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REAL SOLUTIONS

Free Speech and Township Employees:

A Breakdown of Public Employee Speech Rights

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DISCLAIMER

- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to specific questions of attorney-client privilege.
- Please contact an attorney if you need assistance related to a specific legal issue.





US CONSTITUTION AND FREE SPEECH

First Amendment

- “Congress shall make no law... abridging the freedom of speech”
 - The law regarding free speech can be very complex, however, and not all speech is protected.
 - Public employee speech is less protected than other forms of speech.

Fourteenth Amendment

- Applies the First Amendment’s guarantee to state and local governments.

Discipline/Termination of Public Employees for speech

- Considered a restriction on speech – can be unconstitutional



CONTRAST WITH PRIVATE-SECTOR

Public employees have constitutional protections at work

- Not so for private-sector employees!

Private-sector

- No free speech rights at work
- Can be disciplined / terminated for speech – limited exceptions





BALANCING TEST

1. The employee is speaking as a private citizen, and not as part of his or her official duties;
2. The employee is speaking on a matter of public concern; and
3. The employee's speech interests outweigh the municipality's interest in operating efficiently and effectively.



PUBLIC
EMPLOYEE

VS

PRIVATE
CITIZEN

- Speaking as a private citizen, not part of official duties, speech is much more likely to be protected.
- Speech that is a part of an employee's job or official duties can be disciplined more easily.
- Look to the specific facts and ask the "who, what, when, where, how, and why" questions.
- If the speech is not a part of the job or official duties, and the public would not understand the employee to be speaking as a township spokesperson, the employee is likely speaking as a private citizen.



- Two police officers attend public meeting off duty.
- In audience, wearing uniforms.
- Spoke in time reserved for City employees, not public comment.
- Spoke critically of elected official plan for PD.
- Terminated.
- Courts upheld termination – speaking as a public employee.
- How could the case come out differently?

PUBLIC EMPLOYEE

VS

PRIVATE CITIZEN



MATTER OF PUBLIC CONCERN

“any matter of political, social, or other concern to the community”

Examples:

- Public Fraud
- Mismanagement
- Racial and Other Illegal Discrimination
- Sexual Harassment
- Improper use of Public Monies or Assets
- Public Policy
- Ethics / Professional Responsibility

What it isn't:

- Personal vendettas
- Gripes about internal policy
- Frustration with the boss



MATTER OF PUBLIC CONCERN

- First Marshal for FDNY.
- Deadly fire on movie, Fire Marshal pins it on production crew.
- Supervisors pressure him to alter findings.
- Fire Marshal refuses, emails colleagues, threatens to sue City.
- Goes to news media and prosecuting attorney about the cover up by supervisors.
- His role is reduced, denied overtime, retires.
- Is he speaking on a matter of public concern?
- Does it change over the course of the facts?





BALANCING THE INTERESTS

- Weighing employee interest in free speech vs. public employer interest in efficient and effective operation.
 - Courts give high weight to free speech rights (especially political speech)
 - Township must show disruption to operations (more than bruised egos)
- Examples of disruption
 - Public outcry (but generally insufficient on its own)
 - Harm to working relationships
 - Disruption to employee supervision
 - Damage to public trust





BALANCING THE INTERESTS

- University policy to address students by their preferred pronouns
- Professor refuses to address transgender student by preferred pronouns – religious beliefs
- Professor addresses her by last name only
- University requires Professor to use female pronouns or stop using gendered pronouns
- Matter of public concern?
- Private citizen or public employee?
- Balance?
 - Strong speech interest – religious / philosophical beliefs are highly protected. More protection where speech is compelled. College classrooms are quintessential place for spirited debate.
 - University interest – interest in protecting students from discrimination. Weaker interest where only harm is offense. Student succeeded in class, university's claims are weaker. Using only last name is a suitable compromise.



FREE SPEECH AND OFF-DUTY CONDUCT

- More likely to be a matter of public concern
- More likely spoken as private citizen
- Need a “nexus” to the job
- What’s a “nexus”?
 - Relation to job duties
 - Damage to supervisory relationships
 - Bringing employer into disrepute
 - Creation of unsafe conditions for employee or public
 - Severity of misconduct – more severe – less connection to work necessary





FREE SPEECH AND OFF-DUTY CONDUCT

- Public school bus driver
- Off-duty Facebook post – endorsing school board candidate
- Post also criticized another candidate – her child was bullied
- Bus driver removed from assignments
- Private citizen?
- Matter of public concern?
- Balance
 - Information / opinion about a political candidate = strong speech interest, especially off duty
 - School's interest is weak. No disruption. Only criticism of political candidate



PUBLIC EMPLOYEES AND SOCIAL MEDIA

- Most common place for speech issues to arise
- Free speech rules apply to social media
- Can't prohibit use of social media on employee's own time
- Can't prohibit criticism of the township
- Can't prohibit posting personal political beliefs
- **CAN** prohibit discriminatory or harassing posts
- **CAN** prohibit or limit social media use while on duty



CONSIDERATIONS FOR TAKING DISCIPLINARY ACTION

- Consider the test:
 - Related to important social or political issues?
 - Said as part of official job duties?
 - Balance of right to speech vs. right to efficient operation
- Off-duty and political speech = most protected
- Take some time to consider
 - Allow any strong emotions to cool down before taking action.
- Consult with township labor & employment counsel





Questions

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