Does Freedom of Speech in the Workplace Exist?

First Amendment – U.S. Constitution

Congress shall make no law respecting an establishment of religion, 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.

General Principles Applied Under the First Amendment

The First Amendment is distinct under the law because it explicitly limits certain activities or powers of the government. *Heffernan v. City of Patterson,* 136 S.Ct. 1412, 1418 (2016)("Unlike, say, the Fourth Amendment, which begins by speaking of the 'right of the people to be secure in their persons, houses, papers, and effects…,' the First Amendment begins by focusing upon the activity of the Government.").

Through the Fourteenth Amendment, the First Amendment applies to the States and prohibits State and local governments from acting in a manner that curtails the freedom of speech. *Janus v. American Federation of State, County, and Municipal Employees Council 31*, 138 S.Ct. 2448, 2463 (2018).

The U.S. Supreme Court has repeatedly held that freedom of speech "Includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see Riley v. National Federal of Blind of N.C., Inc.,* 487 US 781, 796-797 (1988); *Harper & Rowe Publishers, Inc., v. Nation Enterprises,* 471 US 539, 559 (1985); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256-257 (1974).

Restated, the First Amendment protects the right of avoiding or declining to associate with others for expressive purposes. *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984)("Freedom of association…plainly presupposes a freedom not to associate"). That right was recently underscored when the U.S. Supreme Court held that governmental unions can no longer charge and collect non-agency fees from non-consenting employees because such a procedure violates the First Amendment. The Court stressed that such employees must affirmatively and clearly consent to making such agency fee and other payments to the union from their wages. Only upon consenting to make such payments in the required fashion do such employees waive their First Amendment rights. *Janus v. State, County, and Municipal Employees Council 31,* 138 S.Ct. 2448, 2486 (2018).

One of the goals of such protections is to prohibit the governmental imposition of norms. *See West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, (1943)("If there is any fixed star in our constitutional constellation, it is that no official high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.")(J. Jackson).

With some exceptions, the protections provided by the First Amendment result in prohibiting a government employer from terminating or demoting an employee because the

employee supports a certain political candidate. *Heffernan v. City of Patterson,* 136 S. Ct. 1412, 1417 (2016)("With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate."); *Elrod v. Burns,* 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

The exceptions to the protections afforded governmental employees recognize and take into account "practical realities" that include the need for "efficiency" and "effective[ness]" in the providing of government services. *Waters v. Churchill,* 511 U.S. 661, 672 (1994); *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 564 (1973).

Restated, government employees do not surrender their First Amendment rights to free speech regarding matters of public concern just because their employer is a public entity. *Garcetti v. Ceballos,* 547 U.S. 410, 417 (2006). On the other hand, the First Amendment rights held by government employees is not absolute. As an employer, the government possesses a recognized legitimate interest "' in promoting the efficiency of the public services it performs through its employees.'" *Id.*

First Amendment Retaliation Actions

The five part test courts use to evaluate First Amendment retaliation claims come from the principles and holdings of the U.S. Supreme Court in *Garcetti v. Ceballos,* 547 U.S. 410 (2006) and *Pickering v. Board of Education,* 391 U.S. 563 (1968). Welded together, they are commonly referred to as the *Garcetti/Pickering* test.

In order for government employees to establish retaliation claim under the First Amendment, they must show that their speech qualifies for constitutional protection through a two-pronged analysis that examines whether 1) the employee made a speech as a private citizen; and 2) whether the public employee's speech addressed a matter of public concern. If the public employee falls short on satisfying either of the two elements "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Garcetti v. Ceballos,* 547 US 410, 418 (2006).

Under the first prong, government employees' speech only qualifies for protection when they speak as a private citizen. What this means is that when such employees' speech occurs as part of their official duties, their speech fails to qualify for the protections afforded by the First Amendment. The logic behind this analysis is that when the government employee speech is not conducted as a private citizen, and instead arises from the employee's performance of official duties, such speech is not encompassed within the protections afforded by the First Amendment to private citizens. *Garcetti,* 547 U.S. at 421, 423-24. As noted in *Garcetti,* "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-422.

The challenge is that there is no bright-line test that one can use to assess and evaluate

whether a government employee is speaking pursuant to their official duties. As a result, court perform a case-by-case analysis that looks at a number of factors, including whether the government employee was of the type the employee was paid to do, and if the government employer "commissioned" the speech made by the government employee. *Lincoln v. Maketa,* 860 F.3d 533, 538 (10th Cir. 2018).

In 2014, the U.S. Supreme Court refined its analysis of what speech falls within the unprotected zone of speech made during the course of official duties of a government employee. In *Lane v. Franks,* 134 S.Ct. 2369, 2379 (2014), the Court held that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." What the Court sought to make clear in *Lane* is that "there mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee--rather than citizen--speech." 134 S.Ct. at 2379. As a result, there is appellate case law that reads the limiting language in *Lane* as reasserting the First Amendment protections for government employee speech that touches upon ordinary employment responsibilities, while underscoring that government employee speech that is made in accord with or in furtherance of ordinary employment responsibilities remains unprotected. *Alves v. Bd. of Regents of Univ. Sys. Of Ga.,* 804 F.3d 1149, 1162 (11th Cir. 2015).

Lane is also instructive because it provides a relevant example of a type of government or public employee speech that qualifies as being made as a private citizen. In *Lane,* the plaintiff community college director testified before a grand jury and at trial about a legislator employee's handling of funds that led to an indictment and criminal conviction of the legislator employee for mail fraud and theft concerning a program receiving federal funds. The plaintiff testified pursuant to a subpoena, and the Court stressed that such truthful testimony was not part of that employee's ordinary job duties even when such testimony related to the plaintiff's public employment or involved data that the director acquired on the job. *Lane,* 134 S.Ct. 2369 & n.4.

A deputy candidate for sheriff spoke on matters of public concern during his campaign when discussing the communications and radio systems used in the county at public forums and in the newspaper. Moreover, no such comments were conveyed to a private audience at work closed to the public, nor where they conveyed as part of plaintiff's official job duties. *Morgan v. Robinson,* 881 F.3d 646, 653 (8th Cir. 2018). Of interest, the strength of the plaintiff deputy's showing that the statements at issue were made in the public interest, and were tied to his discharge six days after the election in a termination letter, formed grounds for the court to state that the defendant needed to meet a higher burden to support the discharge of the plaintiff. *Morgan,* 881 F.3d at 650, 654.

Government employees who also serve as union officials present an interesting situation at the cross-roads of whether their speech about workplace issues was part of their regular job duties or made as a private citizen. In *Montero v. City of Yonkers,* 890 F.3d 386 (2nd Cir. 2018), the plaintiff employee was a police officer who was elected vice president for the police union. During a union meeting, the plaintiff criticized the union president for having a close relationship with a police commissioner who had made decisions to eliminate several police units, including those dedicated to working on domestic battery and burglary cases. *Id.* at 391. Plaintiff alleged

that he was retaliated against for his comments by way of investigations conducted of him and claimed threats of violence followed by his expulsion from the union. *Id.* at 392-93. The Court found that the speech at issue was made as a union vice president, a volunteer post that was not part of his regular police duties. Therefore, the speech by the plaintiff was not part of his regular police duties and was made as a private citizen, and therefore protected by the First Amendment. *Id.* at 397-99.

Recent case law, however, also shows multiple instances where government employee plaintiffs could not show that their speech was made as a private citizen. For example, an investigator and then supervisor employed by the Independent Police Review Authority of the City of Chicago created reports on police misconduct as part of his job. The record indicated that as part of his job duties, the plaintiff had to revise his reports as directed by his supervisors, even if the net effect was to produce a document that described a police office in a more favorable manner than originally written. The report process was governed by administrative regulations that explicitly granted the Chief Administrator with the authority to make disciplinary recommendations to the Chicago Police Department. As a result, the plaintiff employee was required to draft and revise his reports, therefore making his speech related to such reports part of his official duties. Since such speech was not made as a private citizen, the First Amendment did not protect the plaintiff employee's speech about his reports. *Davis v. City of Chicago,* 889 F.3d 842, 844-46 (7th Cir. 2018). The Seventh Circuit has issued similar opinions before *Davis* in which it stressed that employees who uttered concerning, troubling, or significant speech as part of their regular job duties did not qualify for First Amendment protection. *See Roake v. Forest Pres. Dist. of Cook Cnty.,* 849 F.3d 342, 346-47 (7th Cir. 2017)(finding police officer who made internal reports about other officers committing illegal acts on the job made communications as part of official duties meaning First Amendment could not sustain retaliation claim).

Other recent examples of speech made pursuant to official duties include a public university lecturer who complained to a chancellor about the grade appeal process that applied to a student-athlete. The plaintiff lecturer's speech related to his grading duties which were part of his official duties. That gap in First Amendment coverage supported the granting of qualified immunity to the university officials named as defendants. *Lyons v. Vaught,* 875 F.3d 1168, 1173-76 (8th Cir. 2017). The same logic led to finding that the individual university official defendants were entitled to qualified immunity where a plaintiff employed as a director of budget and financial planning was found to not be speaking as a private citizen when her budget related comments to an enrollment committee on which she served were the alleged basis for the non-renewal of her contract. *Bradley v. W. Chester Univ. of the Pa. State Sys. Of Higher Educ.,* 880 F.3d 643, 652-54 (3rd Cir. 2018)("She attended the EMC meeting at the behest of Mr. Mixner, her direct supervisor, and the record contained no indication that the meeting was open to the public.")("The undisputed facts, however, show that Ms. Bradley was paid to critically evaluate WCU's budgeting process--*i.e.,* scrutinizing and analyzing the numbers appearing in the budget was part of her job. That is what she was doing at the EMC meeting on October 29, 2014, and that is why we hold that she was speaking pursuant to her official duties as a public employee at that meeting, and not as a citizen."). In addition, a school nurse asserted that she was retaliated against for producing her nursing notes in response to a subpoena. The appellate court found that plaintiff's actions in creating the notes and producing them in response to a

subpoena were performed as part of her official job duties as a school nurse. Therefore, the plaintiff did not qualify for First Amendment protection which caused her §1983 claim to fail and the individual defendants were dismissed based on their qualified immunity defense. *Rayborn v. Bossier Parish Sch. Bd.,* 881 F.3d 409, 417-18 (5th Dist. 2018).

Under the second prong of the analysis, a court must determine whether the government employee, speaking as a private citizen, spoke on a matter of public concern. *Connick v. Myers,* 461 U.S. 138, 145-49 (1983). Speech made on a matter of a private concern, such as a private grievance at work, lacks constitutional protection. But context matters, even when speech is made as part of a family concern. A school district employee was found to have made protected speech when submitting a letter that asked for a reduced sentence of a nephew who had pled guilty to a charge of manufacturing child pornography based on a video he made of a minor using the bathroom in his apartment. The plaintiff teacher used his own created school stationary for the letter sent to the sentencing judge. The school board terminated the plaintiff teacher. While acknowledging that the plaintiff teacher had a personal interest in the outcome of the sentencing of his nephew, the Court stressed that sentencing is a public matter, and related speech receives the broad protections afforded by the First Amendment. *Bailey v. Indep. Sch. Dist. No. 69 of Canadian Cnty. Okla.,* 896 F.3d 1176, 1182 (10th Cir. 2018). Another example of speech on a matter of public concern occurred when a police officer, in his capacity as a union vice president, raised his concerns about public safety caused by a reduction in manpower. The plaintiff also called for a no-confidence vote against a police commissioner. Such concerns extended beyond personal grievances and qualified as speech on a matter of public concern. *Montero v. City of Yonkers,* 890 F.3d 386, 401 (2nd Cir. 2018).

But government employees pursuing a First Amendment retaliation claim, and who typically plead a claim under 42 U.S.C. §1983, must show more than that their speech as issue was made as a private citizen, and that their speech regarded a matter of public concern.

The third element of their claim requires government employees pursuing a First Amendment retaliation claim to establish that the interest of the government do not outweigh the free speech interests of the government employee. *Pickering v. Bd. of Ed.,* 391 U.S. 563, 568 (1968). A recent formulation of that test examines (1) the government employer's general authority and responsibilities; (2) the nature and character of the employer-employee relationship at issue; (3) the speech involved; and (4) the evidence that indicates the impact of the speech on the efficient operations of the government employer. *Nord v. Walsh County,* 757 F.3d 734, 740 (8th Cir. 2014). But within this context, a court can also look at the record to see if a narrow exception for policymakers or sensitive government positions applies. For example, an assistant prosecutor was found to have made speech as a private citizen, and not as part of her job duties, while supporting an incumbent state's attorney who lost a primary election. *Borzilleri v. Mosby,* 874 F.3d 187, 189-90, 194 (4th Cir. 2017). Yet the plaintiff assistant state's attorney qualified as a policymaker who made many discretionary decisions who could be lawfully discharged for politically disloyal speech. *Borzilleri,* 874 F.3d at 191-95.

However, where a defendant government official or employer fails to make a showing that justifies the employment termination, and cannot show an incident of alleged disruption or

its impact, and the plaintiff's job performance was satisfactory at all relevant times, a court may find no need to apply the *Pickering/Connick* balancing test. *Morgan v. Robinson,* 881 F.3d 646, 655-57 (8th Cir. 2018).

The fourth First Amendment retaliation element compels the government employees to show that their speech was a motivating factor in the adverse employment action they sustained. As part of this burden, plaintiffs need to demonstrate that they sustained an adverse employment action. For example, an internal investigation is generally not considered to qualify as an adverse employment action. *Lincoln v. Maketa,* 880 F.3d 533, 543 (10th Cir. 2018). With respect to criminal investigations that do not result in the filing of charges and bringing someone to trial, the appellate courts have not reached a consensus whether such investigations qualify as an adverse employment action. *Lincoln,* 880 F.3d at 540-41 (explaining that defendant sergeant was entitled to qualified immunity where law was unclear that criminal investigation alone constituted an adverse employment action); *see also Rehberg v. Paulk,* 611 F.3d 828, 850-51 & n.24 (11th Cir. 2010)(deciding not to treat retaliatory criminal investigation as a violation of the First Amendment); *compare with Coszalter v. City of Salem,* 320 F.3d 968, 976 (9th Cir. 2003)(stating that a criminal investigation could violate the First Amendment).

For purposes of determining whether a government official is entitled to qualified immunity, the analysis for that determination relies on specific facts rather than abstract principles. *White v. Pauly,* 137 S.Ct. 548, 552 (2017). The analysis typically requires plaintiff's counsel to identify on-point case law that supports a judicial finding that the defendant's conduct obviously satisfied the element of plaintiff's First Amendment retaliation action at issue, for example, including what qualifies as an adverse employment action. *Lincoln v. Maketa,* 880 F.3d 533, 541 (10th Cir. 2018); *Sause v. Bauer,* 859 F.3d 1270, 1275 (10th Cir. 2017). For example, since the circuits disagree over whether paid administrative leave qualifies as an adverse employment action, the absence of consensus authority may support a defendant's quest for qualified immunity against a First Amendment retaliation claim. *Lincolns v. Maketa,* 880 F.3d 533, 542 (8th Cir. 2018)("Without any guidance, we do not regard placement on paid administrative leave as a clearly established adverse employment action."), *citing Dahlia v. Rodriquez,* 735 F.3d 1060, 1079 (9th Cir. 2013)(adverse employment action occurred when plaintiff placed on paid administrative leave that resulted in forfeiting holiday and on-call pay and loss of employment opportunities); *Stewart v. Miss. Transp. Comm'n,* 586 F.3d 321, 332 (5th Cir. 2009)(no adverse employment action occurred where plaintiff placed on paid administrative leave for three weeks and there were no other adverse consequences); *Nichols v. S. Ill. Univ.-Edwardsville,* 510 F.3d 772, 787 (7th Cir. 2007)(no adverse employment action were plaintiff was placed on paid administrative leave for three months); *Michael v. Caterpillar Fin. Servs.,* 496 F.3d 584, 596 (6th Cir. 2007)(adverse employment action occurred where plaintiff placed on paid administrative leave for four days when coupled with placement on 90-day performance plan).

Courts can reject appeals by defendants of an unfavorable ruling on qualified immunity where there are related disputed issues of fact. Where such factual disputes exist, jurisdiction for an interlocutory appeal may be lacking. For example, where the question of qualified immunity required resolving whether changes made to a memorandum of a plaintiff staff attorney about a state commission's actions regarding a retirement plan were false, then the

determination of qualified immunity could not be made as a matter of law. Therefore, the appellate court found jurisdiction lacking and dismissed the appeal. *Brown v. Halpin,* 885 F.3d 111, 117-19 (2nd Cir. 2018).

The fifth First Amendment retaliation liability element that must be demonstrated is that the defendant would not have made the same employment decisions in the absence of the protected speech. While directly applicable to this element, and involving a situation where a non-decision maker was dismissed on qualified immunity, there is a growing batch of case law that sets aside the previous notion that a non-decision maker could not incur liability for an alleged First Amendment retaliatory discharge. Under this analysis, whether a non-decision maker's unlawful retaliatory motive formed a link in the causal chain resulting in the alleged unlawful termination is the issue. *Sims v. City of Madisonville,* 894 F.3d 632, 640-41 (5th Cir. 2018). In *Sims,* the individual police sergeant was dismissed based on qualified immunity. The individual defendant could be not subjected to the clarified standard due to the uncertainty of prior case law in effect at the time the plaintiff police officer complained that his supervising sergeant solicited the assistance of other officers to plant drugs on his wife during a custody battle over their children.

The inquiry of whether the public employee speech will receive constitutional protection constitutes a question of law. *Forgue v. City of Chicago,* 873 F.3d 962, 966 (7th Cir. 2017).

Other Speech Rights Granted to Private or Public Employees

The speech rights granted to private employees by statute or common law do not concern political speech. Instead, whether the source is federal or state law, they involve the promotion of specific policies, for example protecting the rights of private employees to take concerted action, or to further defined policy goals by whistleblowing activities.

Section 7 of the National Labor Relations Act gives employees the right to "assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. For example, Section 7 gives locked-out employees the right to picket. *Am. Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 310 & n.10 (1965).

Section 8(a) of the National Labor Relations Act bars an employer from interfering with, restraining, coercing, or discriminating against employees who are exercising their Section 7 rights. 29 U.S.C. §158(a)(3).

What happens if a locked-out and picketing employee yells out racially hostile comments at personnel hired to replace the picketing employees? Following a lock-out, an employer who called back employees including the picketers refused to recall the employee who voiced racial insults. Under the analysis applied in striker misconduct scenarios, an appellate court case aside the employer's argument that its anti-harassment policy supported its decision not to call back the harassing employee. Within this context, the court did not disregard the facts. Instead, it determined that the employer's Title VII obligations did not prevail over the law supporting the

reinstatement of the employee. *Cooper Tire & Rubber Co. v. Nat'l Labor Relations Bd.,* 866 F.3d 885, 891-92 (8th Cir. 2017). The severity of this outcome may be understood as occurring within an uncommon bandwidth of striker misconduct cases. For example, a picketer who grabbed his crotch, said "f*** you," and used his middle finger when screaming insults and racial epithets at replacement workers, but without any grounds to find a threat of violence, uttered speech that was protected by the law and had his firing for harassment policy violations reversed. *Consol. Commc'ns., Inc. v. NLRB,* 837 F.3d 1, 6, 12-13 (D.C. Cir. 2016).

Federal law provides whistleblower protections to certain government employees who disclose alleged violations of laws, rules, or regulations, or who report situations that pose a specific danger to public health or safety. 5 U.S.C. §2302(b)(8)(A). Recent significant case law in this area includes *Dep't of Homeland Sec. v. Maclean,* 135 S.Ct. 913 (2015)(TSA air marshal not barred from making disclosure to reporter that agency decided to reduce air marshal missions when believing that the decision was illegal or dangerous during a hijacking alert)(court also ruled that "law" in "right-to-disclose" provision of Whistleblower Protection Act refers solely to a statute and not a regulation or rule); *Parkinson v. Dept. of Justice,* 874 F.3d 710 (Fed. Cir. 2017)(holding that FBI employees must bring whistleblower reprisal claims to the Attorney General rather than Merit Systems Protection Board).

For most private employees in Illinois, their potential whistleblower claim lies in state law known as the Whistleblower Act. 740 ILCS 174/1 et seq. However, such claimants must be full-time, part-time, or contractual employees, and not applicants. *Volling v. Kurtz Paramedic Services, Inc.,* 840 F.3d 378 (7th Cir. 2016).

Finally, for those looking for recent authority on academic freedom, the most significant recent decision in the area was issued by the Wisconsin Supreme Court. *McAdams v. Marquette Univ.,* 2018 WI 88 (Wis. July 6, 2018)(finding university breached its contract with tenured faculty member when suspending him for activity protected by the contract's guarantee of academic freedom).