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Adverse Actions Against Public Employees For First Amendment Speech: An Introduction and Overview

Introduction

Police officers, in accepting public employment, do not thereby forfeit the right to free speech that all people have in the United States under the First Amendment to the Constitution. While the United States Supreme Court and lower federal and state courts have long made that clear, they have also indicated, in no uncertain terms, that the parameters of protected First Amendment speech are not exactly the same as for those not engaged in providing effective and efficient public services.

Because of some of the unique demands of public employment in general and the special needs of law enforcement in particular, which include discipline, morale, *esprit de corps*, and public relations with the community, the analysis of when an officer may face adverse employment actions as a consequence for particular free speech faces some special legal tests.

This short article is intended as a brief introduction and overview of the development of these tests by the U.S. Supreme Court and lower courts, and an examination of some selected cases in which the courts have applied those rules to specific cases. Its focus is on First Amendment speech, not on First Amendment protected associational interests such as family, personal and intimate relations, religious, or union activity, nor political expression such as party affiliation,

supporting candidates for office, or running for office (such as opposing the re-election of an incumbent sheriff). At the conclusion of the article, there is a brief listing of relevant and useful resources and references.

❖ U.S. Supreme Court Rulings

Public employees, the U.S. Supreme Court stated in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering* involved a teacher fired by a local board of education, following a hearing, for sending a letter to a newspaper that was critical of the way in which the board had handled past proposals to raise new revenue for the schools.

The U.S. Supreme Court ruled that in a case in which the fact of employment was only "tangentially and insubstantially" involved in the subject matter of the public communication made by the teacher, it was necessary to regard the teacher as the member of the general public he sought to be. Further, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance cannot furnish the basis for his dismissal from public employment.

In *Connick v. Myers*, #81-251, 461 U.S. 138 (1983), an assistant district attorney was notified that she was being transferred. She then distributed a questionnaire to staff members. Her supervisor told her that she was being terminated because she refused to accept the transfer. The U.S. Supreme Court ruled that the employee's discharge did not offend the First Amendment. The questionnaire was essentially an employee grievance concerning matters of internal office policy.

The questions posed in the survey were not matters of public concern. The purpose of the questionnaire was to create a vote of no confidence in the supervisor. The functioning of the supervisor's office was thereby endangered, because the employee exercised her rights to speech at the office. The limited First Amendment interest involved in the case did not require the supervisor to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy necessary close working relationships.

Subsequent cases have fleshed out the meaning of speech involving a matter of public concern as involving an issue of social, political, or other interest to a community. By contrast, if the speech at issue merely implicates a "purely personal" topic, the First Amendment does not apply to speech by a public employee.

Public employees "must accept certain limitations on [their] freedom" so that a government workplace can provide public services in an efficient and effective manner. *Garcetti v. Ceballos*, #04-473, 547 U.S. 410 (2006); see also *Connick v. Myers*, #81-251, 461 U.S. 138 (1983) (emphasizing that the First Amendment "does not require a public office to be run as a roundtable for employee complaints over internal office affairs").

In *Garcetti*, a deputy district attorney for a county district attorney's office wrote a disposition memorandum explaining his concerns regarding alleged inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case. The employee was also called by the defense to recount his observations about the affidavit.

The employee claimed that his supervisors retaliated against him based on his memo. He did not dispute that he prepared the memo pursuant to his duties as a prosecutor. In finding that the employee's speech was protected, the appeals court did not consider whether the speech was made in his capacity as a citizen.

The U.S. Supreme Court ruled that the employee's claim of unconstitutional retaliation failed because he was not speaking as a citizen for First Amendment purposes since he made the statements pursuant to his official duties. The employee did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. The First Amendment did not prohibit managerial discipline based on the employee's expressions made pursuant to official responsibilities.

While there are some variations in how lower courts have analyzed these rules, in general when a public employee is punished by his employer for his speech, a three-part test is used to weigh the validity of that adverse action. First, the court considers 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.

If it is the former, the court evaluates whether the employee's interest in First Amendment expression outweighs the employer's interest in the efficient operation

of the workplace. The employer retains discretion to punish employees for speech it reasonably believes threatens workplace order and efficacy.

Finally, if the first two inquiries are decided in the employee's favor, the court must decide whether the protected speech was a substantial factor in the employer's decision to take adverse employment action. If it was not a substantial factor, but the employee was instead terminated or disciplined for others reasons such as misconduct or job performance, no actionable First Amendment claim is found.

❖ Some Applications

Let's examine a few cases in which lower courts have applied these tests. *Carey v. Throwe*, #19-1194, 957 F.3d 468 (4th Cir.) concerned the question of whether the speech at issue touches on a matter of public concern. In this case, an employee of Maryland's Department of Natural Resources (DNR), who served as a law enforcement officer there for 26 years and then as a civilian employee, submitted to a local website two anonymous blog posts about a captain of the Internal Affairs Unit of the Maryland Natural Resources Police,

The posts were not flattering, and among other things, they collected screenshots from the captain's private Facebook page that showed photos of him posing with scantily-clad women and various comments that he had made about gun violence. In the months that followed, the employee was fired from the DNR, his Law Enforcement Officer Safety Act ("LEOSA") card to carry a concealed firearm was rescinded, and he was disparaged on social media.

He filed suit claiming that these actions violated his First Amendment rights. A federal appeals court upheld the dismissal of his First Amendment retaliation claim, holding that the plaintiff's posts concerned nothing more than purely personal speech, as they were devoid of any content that rose to a level of public concern.

While his posts were critical of a supervisor, rather than involving matters of public concern, the posts showed that the supervisor engaged in boorish, tasteless, and boastful behavior, which did not impeach the supervisor's conduct of his professional duties, and were merely an airing of personal grievances. The court also upheld the dismissal of the claim that the defendants violated his right to carry a

concealed firearm under the Law Enforcement Officer Safety Act, holding that the Act was not privately enforceable under 42 U.S.C. 1983.

Sometimes, a case can involve both protected and unprotected speech. In *Henry v. Johnson*, #18-3298, 950 F.3d 1005 (8th Cir. 2020), a sergeant with the Missouri State Highway Patrol (MSHP) got involved in a public controversy over the drowning death of a young man while he was in MSHP custody. He testified during a legislative inquiry as well as in a deposition in a civil lawsuit and also publicly spoke out several times about the case to a member of the press and members of the decedent's family, and on social media about what he claimed was an internal MSHP cover-up of the drowning,

He subsequently faced a transfers and other threatened adverse employment actions, including a reduction in rank, but retired before a hearing on that reduction could be held. He claimed that these actions violated his First Amendment rights. A federal appeals court upheld summary judgment to the defendants on the First Amendment retaliation claims.

His non-testimonial speech was not entitled to First Amendment protection. While it was undisputed that he spoke as a private citizen and his speech was of public concern, the highway patrol showed sufficient evidence of disruption to the efficiency of its operations. The factors weighed in favor of the highway patrol's interest in efficiency and indicated that the plaintiff's speech activity was more likely than not impeding his ability to perform his job duties as a police officer.

Therefore, the defendants were entitled to qualified immunity regarding his speech to the family of the victim of a drowning accident, on social media, and to the news reporter. The court also found that the remaining testimonial speech was not a substantial or motivating factor in the adverse employment actions against him.

In *Nagel v. City of Jamestown*, #18-2842, 952 F.3d 923 (8th Cir. 2020), a former city police officer sued the city and the chief of police, claiming unlawful retaliation for exercising his First Amendment right to participate in a media interview, deprivation of his right to a pre-termination process, and violation of his rights under the North Dakota state Constitution.

A federal appeals court upheld summary judgment for the defendants, ruling that the plaintiff failed to prove his speech as a public employee was protected by the

First Amendment. He gave a media interview in which he denied giving an anonymous tip to a broadcast station accusing a member of the sheriff's department of using a county-owned jet ski for personal use. He was accused of having given the tip using an alias connected with a Facebook account he used for investigatory purposes. He was not speaking as a citizen in a local news interview.

His statements in the media interview made clear that his appearance was within the scope of his duties as a member of the police department and President of the Fraternal Order of Police. Further, his speech during the interview was not on a matter of public concern because his asserted desire was to clear the name of his Facebook alias, which was a purely private interest.

Even assuming the plaintiff was a citizen commenting on a matter of public concern, his speech at the interview was not First Amendment protected, because it created great disharmony in the workplace, interfered with his ability to perform his duties, and impaired his working relationships with other employees.

The court also found that plaintiff was not deprived of his right to due process. The city afforded him constitutionally adequate pre-termination process since the officer knew enough about the incident to prepare a response and had many meaningful opportunities to present his side of the case, and the decision to fire him was upheld after a full trial-type post-termination hearing. The court declined to exercise supplemental jurisdiction over the state law claims.

Retaliation for protected First Amendment speech can result in substantial damages. In *Greisen v. Hanken*, #17-35472, 925 F.3d 1097 (9th Cir. 2019), a former police chief sued his city's former city manager, claiming that his First Amendment rights were violated by subjecting him to adverse employment actions in retaliation for him engaging in constitutionally protected speech. The plaintiff suspected that there were improper city accounting and budgeting practices by the city manager and expressed his concerns to a number of city council members and others.

A jury verdict in favor of the plaintiff awarded him $1,117,488 in economic damages and $3,000,000 in non-economic damages. A federal appeals court upheld this result. He provided sufficient detail about his speech to establish that

it substantially involved a matter of public concern. The plaintiff spoke as a private citizen rather than a public employee, and the trial court properly concluded that his retaliation claim could be based in part on the defendant's own speech acts, in the form of defamatory communications to the media about him. The defendant waived his argument that his actions were supported by an adequate justification. Sufficient evidence supported the conclusion that the defendant's retaliatory actions proximately caused the plaintiff's termination and the defendant was not entitled to qualified immunity

❖ Resources

The following are some useful resources related to the subject of this article.

- First Amendment to the U.S. Constitution. Wikipedia article.
- First Amendment Related. AELE Employment Case Summaries.
- Employee First Amendment - A Case Study, by Karen Kruger, visual presentation at the IACP Legal Officers' Section, Chicago, Illinois (October, 2015).

❖ Relevant Monthly Law Journal Articles

- Does Ordering an Employee to Refrain From Certain Personal Contacts Violate Constitutional Due Process? by Michael P. Stone and Marc J. Berger, 2007 (3) AELE Mo. L.J. 501.
- Picketing Rights of Public Employees, 2007 (11) AELE Mo. L. J. 201.
- Regulation of an Employee's Off-Duty Activities Part Three- Participating in Unapproved Training Programs and/or Membership in Controversial Organizations or Events, 2008 (2) AELE Mo. L. J. 201.
- Regulation of an Employee's Off-Duty Activities. Part Four - Sexual Conduct, 2008 (3) AELE Mo. L. J. 201.
- Online Networking, Texting and Blogging by Peace Officers Part One - Impeachment, Policy & First Amendment Issues, 2010 (4) AELE Mo. L. J. 201.

- Online Networking, Texting and Blogging by Peace Officers Part Two - Limitations on Management's Right to Monitor Content, 2014 (11) AELE Mo. L. J. 201.
- Sexualized and Derogatory Language in the Workplace**,** 2011 (2) AELE Mo. L. J. 201.

❖ **References:** (*Chronological*)

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2. Silence or Noise?: The Future of Public Employees Free Speech Rights and the United States Supreme Court's Jurisprudence on the Scope of the Right, by Laura Dallago, 22 Washington and Lee Journal of Civil Rights and Social Justice Issue 1 239 (March 2016).
3. Free Speech and Parity: A Theory of Public Employee Rights, by Randy J. Kozel, 53 William and Mary Law Review Issue 6, article 4 1985 (2012).
4. Public Employee Speech, Categorical Balancing and Section 1983: A Critique of *Garcetti v. Ceballos*, 42 Univ. of Richmond Law Rev. 561 (2008).
5. Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases, by Pengtian Ma, 30 J. Marshall L. Rev. 121 (1996)

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