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THE GOVERNMENT WORKPLACE: FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES

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The results of the recent presidential election in the United States have spurred an increase in political commentary on social media and in the work place. Though this can create problems and dialogues in any workplace, it is especially important for public employers and employees to be mindful of the First Amendment protections available to government employees.

Public employees do not lose their First Amendment rights simply by taking a government job. If a public employer terminates or otherwise retaliates against an employee for his or her expression of political speech, that could be unconstitutional and the employee could assert a claim of First Amendment retaliation under § 1983 of Title 42 of the United States Code. However, there are very important limitations on the First Amendment rights of public employees and the effect to which their speech affects the workplace.

The following test represents how federal courts in the Third Circuit look at the protection of First Amendment rights in public employment.

Step One - Was it an official act?

Before even addressing what kind of speech was at issue, a Court will need to determine whether the employee spoke pursuant to his or her official duties.¹ If employee’s speech was pursuant to official duties, then it is unprotected because it is a reflection of the “exercise of employer control over what the employer itself has commissioned or created.”² However, if the employee was making the statement as a citizen, then the Court will move on to the next step to determine if the speech at issue is protected.

Step Two - Was it an issue of public concern?

Assuming the employee spoke as a citizen rather than an employee, the court must next determine whether the subject of the speech was a matter of public concern.³ To do this, the Court will look to each instance of allegedly protected speech and examine whether the content, form and context of the statement relates to any matter of political or social concern to the community.⁴ If the speech is not a matter of public concern, it is unprotected speech because government officials should have a wide latitude in managing their offices.⁵ However, if the speech does involve a matter of concern, the Court will go on to the next step.

Step Three - Does the employee’s interest in free speech outweigh the government’s interest as an employer?

Finally, the Court will employ a balancing test to determine whether the employee's interest in commenting on a matter of public concern outweighs the state's interest as an employer.⁶ The court can consider a number of factors including an employer's interest in: (1) maintaining discipline by immediate superiors;⁷ (2) maintaining harmony among coworkers;⁸ (3) an employee's continued work performance in his or her daily duties;⁹ and (4) regular operation of the workplace generally. It is worth noting that this balancing test is likely to favor the government when a high-level government official speaks out against his or her employer.¹⁰

Take Away

If you are a public employer or public employee, please be mindful that any adverse employment action taken, based on expression of political speech, potentially violates the First Amendment and is legally actionable.

¹ *Garcetti*, 126 S.Ct. at 1960; see also *Mills v. City of Evansville, Ind.*, 452 F.3d 646, 647 (7th Cir. 2006) (“*Garcetti* ... holds that before asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking ‘as a citizen’....”).

² *Garcetti*, 126 S.Ct. at 1960.

³ *Connick v. Myers*, 461 U.S. 138, 147, 148 (1983).

⁴ *Munroe v. Central Bucks School Dist.*, 34 F.Supp. 3d 532, 535 (2014).

⁵ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

⁶ *Pickering*, 391 U.S. at 568; *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1327 (10th Cir.2007).

⁷ *Pickering*, 391 U.S. at 570.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Curinga v. City of Clairton*, 357 F.3d 305, 309 (3d Cir. 2004).