Seventh Circuit panel rules that teacher's in-class speech, which involved use of a racial epithet for educational purposes, was not speech protected by the First Amendment[1]

Brown v. Chicago Bd. of Educ., No. 15-1857 (7th Cir. Jun. 2, 2016)

Abstract: A U.S. Court of Appeals for the Seventh Circuit three-judge panel has ruled that a teacher's use of a racial epithet in class was not speech protected by the First Amendment. The panel concluded that the teacher spoke pursuant to his official duties and was, thus, controlled by the Seventh Circuit's decision in *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007), which holds that a teacher's in-classroom speech is not the speech of a "citizen" for First Amendment purposes. The court rejected the teacher's argument that the holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which indicates that speech pursuant to one's employment duties is not protected, does not apply when the speech in question is related to scholarship or teaching.

The panel also rejected the teacher's substantive due process claim that the school policy regarding a teacher's use of racial epithets was unconstitutionally vague. It found no vagueness in the policy that banned the use of racial epithets in front of students.

Facts/Issues: Lincoln Brown, a teacher at Murray Language Academy (MLA), interrupted his teaching session when he caught students passing a note in class containing music lyrics with the offensive N-word. Brown decided to use the language in the note as a teachable moment involving a discussion of why such words are hurtful and must not be used. MLA Principal Gregory Mason happened to observe the lesson. Brown was suspended and brought this suit in federal district court under § 1983 against the Chicago Board of Education (CBOE). Brown's First Amendment free speech and Fourteenth Amendment

[1] Excerpted from NSBA Legalclips.

substantive due process claims proceeded to the summary judgment stage, where CBOE prevailed.

Ruling/Rationale: The Seventh Circuit panel affirmed the lower court's grant of summary judgment in favor of CBOE. Addressing Brown's First Amendment claim, it found the claim failed "right out of the gate." Citing *Garcetti*, the panel pointed out that whether a public employee's speech is constitutionally protected depends on "whether the employee spoke as a citizen on a matter of public concern."

The panel emphasized that Brown had conceded that he was speaking as a teacher, i.e. employee, not as a citizen. It noted *Garcetti* held that a public employee is not speaking as a citizen when making "statements pursuant to [his] official duties." However, it said, "The question remains whether the *Garcetti* rule applies in the same way to 'a case involving speech related to scholarship or teaching.'"

Although the U.S. Supreme Court has not addressed the question, the panel found that the Seventh Circuit had confronted it in *Mayer*. In *Mayer*, the Seventh Circuit had concluded "that a teacher's in-classroom speech is not the speech of a 'citizen' for First Amendment purposes." According to the panel, the fact that Brown had deviated from a scheduled grammar lesson to give an impromptu lesson on racial epithets did not alter the fact that he was speaking pursuant to his official duties.

The panel rejected Brown's argument that it should ignore *Mayer* and, instead, adopt the Ninth Circuit's conclusion in *Demers v. Austin*, 746 F.3d 411 (9th Cir. 2014), that *Garcetti* does not apply "in the same manner to a case involving speech related to scholarship or teaching." It pointed out that "*Demers* addressed speech in a university setting, not a primary or secondary school." The panel also noted that the Ninth Circuit had "relied on the long-standing recognition that academic freedom in a university is 'a special concern of the First Amendment' because of the university's unique role in participating in and fostering a marketplace of ideas."

The panel found that in the K-12 context the Ninth Circuit follows the *Mayer* approach. It found that both the Third and Sixth Circuits also followed *Mayer.* While acknowledging the Fourth Circuit hued to the position urged by Brown, it stressed that the Fourth Circuit had provided no analysis. The panel, therefore concluded:

We see no reason to depart here from our decision in Mayer. Brown made his comments as a teacher, not a citizen, and so his suspension does not implicate his First Amendment rights.

Turning to Brown's substantive due process claim, the panel concluded that his argument that the policy banning teachers from using racial epithets in front of students was unconstitutionally vague was without merit. It said, "Brown's real frustration seems to be that the policy does not distinguish between using the word in an educational manner from its use as a slur directed toward a student or colleague."

The panel also rejected the notion that CBOE's past inconsistent enforcement of the policy resulted in its failure to provide Brown with notice that the policy would be enforced in this instance. It found Brown's suit was "really a First Amendment case, which gains nothing from the addition of the substantive due process argument." The panel concluded:

And from a First Amendment stand point, Garcetti dooms his position. The Board may have acted in a short-sighted way when it suspended him for his effort to educate the students about a sensitive and socially important issue, but it did not trample on his First Amendment rights.