

CAUTIONARY TALE FOR PUBLIC EMPLOYERS – REMEMBER THE FIRST AMENDMENT

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When a public employee makes unpopular public statements, the employer must remember that the employee's statements could be protected by the First Amendment. On September 15, 2014, the Fifth Circuit Court of Appeals in [Christian Cutler v. Stephen F. Austin State University](#) affirmed the trial court's ruling that the University and four University officials had no immunity from a First Amendment retaliation claim. Cutler, the University's Director of Art Galleries, received an invitation from a member of Congress to judge a high school art exhibition. After receiving the invitation, Cutler researched the Representative and discovered that he had made statements with which Cutler disagreed. Cutler then called the Representative's staff and refused the invitation, calling the Representative a "fear monger." The University fired Cutler seven days after learning of the incident. After his termination, Cutler sued the University and four officials, alleging that they retaliated against him for exercising his First Amendment right to free speech. The defendants moved for summary judgment on the basis of qualified immunity but the district court denied the motion. The Fifth Circuit Court of Appeals affirmed the district court's decision. The court focused on the U.S. Supreme Court's decision in *Garcetti v. Cevallos*, 547 U.S. 410 (2006), which held that the First Amendment generally protects employees who speak as private citizens on matters of public concern, but does not protect them when they speak pursuant to their official duties. The court found that the First Amendment protected Cutler's statements because the event was not within his job requirements and he spoke to the staff of an elected official as a private citizen. This case serves as cautionary tale for all public employers, including public colleges and universities, as well as primary and secondary schools. While public employers can generally discipline employees for speech made as a part of the employee's official duties, employees likely have First Amendment protection when speaking as private citizens on matters of public concern—even when they express unpopular views.

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