

## Can city fire employee who said it broke law?



### When is employee speaking as a citizen?

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Recently a fascinating sunshine law case was decided by the Eighth Circuit Court of Appeals that should be an earth-trembling experience for many city officials around our state. That court looked at the case of an employee fired for pointing out to the city council that its members were violating the sunshine law, and held that the employee was simply exercising his First Amendment rights and the city was not justified in shutting him up by firing him.

The City of Orrick hired a new public works director in 2001. Two years later the city sent him to a training session, which, unfortunately for the city, included a session on the fine points of the sunshine law. (A little training can be a good thing!)

The employee returns, his eyes wide open because he's convinced the council is violating the law. First thing he does is report to the council on his training, including the fact that he thinks the city needs to make a written policy relating to the sunshine law and create a compliance committee.

Unfortunately, the city did not greet this suggestion with smiling faces. Instead, the city attorney told the employee that the council was not violating the law, and another council member told him he was angering the council and needed to "shut up."

This, however, was an amazing employee. Instead of shutting up, he picked another council meeting to stand and read the sunshine law aloud to the council members and ask them not to hold an "illegal meeting."

Well, this went on for several weeks; I'll cut to the chase. The employee was soon fired. He found a sympathetic attorney and sued the city for violating his First Amendment rights and for unlawful discharge.

Before I tell you what happened, I need to stop for a moment and remind you about a U.S. Supreme Court decision from 2006. I wrote about this decision, called *Garcetti v. Ceballos*, in my column in the July, 2006, Missouri Press News (I'm just sure all of you still have that around and either remember it vividly or are going to run right out and pull it from your shelf to read it again.)

That case was interesting because it involved a deputy district attorney who was terminated for a memo critical of his supervisors written in the course of his job duties. The court held that there were clear differences between the rights of a citizen and the rights of an employee. The court studied the issue of speech of an employee in regard to his duties vis a vis speech of an employee who also has rights as a citizen.

Of greatest importance to the court was that the employee made his statements pursuant to his duties. In this case, the U.S. Supreme Court found, the employee was not speaking as a citizen, but as an employee, and therefore the employer had a right to control the statements of the employee. In short, he had no First Amendment rights.

That case was important to the Eighth Circuit Court of Appeals in this case, but the outcome was much more favorable. The court looked with great detail as to whether this employee was speaking in the scope of his duties maintaining park, water, sewer and streets. He had no sunshine law duties, the court said. In regard to that issue, he was speaking solely as a citizen.

The court also made some significant points about speech by public employees. "Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern," the court said.

It didn't even matter that the employee was not a resident of the community in which he was employed. "It is [his] United States citizenship which triggers First Amendment protection," the court said, not the city in which he resides.

The court even looked briefly at whether the city could rely on the fact that its city attorney had initially told the employee that the council was not in violation, and concluded the council had not specifically asked the city attorney about certain issues related to what the employee raised, thereby potentially foregoing that defense.

"This court has held 'no right is more clearly established than freedom of speech, and ... speech alleging illegal misconduct by public officials occupies the highest rung of First Amendment hierarchy,'" the court concluded, finding that the city had no right to discharge the employee for his complaints.

This decision should bring joy to employees all across the state. They should no longer fear the loss of their jobs for their objections. And this decision just adds another level of protection for citizens, whatever their position, to object when their rights are trampled upon by public bodies who are unconcerned about the sunshine law's provisions.