Free Speech Rights of Public Employees

MAY A PUBLIC ENTITY DISCHARGE OR OTHERWISE DISCIPLINE AN EMPLOYEE BASED ON HIS/HER SPEECH?

by:
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"Can they discipline me? What about my First Amendment Rights?" Those are common refrains that I hear whenever a public employer uses an employee's speech as the ground for discharge, discipline, or denying a promotion.

At one time, the United States Supreme Court's answer to this question was a simple "Yes." Justice Oliver Wendell Holmes wrote in 1892 that:

> There may be a constitutional right to talk politics, but there is no constitutional right to be a policeman.

McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

As late as 1952, the Supreme Court in *Adler v. Board of Education*, said:

> You have a constitutional right to say and think as you will, but you have no constitutional right to work for the government.

342 U.S. 485

However, by 1967, that premise had been rejected, and was replaced with the fundamental principle that public employment cannot be conditioned on a surrender of constitutional rights.

But that current philosophy is not without limitation. Although two of the fundamental maxims underlying the First Amendment are the right to criticize the government, and the right to express freely a viewpoint, due to the fact that public employers must maintain the efficient operation of the people's business, the courts have found it acceptable for government employers to discipline employees for speech that undermines the integrity of the office or disrupts morale.

This creates a dilemma. While the Supreme Court recognizes that government employers must protect business efficiency, it also has said that "the threat of dismissal of public employment is ... a potent means of inhibiting speech." *Pickering v. Board of Education*, 391 U.S. 563, 574 (1969).

Because both public employers and employees have important interests at stake in free speech cases, the courts have taken to managing these competing interests by balancing the

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government's interest in maintaining an efficient workplace against the individual employee's interest in free expression.

What has resulted is a precarious balance which holds that while the constitutional right to free speech in public employment is not surrendered, is still severely limited.

The Free Speech Test

The test for First Amendment protection of government employees' speech rights was outlined by the United States Supreme Court in *Pickering v. Board of Education,* 391 U.S. 563 (1968). In that case, the court found that public employees must clear two hurdles in order to show that they have been disciplined in violation of the First Amendment:

- The employee must show that his or her speech addresses a matter of public concern
- The employee must show that his or her free-speech interest outweighs the employer's interest in business efficiency.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement..." *Connick v. Myers*, 461 U.S. 138, 147-148 (1983).

The Public Concern Hurdle

The first hurdle an employee must jump to show that his or her speech is protected is that the speech was on a matter of "public concern."

Applying the public concern test has revealed a fundamental problem – no one knows what it is. Suddenly, determining matters of public concern has been analogized to determining pornography – "I know it when I see it."

In the recent decision of the porn-selling police officer, the United States Supreme Court defined the "public concern" test by emphasizing that to be protected the speech must be of "legitimate news interest", and "of value and concern to the public" at the time of publication to be protected. *City of San Diego v. Roe* (2004) ___ U.S. ___ ; 125 S. Ct. 521.

Speech touching on corruption or discrimination in the workplace have been generally viewed by the courts as matters of public concern.

But, speech about personnel or internal disputes are considered unprotected because they involve personal grievances rather than matters of public interest.

The Balancing Act

Once the "public concern" hurdle is cleared, the courts will then balance the employee's interest in speaking out against the employer's interest in maintaining an efficient workplace. The courts generally weigh whether the speech in question:

- Impairs discipline or harmony among co-workers
- Has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary

- Interferes with the normal operation of the employer's business.

Courts will often defer to employers' judgments about the potential disruptiveness of employee speech. For example, one federal appeals court in 1990 ruled that Illinois prison officials could terminate a corrections officer for his membership in the Ku Klux Klan and his expression of a white-supremiscist viewpoint. *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998). The parties agreed that the officer's association with the Klan and advocacy of white supremacy touched on matters of public concern. But, while the officer argued that the prison could not discipline him for off-duty activities, the prison countered that his conduct was undermining discipline and creating a danger in the workplace.

In *Wecherding*, the appeals court wrote that the balance "weighed heavily" in favor of the prison, which had an important interest in maintaining safety and avoiding racial violence. The court also found that the employee's position as a sergeant weighed against him as well, because supervisory and managerial employees set examples for subordinates, and because the views of supervisory and managerial employees are more likely to be considered reflective of the employer's views.

Similarly, in 2000, the Massachusetts Supreme Court held that the state could fire an investigator for telling a racist joke at a dinner honoring retiring members of a city council. *Pereira v. Commissioner of Social Services*, 432 Mass. 251 (2000). The court noted that "a public employee has a strong interest in speaking her mind free from government sanction." However, the court reasoned that in this instance the employee's racist speech had the "clear potential" to undermine the agency's relations with its clients and the community.

On the other hand, in *Rankin v. McPherson*, (1987) 483 U.S. 378, the U.S. Supreme Court ruled in favor of a clerical employee who had been discharged from a Texas constable's office for making a disparaging remark about then-President Reagan. Ardith McPherson, a data entry employee, told a co-worker after John Hinckley, Jr. shot Reagan: "If they go for him [Reagan] again, I hope they get him."

In *Rankin*, the court first determined that McPherson's comment "plainly dealt with a matter of public concern." Then it proceeded to the balancing test and noted that the comment was not heard by any member of the public and was "unrelated to the functioning of the office." The majority also focused on the fact that McPherson did not have a high-ranking job. "Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal."

Conclusion

The First Amendment is not an absolute shield to disciplinary actions, as its protections are somewhat limited. Personal disputes and grievances are not protected, whereas discussions on matters of public concern are

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somewhat protected. The balancing test is unpredictable. Consequently, you are best advised to "think before you speak."

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