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The "**freedom of speech**" is clearly set forth in the First Amendment of the United States Constitution.[1] The freedom of speech is the right to articulate one's opinions and ideas without fear of government retaliation or censorship, or societal sanction. The freedom of expression is oftentimes used synonymously with the freedom of speech which can cause an issue for public-sector employers and employees, since any adverse employment action taken against an employee by a public-sector employer is action taken by the "government" within the meaning of the First Amendment.

So to what extent does the First Amendment protect a public employee's ability to speak freely?

The Basics

In 1967, the U.S. Supreme Court held that an employer may not unreasonably restrict public employees' rights;[2] as to what was unreasonable, however, remained unclear. Instead, the Court required a balance of the respective interests of the parties in making this determination. The Supreme Court later clarified that in balancing the parties' respective interests, courts should weigh a public employee's right to comment on a matter of public concern against the interest of the public employer to provide efficient, effective services.[3] Where a public employee's speech does pertain to a matter of public concern, the balance will generally tip in the employee's favor.

The Test

From many of the cases decided by the Supreme Court, the following four-step analysis has emerged in dealing with claims that an employer has unlawfully retaliated against an employee for the exercise of the employee's First Amendment right to freedom of speech:

- **Was the employee speaking pursuant to his/her ordinary job duties?**
  - If yes, then there is no First Amendment protection for employment purposes.
  - If no, proceed to Step 2.

- **Was the employee speaking on a matter of public concern?**
  - If yes, proceed to Step 3.

- If no, then there is no First Amendment protection for employment purposes.

- **On balance, does the employer's or employee's interests prevail?**
  - If the employer's interests prevail, then there is no First Amendment protection for employment purposes.
  - If the employee's interests prevail, proceed to Step 4.

- **If the employee's interests prevail, was the protected speech a substantial or motivating factor in the adverse employment action?**
  - If yes, then the adverse employment action constitutes unlawful retaliation.
  - If no, then the adverse employment action does not constitute unlawful retaliation.

Speech Pursuant to Ordinary Job Duties

The first step of the analysis asks whether the employee was speaking **pursuant to the employee's ordinary job duties**. If so, then the analysis ends there and an employer may take action against the employee based upon the statement without the employee having any recourse under the First Amendment. If it does not, then the employer should continue to explore the remaining steps of the analysis prior to taking action.

The U.S. Supreme Court has explained that "…when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."[4] In a later case, the Court clarified that speech outside the scope of a public employee's ordinary job duties can be speech as a citizen for First Amendment purposes even when it relates to the employee's public employment or concerns information learned during that employment.[5] In determining what the ***ordinary duties*** of the employee are, the court will generally take a practical view and look to not only those duties in an employee's job description, but also those duties that the individual is expected to perform.

There are several cases focusing on this particular issue which can be found below.[6]

Speech Touching on a Matter of Public Concern

The second step of the analysis asks whether the employee was speaking on a **matter of public concern**. If they were not, then the analysis ends there, and an employer may take action against the employee based upon the statement without the employee having any recourse under the First

Amendment. If they were, however, then the employer should continue to explore the remaining steps of the analysis prior to taking action.

A matter of public concern is one upon which “free and open debate is vital to informed decision-making by the electorate.”[7] This will generally include political, economic and social issues, racial discrimination and the government’s use of its financial resources.[8] Determining whether a public employee has spoken on a matter of public concern depends upon the “content, form, and context of a given statement, as revealed by the whole record.”[9]

The content, form and context portion of the analysis requires that the court examine the following:

- Whether the statements were made at home or at work
- Whether the statements were made in public or private
- How many people heard the statements
- If the speaker’s motives were primarily personal in nature.[10]

There are four primary categories into which cases fall where a public concern has been found. These categories include the following:

1. Misconduct by the department, superior officers, the chief, fellow officers or the municipal government[11]
2. Unsafe equipment or working conditions[12]
3. Incompetence[13]
4. Harassment or discrimination[14]

There are a variety of cases available in which courts have determined that an employee’s speech **did** touch upon a matter of public concern (see below).[15]

Likewise, there are also several cases available in which courts have determined that an employee’s speech **did not** touch upon a matter of public concern (see below).[16]

The Balancing Test

The third prong of the test requires that the Court **weigh the strength of the employee’s interests against the government’s interest in the efficient administration of the workplace**.[17] This is what is referred to as the Pickering balancing test.

In making this determination, courts will generally consider the following factors:[18]

- Does the statement impair discipline by superiors?
- Does the statement impair harmony among coworkers?
- Does the statement have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary?
- Does the statement impede the performance of the speaker's duties?
- Does the statement interfere with the regular operation of the enterprise?
- Does the speaker serve in a confidential, policy making or public contact role in the organization?
- Does the statement undermine the mission of the police department?
- Does the statement conflict with the speaker's responsibilities?
- Has the speaker abused authority and public accountability?

The more these questions are answered in the affirmative, the better the employer's argument for restricting the statement or disciplining the employee for making the statement.

Historically speaking, there are fewer cases where courts have ruled that the balance weighed in favor of the **employee**. However, there are some such cases available (see below).[19]

There are several cases in which the courts have ruled that the balance weighed in favor of the **employer (see below)**.[20]

Causation

If the employee satisfies the first three elements, the then employee must also prove that **the employee was disciplined as a result of the statement**. To do this, the disciplined officer must show that "but for" the protected statements he or she would not have received the punishment imposed.[21] If the disciplined officer satisfies this, the burden then shifts to the employer to show that there were sufficient grounds, other than the speech, to discipline the employee.[22]

In determining whether the protected speech was actually the cause for the adverse employment action, courts will generally consider the following factors:

- Have other officers been disciplined for the same conduct?
- Does the discipline imposed exceed the discipline imposed on similarly situated officers in the past?
- Has a substantial period of time elapsed since the conduct justifying the discipline occurred? (Note: the longer the time lapse, the more it appears the discipline was prompted by the officer's recent "protected speech", and not his or her prior conduct.)

- How many complaints has the department received regarding the officer?
- Has the officer ever been formally, or informally, reprimanded in the past? If so, how many times, and what was the nature of those offenses?

Note: The more times the officer has been reprimanded, along with the more egregious the offenses, the greater the likelihood that the court will find for the department. Also, the more detailed the documentation, the greater the likelihood the discipline will be upheld.

There are a variety of cases which focus on the issue of causation related to public employee freedom of speech (see below).[23]

Closing

So, as a government employee you CAN'T say whatever you want on social media and expect to be protected by the First Amendment. Public agencies and employees must be aware of the contours of the freedom of speech as applied to public employees. The rules of engagement should be clear to put all parties on notice as to what behavior and speech will be tolerated and what is inconsistent with agency policy. When agencies seek to take action against employees based upon their "speech" or "expression", agencies are best advised to utilize the four-prong test discussed herein. While agencies can't limit their employees from posting on social media you as the employee do so at your own risk – Happy Sharing….

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging **the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added). ↑
2. Keyishian v. Bd. of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967). ↑
3. Pickering v. Bd. of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968). ↑
4. Garcetti v. Ceballos, 547 U.S. 410 (2006). ↑
5. Lane v. Franks, 573 U.S. ___, (2014). ↑
6. See e.g. Crouse v. Town of Moncks Corner, No. 16-1039 (4th Cir. 2/15/17); Debrito v. City of St. Joseph, No. 16-1357, 2017 WL 129033 (6th Cir. 1/13/17); Anderson v. Valdez, 845 F.3d 580 (5th Cir. 2016); Rotunno v. Town of Stratford, No. 12-1352, 2015 WL 4425718 (D. Conn. 7/17/15); Howell v. Town of Ball, 827 F.3d 515 (5th Cir. 2016); Moss v. City of Pembroke Pines, 782 F.3d 613 (11th Cir. 2015); Hartman v. City of New Orleans, Civil Action No. 12-1929, 2014 WL 201695 (E.D. La. 1/17/14); Buehrle v. City of O'Fallon, Missouri, 695 F.3d 807 (8th Cir. 2012); Ramey v. U.S.

Marshals Service, 755 F.Supp.2d 88 (D.D.C. 2010); Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010); Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008). ↑

7. Pickering, 391 U.S. at 571-2. ↑
8. Id. ↑
9. Connick v. Myers, 461 U.S. 138, 147-8 (1983). ↑
10. Connick, 461 U.S. at 153. ↑
11. Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989); See Brockell v. Norton, 732 F. 2d 664 (8th Cir. 1984); ("Chain of command" rule could not be used to terminate an employee who reported what he believed was misconduct.) ↑
12. Pesek v. City of Brunswick, 794 F.Supp. 768 (N.D. Ohio 1992). ↑
13. Chico Police Officers' Assn. v. City of Chico, 283 Cal Rptr. 610, 611 (1991). ↑
14. Matulin v. Village of Lodi, 862 F.2d 609 (6th Cir. 1988); Wilson v. University of Texas, 973 F.2d 1263 (5th Cir. 1992). ↑
15. See e.g. Bagi v. City of Parma, No. 14-cv-558, 2016 WL 4418094 (N.D. Ohio 8/19/16); Riccuiti v. Gyzenis, 834 F.3d 162 (2d Cir. 2016); Cochran v. City of Atlanta, 150 F.Supp.3d 1305 (N.D. Ga. 2015); Stinebaugh v. City of Wapakoneta, 630 Fed.Appx. 522 (6th Cir. 2015) (Unpub.); Pucci v. Nineteenth Dist. Court, 596 Fed.Appx. 460 (6th Cir. 2016); Handy-Clay v. City of Memphis, Tennessee, 695 F.3d 531 (6th Circ. 2012); Hutchins v. Clarke, 661 F.3d 947 (7th Cir. 2011); Wainscott v. Henry, 315 F.3d 844 (7th Cir. 2003); Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). ↑
16. See e.g. Naghtin v. Montague Fire Dist. Board, No. 16-52, 2016 WL 7494866 (6th Cir. 12/3/2016); Holbrook v. Dumas, 658 Fed.Appx. 280 (6th Cir. 2016); May v. Sasser, 666 Fed.Appx. 796 (11th Cir. 2016); Todora v. Buskirk, 96 A.3d 414 (Pa. Commw. Ct. 2014); Garceau v. City of Flint, No. 12-cv-15513, 2013 WL 5954493 (E.D. Mich. 11/7/13); Borough of Duryea v. Guarnieri, 131 S.Ct. 2488, 180 L.Ed.2d 408 (U.S. 2011); Reynolds v. Town of Suffield, 3:10cv1528 (JBA), 2012 WL 3135896 (D. Conn. 7/31/12); City of San Diego, California v. Roe, 543 U.S. 77, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004); Leverington v. City of Colorado Springs, 643 F.3d 719 (10th Cir. 2011); Gross v. Town of Cicero, Illinois, 619 F.3d 697 (7th Cir. 2010); Desrochers v. City of San Bernadino, 572 F.3d 703 (9th Cir. 2009); Miller v. Clinton County, 544 F.3d 542 (3d Cir. 2008); Miller v. Administrative Office of the Courts, 448 F.3d 887 (6th Cir. 2006); Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d

1342 (11th Cir. 2006); Durgins v. City of East St. Louis, Illinois, 272 F.3d 841 (7th Cir. 2001); Daniels v. City of Arlington, 246 F.3d 500 (5th Cir. 2001); Lawrenz v. James, 852 F.Supp. 986 (M.D. Fla. 1994). ↑

17. Putnam v. Town of Saugus, Massachusetts, 365 F.Supp.2d 151 (2005); Mullin v. Town of Fairhaven, 284 F.3d 31, 37-38 (1st Cir.2002); Tang, 163 F.3d at 12 (citing Pickering, 391 U.S. at 568, 88 S.Ct. 1731). ↑
18. Rankin v. McPherson, 483 U.S. 378 (1987). ↑
19. See e.g. Purvines v. City of Crestview, No. 3:15-cv-326/MCR/EMT, 2016 WL 5844868 (N.D. Fla. 9/30/16); Cooper v. Smith, 89 F.3d 761 (11th Cir. 1996). ↑
20. See e.g. Lynch v. Ackley, #14-3751, 811 F.3d 569 (7th Cir. 2016); LeFande v. District of Columbia, 841 F.3d 485 (D.C. Cir. 2016); O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993); Shirvell v. Dep't of Attorney General, 866 N.W.2d 478 (Mich. Ct. App. 2015); Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008); Hinshaw v. Smith, 436 F.3d 997 (8th Cir. 2006); Locurto v. Guiliani, 447 F.3d 159 (2d Cir. 2006); McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985). ↑
21. Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977). ↑
22. Id. ↑
23. See e.g. Bailey v. Wheeler, 843 F.3d 473 (11th Cir. 2016); McGunigle v. City of Quincy, 132 F.Supp.3d 155 (D. Mass. 2015); Lalowski v. City of Des Plaines, 789 F.3d 784 (7th Cir. 2015); Swetlik v. Crawford, 738 F.3d 818 (7th Cir. 2013); Dew v. City of Scappoose, 145 P.3d 198 (Or. Ct. App. 2006); Tharling v. City of Port Lavaca, 329 F.3d 422 (5th Cir. 2003); Skaarup v. City of North Las Vegas, 320 F.3d 1040 (9th Cir. 2003). ↑