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SUMMARY

In California, the First Amendment may protect public academic employees from adverse employment actions based on their speech.

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NINTH CIRCUIT HOLDS THAT ACADEMIC EMPLOYEES' SPEECH PURSUANT TO THEIR OFFICIAL DUTIES MAY BE PROTECTED BY THE FIRST AMENDMENT

The Ninth Circuit recently held that statements made by academic employees pursuant to their official duties – such as commenting on faculty restructuring – may be protected by the First Amendment in certain circumstances. *Demers v. Austin*, 2014 WL 306321(9th Cir. Jan. 29, 2014). The opinion clarifies that the Ninth Circuit will analyze First Amendment claims based on "teaching and writing on academic matters … by publicly employed teachers" under the Supreme Court's decision in *Pickering v. Board of Educ.*, 391 U.S. 536 (1968).

In *Pickering*, the Supreme Court held that a public employee's speech would be protected if it addressed a matter of public concern and the employee's interest outweighed the employer's. However, in a later decision, *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the Court held that, "when public employees make statements pursuant to their official duties the Constitution does not insulate their communications from employer discipline." The Ninth Circuit's decision in *Demers* is noteworthy because, for public academic institutions in California, it clarified that employment actions taken against academic employees on the basis of their speech would not be analyzed under the *Garcetti* test but rather the more employee-friendly *Pickering* test.

In *Demers*, a professor at Washington State University alleged that the University had retaliated against him based in part on a pamphlet he had written proposing to restructure the faculty of his college. He wrote the pamphlet when he was serving on a committee considering related issues. The court found that Demers wrote the pamphlet pursuant to his official duties, rejecting the argument that his use of a separate business's name in distributing the pamphlet rendered it speech by a private citizen. Had the court followed *Garcetti*, the pamphlet would not have been protected speech. However, the court held that *Garcetti* did not control because this type of speech – "teaching and academic writing" by public employees – and academic freedom are a "special concern of the First Amendment."

Turning to the *Pickering* test instead, the court began by "recognizing our limitations as judges" to assess "the nature and strength" both of the public interest in academic speech and of the employing university's institutional interests. Courts "should hesitate before concluding," on the one hand, "that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego," or on the other "that we know better than the institution itself the nature and strength of its legitimate interests." In particular, the court noted that a university's "content-based judgment" of a professor's writing for purposes of tenure or promotion is "both necessary and appropriate."

Applying the *Pickering* test, the court found that the professor's pamphlet addressed a matter of public concern, emphasizing that "academic writing" is not limited to just scholarship and noting that the pamphlet contained broad recommendations about the school's focus and direction at a time when the school was debating these issues and had been distributed widely. The court remanded the case to the district court to decide the remaining issues, *e.g.* whether the University's interest in controlling the circulation of the pamphlet outweighed the professor's interests and whether the University would have taken the employment actions against the professor absent the protected speech.

The *Demers* decision is significant for the University because the court has signaled that academic employees are likely to have greater protection from adverse employment actions based on speech made in the course of their official duties than other public employees enjoy. However, the Ninth Circuit did not rule on what the outcome of the balancing test should have been in this case, nor has it yet applied it to a number of more complex scenarios, for example tenure decisions based on academic writing. Indeed, the court acknowledged that the balancing process "is likely to be particularly subtle and difficult" in the academic setting.