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Freedom of Expression Within the Public Sector: The Balancing Standard

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Abstract

This paper examines the issue of the public sector employee's rights to freedom of speech in the workplace. The most important cases discussed include the 1892 McAuliffe v. City of New Bedford decision, the landmark 1968 Pickering v. Board of Education decision, and the 1982 Connick v. Myers decision. The balancing standard set forth by *Pickering* is acknowledged as being still valid today. The influence of and tension between the inherently competing interests of the public, the public agency, and the public employee is acknowledged and discussed. Several court cases regarding the issue of free speech specifically within social services are briefly argued. Finally, the importance of a well-defined and reasonable communication and grievance procedure within the education and social services agencies is emphasized in providing this unique public workplace an environment, which minimizes the opportunity for conflict and litigation over the issue of free speech rights.

Freedom of Expression Within the Public Sector: The Balancing Standard

Overview

Americans take for granted their First Amendment right to free speech. They regard freedom of speech to be the primary benefit of living in a democracy. In his book entitled Law for the Public Sector, Rice (1958) mentioned that free speech is a citizen's fundamental civil right guaranteed in the First, Fifth, and Fourteenth Amendments of the Constitution. However, when it comes to the workplace, freedom of speech is not such a given. This fact of life for the employed has come as a rude awakening for many. In the private sector, employees can be, and often quickly are, shown the door for exercising what they feel are their free speech rights. The employer has wide discretion in determining whether an employee's comments warrant dismissal. In the public sector though, employees are treated differently from private sector employees with regard to their right to free speech in the workplace (The American Bar Association, 1997). Public sector employees enjoy greater protection of their First Amendment rights simply because they are in jobs specifically to represent the interests of the public. However, Litchford (1993) explained that a public employee's freedom of expression is not absolute and that there is a chance of governmental intervention to curtail it. The courts grant substantial leeway for government agencies to take action against their employees to ensure effectiveness and efficiency within the agency.

McAuliffe v. City of New Bedford

As a result, how does the public servant know exactly when he or she is protected and when it is safe to exercise free speech in the workplace? Becoming knowledgeable about existing case law is the only way to be reasonably sure. Rice (1958) stated the longstanding point of law established by Justice Oliver Wendall Holmes in the 1892 McAuliffe v. City of New

Bedford decision. The question in every case is whether the words used are in such circumstances and are of such nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent (Rice, 1958, p. 31).

Smolla (1992) supported the primary importance of free speech in a democracy by describing the five ways that freedom of speech relates to the democratic doctrine of self-governance:

1. As a means of participation
2. As a means of the pursuit of political truth
3. As a means of facilitating majority rule (i.e., the collective will of the people)
4. As a means of restraining tyranny, corruption, and ineptitude
5. As a means of promoting stability and order.

According to Schofield (1984, November), little free speech protection was granted to public employees prior to the 1960s. Up to that point, the public servants' rights to free speech was governed entirely by the 1892 McAuliffe v. City of New Bedford, 29 N.E. 517, 517-18 (Mass. 1892) decision. In Justice Holmes' words:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms, which are offered him.

As Holmes saw it, the policeman entered into a contractual agreement of his volition and in so doing his First Amendment right to free speech on the job was to be quite literally suspended. The suspension of an employee's right to free speech was seen as implicit within the

contractual agreement. However, during the 1960s, Holmes rationale underlying the right/privilege distinction was given a blow by the Supreme Court, even in the face of its acknowledgment of the government's role in ensuring "the fitness and loyalty of employees" (Schofield, 1984, November, p. 25). The 1960s marked a turning point in case law regarding free speech in the workplace. No longer would public employees be considered second-class citizens with regard to their First Amendment right to free speech. The issue, of course, has not ended here, as it never does in Constitutional law. This new way of looking at the free speech rights of public employees opened up a legal assortment of problems, which to this day is still being tested in the courts.

Pickering v. the Board of Education

In 1968, a decision by the Supreme Court, Pickering v. the Board of Education, 391 U.S. 563 (1968), helped to clarify how the naturally competing interests of the public, the employer, and the employee can be weighed. The Pickering decision provides "a balancing standard" among three competing interests represented in the public sector. The case was brought to the Supreme Court by Marvin Pickering, a high school teacher, who was dismissed from his job after sending a letter to a newspaper critical of the Board of Education in their handling of financial resources with respect to educational and athletic programs. The Court adopted a "flexible standard" which accommodated the interests of all involved. This standard was based on six factors used to weigh the three competing interests:

1. Statements are not directed at a person who has a close working relationship requiring personal loyalty and confidence
2. Speech does not affect the preservation of discipline by supervisors or co-workers
3. Speech is not detrimental if it relates to public record

4. Speech is not so unfounded as to evidence unfair or incompetent
5. Criticism concerns matter of public concern and an informed opinion
6. Speech does not impede job performance or interfere with regular operations of an organization.

The ruling fell short in that "it failed to provide guidance for reviewing courts regarding the appropriate allocation of burdens of proof between governmental employer and employee" (Schofield, 1984, p. 26). This allowed for subsequent varying interpretations.

Rankin v. McPherson

Litchford (1993) discussed a 1987 case which the Supreme Court applied the balancing test to an employee within a law enforcement (i.e., social services) agency. The Court held that the employee's speech was a matter of public concern and then balanced the interests of the agency against those of the employee. The Court found the speech did not bring discredit or interfere with the efficiency of the agency and did not indicate that the employee's continued employment would lead to any future problems. In this case, Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), the court held that McPherson's discussion with a fellow employee on the assassination attempt on President Reagan was protected. McPherson, a civilian employee, commented on the assassination attempt, hoping that if there were another attempt on the President, that it would be successful. The Court reasoned that the First Amendment would not protect any statement threatening to kill the President. However, in McPherson's case, the Court felt her speech did not amount to a threat or could not properly be criminalized.

Mt. Healthy City Board of Education v. Doyle

The decision of Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977),

established a two-step rule of causation:

> Employees have the threshold burden of showing that their conduct is constitutionally protected under Pickering and that it was a motivating factor in the disciplinary action. After this burden is met, a second phase of causation inquiry begins with the burden of production shifting to the employer. . . . The burden of producing evidence on the issue of causation can shift to the employers, but the ultimate burden of proving a constitutional violation remains at all times with the employees who prevail only by establishing that they would have been rehired but for the protected conduct.

This ruling, according to Schofield (1984, November), attempted to reach a balance when considering the interests of employers and employees, which would avoid resulting in windfalls to inept or misbehaving employees as well as limiting an employer's attempts to contain an employee's protected expression.

Givhan v. Western Line Consolidated School District

In 1979, Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) finally defined more precisely the public interest requirement, which was not addressed in previous rulings. Givhan, who was a junior high school teacher, was dismissed after several encounters with her principal in which "she claimed . . . that policies and practices of the school district were racially discriminatory" (Schofield, 1984, November, p. 27). After the Fifth U.S. Circuit Court of Appeals ruled that Givhan's privately expressed complaints and opinions were not protected under Pickering, the Supreme Court disagreed and stated that a public employee's private expressions are not beyond constitutional protection. The Court maintained, however, "the degree of protection for privately expressed speech is not necessarily entitled to the same degree of constitutional protection as employee speech is more closely tied to a matter of public

interest" (Schofield, 1984, November, pp. 27-28). Teachers do have First Amendment rights that are beyond the school/school district setting. Although teachers can freely speak about issues that have a personal interest and are not popular amongst the school administration, teachers must prelude their speech as a taxpayer/private citizen rather than an employee of the school system. One limitation regarding teachers' free speech is not to create material disruption of the educational process or interfere with the rights of others.

Connick v. Myers

The 1982 case of Connick v. Myers, 461 U.S. 138, 1984, picked up where Givhan left off. Insubordination was the issue in this New Orleans Parish, Louisiana District Attorney's Office case. The court was asked to decide, in essence, "whether personal internal employee grievances should be considered matters of public interest covered by Pickering" (Schofield, 1984, November, p. 28). Here the Supreme Court rejected the balancing standard of judicial review for employee speech and set forth an exception to how Pickering could be applied:

> . . . When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (Schofield, 1984, November, p. 28)

Schofield (1984, December) considered Connick the most important decision concerning First Amendment speech protection for public employees since Pickering. The case was heard in the Supreme Court after New Orleans Assistant District Attorney Sheila Myers was transferred to prosecute cases in a different section of the criminal court. Myers, who was deemed competent and conscientious, was opposed to the transfer and expressed her opinion to

supervisors, including her boss, Harry Connick the District Attorney for Orleans Parish. Her concerns regarding the conditions of her newly assigned office led her to create a questionnaire, which asked for the reviews of other staff members regarding "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns" (Schofield, 1984, November, p. 28). Connick fired Myers for insubordination after learning of the questionnaire, but maintained he based her dismissal on her refusal to accept her transfer. Myers sued for wrongful termination for infringement of her constitutionally protected right to free speech by circulating her questionnaire (Smolla, 1992).

U.S. District Court determined that the true reason of her dismissal was, in fact, the questionnaire, and not Connick's contention that it was her refusal to transfer. The Court further held that:

> The question was a form of speech and entitled to constitutional protection unless ". . . it substantially and materially or unduly interferes with the effective operation of the District Court concluded: (1) That the issues presented in the questionnaire are related to the effective functioning of the district attorney's office, a matter of 'public concern,' and (2) that Connick had failed to demonstrate clearly that the questionnaire caused substantial interference with either established office policy, Myer's work performance, or the maintenance of close working relationships. (Schofield, 1984, November, pp. 28-29)

Subsequently, the Supreme Court reversed the decision concluding that the District Court had misapplied Pickering's "matters of public interest" requirement. What the Supreme Court stated was that the Pickering balance test was the:

> Appropriate standard for judicial review for determining when employee speech is constitutionally protected . . . and that the expressive activity for which Sheila Myers was dismissed is not protected under that balance standard. Most importantly, the Court ruled that personal internal employee grievances are categorically excluded from Pickering's coverage because such speech does not relate to a matter of public concern. In other words, no balancing of interests is required where employee speech does not relate to a matter of public interest. (Schofield, 1984, November, p. 29)

Very importantly, the opinion in Connick v. Myers, 461 U.S. 138, 146-7, 103 S.Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1982), concluded that

> First, no balancing of interests under Pickering is constitutionally required to protect employee speech unless that speech is . . . fairly characterized as constituting speech on a matter of public concern. The Court conceded the importance of managerial efficiency by stating that government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Secondly, with the exception of one question concerning official pressure to work for particular political candidates, the questionnaire circulated by Sheila Myers did not fall under the rubric of matters of public concern. (Schofield, 1984, November, pp. 29-30)

The Court, in a beautifully worded statement, explained its reasoning: "It would be a Pyrrhic victory for the great principles of free expression if Sheila Myers' First Amendment right to participate in discussions concerning public affairs was confused with her attempt to constitutionalize an employee grievance" (Schofield, 1984, November, p. 30).

In a subsequent article by Daniel Schofield entitled *Freedom of Speech and Law Enforcement*, an analysis of Connick v. Myers (1982) examined the ramifications of this most

important decision by the Supreme Court. Explained is that several post-Connick lower court decisions "reflect a judicial reluctance to interfere with the internal operation of law enforcement organizations, and that the courts assumed a deferential posture toward the reasonable belief of law enforcement managers that an employee's speech-related activity [can] disrupt the organization . . ." (Schofield, 1984, December, pp. 17-18).

Hughes v. Whitmer

In the decision of Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983), the court ruled that the transfer of a member of the Missouri State Highway Patrol was not a violation of the trooper's First Amendment rights. The case history is lengthy, but to summarize:

A Missouri state trooper was transferred after having been at the same troop in Willow Springs for approximately 10 years. During this transfer, the trooper did not lose any salary; however, was reassigned to another troop 200 miles away from the city of St. Louis. This transfer also occurred after this said trooper had investigated his lieutenant's 24-year-old son whom might have been involved in drug trafficking. This led to a lot of conflict within the troop consisting of corruption, friction between others, and a morale issue. This trooper had then filed a law suit claiming actions as a whistle-blower as these types of activities are protected under the Constitution. The court found that the trooper's superiors reasonably concluded that the disruptive effects resulting from the trooper's exercise of free speech created a serious morale problem, and that it did not consider the trooper's dissension-causing speech to be of sufficient public importance to override the substantial interests of the patrol in maintaining morale. Rather than finding the trooper had engaged in legitimate whistle-blowing activities, the court found that his transfer was based on unprotected dissension-causing conduct (Schofield, 1984, December, p. 18).

The court established that an employee's free speech claims should be regarded in light of the circumstances and in the context of all relevant circumstances existing at the time of the proclaimed free speech activities. Further, it established that it is in the public interest for the offices of public officials to run an efficient, harmonious, and responsible manner. Most importantly, paramilitary units have a need to uphold morale, and *esprit de corps* and an affirmative public image (Schofield, 1984, December, p. 18). At the same time, the court held that an employee's First Amendment interest is entitled to *considerably more weight* where he is legitimately acting as a whistle-blower exposing government corruption. The subsequent decisions in Egger v. Phillips (1983) and Altman v. Hurst (1984) both essentially upheld the decision of Hughes v. Whitmer (1983).

Aitchison (1996) pointed out the importance of a police officer's right to speak freely about corruption and criminal activity within the officer's police agency. The court explained its decision in Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983):

> It would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because their speech disrupted the office. Thus, an employee's First Amendment interest is entitled to more weight where he is acting as a whistle-blower exposing government corruption.

Sitka v. Swanner

A related 1982 case is City and Borough of Sitka v. Swanner, 649 P.2d 940 (Alaska, 1982). James Swanner, the captain of the police department in Sitka, Alaska, attended an off-duty meeting with police officers in which they expressed their dissatisfaction with department policies. Two letters were drafted at the meeting by the police officers, which were approved and signed by Swanner who was later fired for having signed the documents. Swanner

commented that he was wrongfully terminated for exercising his First Amendment rights and as a result, he brought action against the City of Sitka for wrongful discharge. The jury found in favor for Swanner in each question, and awarded him for damages of $88,424 and $16,297 in legal fees. The Pickering balancing standard figured in the court's decision for Swanner; an employer can limit an employee's First Amendment rights only if it can demonstrate that its legitimate interest in promoting efficiency in its operation outweighs the interests of the employee in commenting upon matters of public concern (City & Borough of Sitka v. Swanner, 1982). The court rejected the city of Sitka's argument that a police officer is in a different category than the ordinary public employee, and that any restriction on Swanner's freedom of speech by the department was justified by the overriding need for discipline. The court maintained that under Garrity v. New Jersey, 385 U.S. 493 (1967), when a citizen becomes a public employee, even if he becomes a police officer, that citizen does not waive or forfeit First Amendment rights.

Keyishian v. Board of Regents

In the case of Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), the court ruled in favor for Keyishian. Here, the court maintained that the rights of a citizen making public comments must be balanced against the state's interest in promoting efficiency of its employee's public services. It declared that in the absence of such a position, the employee would have an undoubted right to engage in the exercise of free speech. The court cited Hanneman v. Breier, 528 F.2d 750 (1976) when it stated that the Pickering balance of interests approaches to public employee's First Amendment rights has been expressly held applicable to police officers. In a similar decision, Clary v. Irvin, 501 F. Supp. 706 (E.D. Tex. 1980), the court found that police officers, as providers of a public service, have the prerogative

and even the duty to comment on the quality of service when trying to improve it. Here, three members of a Texas police agency were discharged for privately criticizing the chief of police before members of the city council. The officers' subsequent discharge was seen as a violation of their First Amendment rights in this decision.

Berry v. Bailey

Another expression of an officer's exercise of free speech is the refusal to follow orders or to adhere to a chain of command. Schofield (1984, December) explained that law enforcement agencies have a legitimate interest in requiring employees to obey a superior's order to perform a lawful task and to adhere to reasonable chain of command rules when communicating work-related information. An excellent illustration of this doctrine is the case of Berry v. Bailey, 726 F.2d 670 (11th Cir. 1984) in which the U.S. Court of Appeals for the 11th Circuit ruled that a deputy sheriff's refusal to comply with the sheriff's decision to dismiss charges against certain arrestees was not constitutionally protected speech. The Court relied on Connick when it ruled that the deputy sheriff's wishes in performing his official duties constituted insubordination and may serve as a basis for dismissal. And that, even if the deputy's objectives were more moral and efficient than the sheriff's, corruption in a sheriff's office is not so vital a matter of public interest that it should protect an employee's flagrant defiance of his direct supervisor (Schofield, 1984, December, p. 20).

The court clearly was concerned over any encouragement for employees to defy the employers and then refuse to perform the duties every time they think that the employer is running the office improperly. However, the court did suggest that the deputy might have received constitutionally based protection if he had performed his duties according to the

sheriff's wishes and then offered public criticism regarding the department's inadequate enforcement of the law (Schofield, 1984, December, p. 20).

Melton v. City of Oklahoma City

In Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), Lieutenant Raymon Melton felt his termination from Oklahoma City Police Department was in retaliation for exercising his free speech. Melton had testified in court for a long-time friend (i.e., former judge) who was under investigation and prosecution for malfeasance in public duties by the Federal Bureau of Investigation. The court felt that there was a public concern and the citizenry would be interested in a public official's guilt or innocence in a public hearing. Melton's speech in truthfully testifying at trial outweighed the employer's interest in preventing the testimony to preserve the efficiency and effectiveness of the agency. The agency could not prove that Melton's trial testimony affected the operations of the agency or impeded his performance of his daily duties.

Brockell v. Norton

In the case of Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984), the Eighth Circuit Court of Appeals ordered reinstatement of an officer who was fired from his job as a radio dispatcher for the Marvell, Arizona Police Department. The officer was fired after disclosing to the administering captain from another police agency that a part-time officer had a copy of the certification test. The officer was charged with violating chain-of-command policy, which required department business to be brought first to the chief of police and then, if not properly resolved, to the mayor. Here the court ruled in favor of the employee saying that the report to the captain was protected under Pickering, and that a department's chain of command policy

should not always take precedence over the interest of a public employee in open communication (Schofield, 1984, December, p. 21). Several factors played a part in the court's decision:

1. The public importance of the report
2. The mode of communication
3. The prior attempt to resolve the matter
4. The period of time between the report to the chief and the call to the captain
5. The unlikelihood of proper resolution of the matter if kept in the chain of command.

Also considered were the facts that

1. The department was operated very informally, and the chain of command policy was not written in any manual or handbook.
2. The mayor, making it reasonable to maintain a legitimate doubt whether reports to the mayor regarding the officer's alleged misconduct would be properly resolved, had previously afforded the officer suspected of possessing the preferential test treatment.
3. The officer had a reasonable concern for the reprisals from the mayor, which motivated him to make the anonymous call.

All of these factors created a whistle-blower situation, and it was concluded that an employee's First Amendment interest is entitled to more weight where he is acting as a whistle-blower exposing government corruption and that the officer provided his information to the person in the best position to investigate and resolve alleged improprieties. Schofield (1984, December) explained that a contrary result would have occurred if the officer had provided this information to the public instead of channeling it to an appropriate official (p. 21).

Conclusion

There are other cases, too numerous to detail within the scope of this paper, which pertains to public employee free-speech rights. The following are cases supporting a police officers' right to free speech in the workplace.

Koenig (1997) mentioned the Umbehr (Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 116 S.Ct. 2342, L.Ed.2d (1996) court decision, which protects a government employee from termination as long as he or she speaks freely of public concern.

Worrell v. Bedsole (1997) upheld the free-speech rights of a deputy sheriff who complained about equipment and personnel shortages in his department. Damages awarded amounted to $781,000.

Waters v. City of Philadelphia (1995) established that the police officer engaged in protected speech when he made statements in a newspaper article expressing concern over local of formal policies for employee assistance programs. The court found that any disharmony or discontent in the police department over the function of the employee assistance program was not the result of the police officer's exercise of free speech in the matter.

In Fikes v. City of Daphne (1996), an officer who alleged he was fired because he reported police misconduct stated a claim under the First Amendment because exposing police misfeasance furthers the department's responsibility to provide effective law enforcement services.

In Jefferson v. Ambroz (1996), the court held that an officer's interest in publicly criticizing the local police department and court system was outweighed by his employer's interest in efficient operation of its probation department. The officer assumed the identity of a gang member on a radio call-in show and spoke out against the police department and court

system. The court maintained that the First Amendment does not prohibit the government employer from barring its employees from using offensive utterances to members of the public.

Although there are numerous cases supporting the right of a police officer to exercise free speech within police organizations, evolving case law interpreting Pickering and Connick leans in favor of the law enforcement organization in that it may impose reasonable restrictions on the work-related speech of employee (Schofield, 1984, December, p. 23). Schofield (1984, December) observed that because

> It is advisable for law enforcement managers to particularize in a formal policy statement the speech rights and obligations of employees. Employees and management should be guided by written policy that affirmatively encourages reasonable employee criticism and protects legitimate law enforcement interests. Speech restrictions must be carefully tailored to accommodate law enforcement needs, such as the protection of confidential information from improper disclosure and the maintenance of on-duty discipline. (p. 23)

In other words, by instituting well-defined and reasonable communication and grievance procedures, law enforcement agencies can facilitate efficiency as well as the likelihood of disruptive expressions of free speech simply because morale and employee job satisfaction would be greatly enhanced. Schofield (1984, December) stated a law enforcement organization's policy should be consistent with the fundamental values that underlie constitutional protection for employee speech (p. 23). By encouraging an open atmosphere of communication, law enforcement agencies can honor all three competing interests (i.e., the public, law enforcement agencies, public servants).

Law enforcement officers, in general, have their unique take on the issue of free speech within the workplace. The issue is extremely important to them as is evidenced by the great

number of court cases regarding the free speech of law enforcement officers. Because many officers feel unfairly deprived of their free-speech rights in conduct of their profession, many suffer loss of morale and enthusiasm for the job. The results from the perception that speaking out will jeopardize all that they have worked so hard for. It is common for them to feel that for the privilege of holding a job in which their lives are on the line every day, they must forfeit to a great degree their right to free speech. This dilemma seems to defy a full resolution. A police officer has a duty to uphold the law and to protect citizens from unfair applications of the law. However, it would seem that no one protects police officers in the same way. Police officers are not alone in their dilemma. All public employees relinquish their right to free speech to some degree. It continues to be up to the judicial system to interpret the degree to which it is relinquished. Roberts (1992) commented on First Amendment protection of law enforcement employees who exercise their freedom of expression.

There is no bright line of demarcation defining legitimate and permissible regulation of otherwise protected First Amendment activities. Generally, the courts will attempt to examine the real purpose behind the department's restrictive action to determine whether or not the employee's exercise of his First Amendment right significantly comprised the employee or the department (Roberts, 1992, p. 33).

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