech made pursuant to the employee's official duties.”

Toward the conclusion of its analysis, and in response to Justice Souter's dissent, the Supreme Court stated:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

As other courts of appeals have noted, this caveat has left unclear the applicability of *Garcetti* in the context of “speech related to scholarship or teaching.” . . .

The plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of “scholarship or teaching” are in play. We recognized this fact in *Lee v. York County School Division* (4th Cir. 2007). . . . Although *Lee* concerned a public high school teacher's First Amendment rights in the classroom, its basis for using the *Pickering–Connick* analysis as opposed to *Garcetti* is equally—if not more—valid in the public university setting, which is the specific arena that concerned both the majority and the dissent in *Garcetti*. Therefore, we are not compelled by *Garcetti* to extend its principles to the case at bar.

There may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply to the specific instances of the faculty member's speech carrying out those duties. However, that is clearly not the circumstance in the case at bar. Defendants agree Adams' speech involves scholarship and teaching. . . . But the scholarship and teaching in this case, Adams' speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams' assigned teaching duties at UNCW or any other terms of his employment found in the record. Defendants concede none of Adams' speech was undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties.

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. In light of the above factors, we will not apply *Garcetti* to the circumstances of this case.

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Instead, a review of Adams' speech utilizes the *Pickering–Connick* analysis for determining whether it was that of a public employee, speaking as a citizen upon a matter of public concern. This analysis permits a nuanced consideration of the range of issues that arise in the unique genre of academia. Under that analysis, “[t]o determine whether speech involves a matter of public concern, we examine the content, form, and context of the speech at issue in light of the entire record.” *Kirby v. City of Elizabeth City* (4th Cir. 2004). “Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.” For purposes of this inquiry, it does not matter “how interesting or important the subject of an employee's speech is,” and “the place where the speech occurs is [also] irrelevant.”

Having reviewed the record, we conclude Adams' speech was clearly that of a citizen speaking on a matter of public concern. Adams' columns addressed topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality. Such topics plainly touched on issues of public, rather than private, concern. . . .

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For the aforementioned reasons, we hold that the district court erred as a matter of law in determining Adams failed to satisfy the first prong of the *McVey* test. We further hold that under the *Pickering–Connick* analysis, Adams has satisfied the first *McVey* prong as a matter of law. Because the district court has never addressed whether the second and third prongs of the *McVey* test are met in this case, we remand the case for further proceedings relevant to that determination.

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*Affirmed in part.*