"The Forum May Be Open, But We Don't Want to Listen to You": Employee Comments at Government Meetings

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This paper addresses problems that can arise when a local governing body is confronted by challenging employee speech during a time for invited public comment at a public meeting. Such a situation can encounter difficult First Amendment questions, and potential Section 1983 liability, if adverse employment action ensues. Indeed, it is not just during the meeting that the government must be careful since subsequent disciplinary actions against an employee who addresses, or attempts to address, the governing body may be challenged as retaliation. To better understand the recent cases it would be helpful to review some of the background on employee speech.

1. The Right-Privilege Distinction

In the late 19th century a New Bedford, Massachusetts police officer made public remarks critical of how the local police department was run. His employer fired him for these remarks. The police officer claimed that such action violated his right of free speech under the First Amendment. Justice Oliver Wendell Holmes, of the Supreme Judicial Court of Massachusetts, succinctly dispatched this claim:

> 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 to him.*[1]

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[1] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1982)(emphasis added).

This view of employee speech essentially sounded in contract. In the same context that public employer could contract with an employee not to be idle, the public body could also require the employee to suspend a constitutional right of free speech. Holmes view was widely quoted and relied upon by other courts between 1892 and 1954.[2] Yet, even though this view held currency for a considerable period of time, decisions from the U.S. Supreme Court challenged its continued existence.

2. The Unconstitutional Conditions Doctrine

The doctrine of unconstitutional conditions was forcefully raised in a matter of commercial, as opposed to First Amendment, litigation.[3] In *Frost & Frost Trucking Co.v. Railroad Comm.*, the Court stated clearly that the government cannot be treated the same as a private party for constitutional purposes. In other words, the U.S. Constitution constrains the actions of the government regardless of the capacity in which the government acts.

> It would be a palable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constittution, but to uphold an act by which the same result is accomplished under the guise of a surrender or a right in exchange for a valuable privilege the state threatens otherwise to withhold. IT is inconceivable that guarantees embedded in the Constitution of the United States may be thus manipulated out of existence.

Id., 271 U.S. at 593-94. In other words, the government is the government regardless of the role in which it acts and in that role the constitution constrains certain actions. Hence, this

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[2] See, generally, WILLIAM VAN ALSTYNE, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 83 Harv. L. Rev. 1429 (1968).
[3] Frost & Frost v. Railroad Comm., 271 U.S. 583 (1926).

doctrine would reject Holmes' view that merely a contract of government employment forces a government employee to forfeit First Amendment rights.

3. The Present Rule

Basic Rule:

The government may not fire or demote an employee based upon the employee's speech if:

1. **The speech is on a matter of public concern, and**
2. **The damaged caused by the speech to the efficient operation of government does not outweigh the value of the speech to the employee and the public.**

This basic rule strikes a balance "between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees."[4] While the public employee is not totally barred from public comment, the government is also permitted to determine if the speech is truly a matter of public concern that, once aired, does not disrupt service to the public. Further, if an adverse employment action occurs because a public employee has exercised a First Amendment right to free speech, the government can be held liable pursuant to 42 U.S.C. § 1983 if such protected speech was a substantial or motivating factor in the decision to penalize the employee.[5]

4. Does the Basic Rule Change if the Government Invites the Comment?

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[4] Pickering v. Board of Education, 391 U.S. 563, 568 (1968); *see also,* Connick v. Myers, 461 U.S. 138, 140 (1983).

[5] *See, e.g.*, Boger v. Wayne Cty., 950 F.2d 316, 322 (6th Cir. 1991); Pesek v. City of New Brunswick, 794 F.Supp. 768 (N.D. Ohio 1992).

While the basic rule is clear and can apply to comments made during the course of employment, what happens if the comments are made as the result of an invitation of the governing body? Government meetings tend to be open to the public. In virtually every state only certain limited circumstances, such as the discussion of personnel matters, permit a government to conduct any business in executive session. So, if the governing body invites public comments during a meeting held on public property, do attendees have an unfettered right to free expression? Or, are public employees necessarily speaking on a matter of public concern merely because the government has invited comments? The answer to both questions is clearly "no."

(a) How open is the forum?

Not all public property is subject to unfettered public speech simply because the government owns or controls that property.[6] For public facilities not dedicated to public communicative activity the government "may regulate speech by the general public so long as that regulation is reasonable and not base on opposition to a particular viewpoint."[7] A government can "legally preserve the property under its control for the use to which it is dedicated."[8] Of course, public property that has by tradition or specific government action been

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[6] United States Postal Serv. v. Council of Greenburg Civic Ass'ns, 453 U.S. 114, 129 (1981); Eichenlaub v. Township of Indiana, 2004 WL 2093435 at 3-4 (3rd Cir. September 21, 2004).

[7] Eichenlaub, at 4.

[8] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993); International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992) Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985); Families Achieving Independence and Respect v. Nebraska Dept. of Soc. Serv., 111 F.3d 1408, 1418-19 (8th Cir. 1997); Sentinel Communications Co. v. Watts, 936 F.2d 1189, 1200-1201 (11th Cir. 1991).

characterized as a public forum for assembly and debate enjoy significant First Amendment protection and speech can be limited only narrowly.[9]

> In these quintessential public forums, the government may not prohibit all communicative activity. For the government to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to that end . . . The State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

Property that is not traditionally open for debate may enjoy the same protections of the traditional public forum if the government declares that the property is open for such expressive activity.[10] These areas are commonly referred to as designated public fora.

A third time of public forum is the limited public forum. This use of governmental property for expressive activity is created by the government and limited to certain groups or the discussion of certain topics.[11] Under recent tests for the public's use of a limited public forum, the U.S. Supreme Court has indicated that content-based restraints are acceptable if

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[9] Parks and public rights-of-way are the typical examples of such a traditional public forum. Hague v. CIO, 307 U.S. 496, 515 (1939). Any government imposed restrictions in such a forum are subject to strict scrutiny and will be upheld only if there is a compelling state interest and the restriction is narrowly construed to meet that interest. *See* Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998); Perry Educ. Ass'n v. Perry Local Educators' Ass'n.. 460 U.S. 37, 45 (1983); Chiu v. Plano Ind. Sch. Dist., 260 F.3d 330, 344-345 (5th Cir. 2001).

[10] The designated public forum is entitled to the same protections as a traditional public forum even though the government was not required to open the forum and is not required to keep the forum open for a particular period of time. Widmar v. Vincent, 454 U.S. 263 (1982); City of Madison Joint School Dist. v. Wisconsin Employment Rel. Comm'n, 429 U.S. 167 (1976).

[11] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

designed to "confine the forum to the limited and legitimate purposes for which it was created."[12] The limitations must be viewpoint neutral as well as "reasonable in light of the purpose served by the forum."[13]

From these decisions it can be gleaned that a time for "citizen communication" during the meeting of a governing body is a limited public forum designed to solicit views on certain matters of interest to the body.[14] In additional to reasonable time, place and manner restrictions, the government is free to limit discussion "to issues germane to town government."[15] To the extent that comments by a government employee relate to some aspect of town government, they should be permitted. Yet, this fact alone does not mean that such comments are truly matters of public concern.

(b) Is public business always a public concern?

Returning to concerns about government employees who speak during citizen participation sessions of government meetings, the fact that the limited (or designated) forum is open does not mean that everything is a matter of public concern. Moreover, even if an employee starts discussing a topic that would otherwise qualify as a matter of public concern, the speech may lead to sanctions if it is really a subterfuge for a personal vendetta against someone else. For example, comments that start out as protected speech but becomes a personal attack against a public official or institution may be subject to adverse employment actions because the attacks are not relevant to any matter of public concern.[16]

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[12] Rosenberger c. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[13] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); Rosenberger, 515 U.S. at 829; Wigg v. Sioux Falls Sch. Dist. 49-5, 2004 WL 1948682 (8th Cir. September 3, 2004).

[14] *See also,* Gault v. City of Battle Creek, 73 F.Supp.2d 811, 814 (W.D. Mich. 1999).

[15] Eichenlaub, 2004 WL 2093439.

[16] Smth v. Cleburne Cty. Hosp., 870 F.2d 1375, 1382 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989).

The Eighth Circuit illustrated this point in *Dunn v. Carroll.*[17] A firefighter alleged that he had permission to wear an American flag emblem on his uniform. The new fire chief, however, had issued a guideline that prohibited any ornamentation of the uniform. The firefighter was ordered to remove the flag patch but he refused to do so. The fire chief then disciplined the firefighter for insubordination. During a public meeting of the board overseeing the fire department, a discussion occurred about this particular suspension. The fire chief was asked to explain his position about the patch and during this explanation the fire fighter accused the chief of being a liar. As a result the fire fighter was terminated for insubordination. Even though the comment occurred during the meeting of a governing body, with the forum opened to discuss this matter, the termination was upheld. Notwithstanding the protected nature of the fire fighter's initial comments about the uniform policy, the personal attack did not outweigh the public body's interest in promoting efficiency within the fire department so the adverse employment action was upheld.

But, what about a situation in which the employee is precluded from speaking during an open communication period? In *Pesek v. City of Brunswick*,[18] that very question was addressed. During an open communication period during a city council meeting a fire fighter wished to address the conditions of employment for fire fighters. This topic is clearly a matter of public concern.[19] The city council, at the behest of the city manager, refused to permit the comments because a state statute provided that negotiations should not take place at public meetings and this was deemed to be a negotiation. The District Court rejected this claim.

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[17] 40 F.3d 287, 293 (8th Cir. 1994).

[18] 794 F.Supp. 2d 768 (N.D. Ohio 1992); *see also,* Local 2106, Intern. Ass'n of Firefighters, AFL-CIO v. City of Rock Hill, 660 F.2d 97 (4th Cir. 1981).

[19] Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

> . . . Brunswick created a limited public forum by inviting citizen participation at its city council meeting . . . As such, the Council was prohibited from selectively denying [the plaintiff] his right to address the Council regarding a matter which was part of the agenda that night based solely upon his status as a government employee. To do so amounts to a content-based restriction and does not pass constitutional muster because it does not offer a compelling justification which must be shown in order to meet the standard of strict judicial scrutiny.

Id., 794 F.Supp. at 785.

(c) Is a matter of public concern always a matter of public concern?

From the above it has been shown that stopping a personal attack issued in the midst of protected speech during the meeting of a governing body does not violate the employee's First Amendment rights. Further, prohibiting the employee's speech altogether is a First Amendment violation if the forum has been opened to other non-employee citizens who are free to speak on the same topic. But, is pubic speech in a limited public forum on what facially appears to be a matter of public concern always protected speech? Or, to put it another way, is a matter of public concern always a matter of public concern?

The answer is "no." As a general rule "[a] statement is characterized as a matter of public concern and not merely a personal employment grievance if it can be 'fairly considered as relating to any matter of political, social, or other concern to the community."[20] To judge whether the speech is a matter of public concern requires that it be reviewed in light of the content, form, and context of the speech. The fact that such an inquiry, which must occur on a case by case basis, reveals some animosity between an employee and a supervisor does not

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[20] Connick v. Myers, 461 U.S. at 146.

render the speech personal in nature. If the employee speaks on a matter of public concern and provides information that helps the public to evaluate the conduct of the government, then the speech is protected.[21] A potential issue for the local governing body, should the employee be disciplined, is whether there was any outstanding motivation for the employee's critical speech, e.g., failure to gain a promotion or a change in assignment. If so, then even comments on an apparent matter of public concern may lead to disciplinary action.[22] If not, then disciplinary action can lead to Section 1983 liability.[23]

(d) What is the policymaker corollary?

One final problem that might arise is when a supervisory employee makes negative comments on a matter of public concern during such a forum. If the employee is in a sensitive or supervisory position, then disciplinary action may occur even though the comments address a matter of public concern in a public meeting.

This situation arose in *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964 (7th Cir. 2001). In this case a school principal was part of a group assigned the task of designing a particular program for the school. The committee did not agree with the principal's recommendation. During a public meeting, despite having been told to support the administration's position, the principal spoke against the recommended proposal and in favor of her own. As a result she was demoted and, when she refused to return to work, was terminated.

The Court noted that the issue before the school board when the principal spoke was a matter of public concern. However, because of the nature of the principal's position, this fact

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21 Wilson v. City of Littleton, 732 F.2d 765, 768 (10th Cir. 1984); *see also* Koch v. City of Hutchinson, 847 F.2d 1436, 1445-47 (10th Cir.), *cert. denied,* 488 U.S. 909 (1988).

22 McEvoy v. Shoemaker, 882 F.2d 463, 466 (10th Cir. 1989).

23 Moore v. City of Wynnewood, 57 F.3d 924, 934 (10th Cir. 1995).

did not preclude disciplinary action being taken against her. "When the policy-maker's speech creates a conflict with the policy stance of his superiors, the effects on government are "acute."[24]

CONCLUSION

Whether opening a government meeting to citizen input constitutes a designated public forum or a limited public forum, dealing with comments from employees creates situations in which local governments may be subject to liability for First Amendment violations. Once the forum is opened, government employees cannot automatically be excluded from the discussion. However, the discussion by employees must be on a matter of public concern. Even so, the comments have to be weighed against their impact upon the government and if that impact outweighs the employee's right to speak, disciplinary action can result.

Whether a topic is a matter of public concern, or whether the right to speak is outweighed by a legitimate governmental concern is a question of law. Still, there are certain factual issues that help determine how the legal issues will be resolved. For example, a personal vendetta, or an internal concern specific to the speaker can overcome the public nature of the comments. Further, comments by a policymaking employee that are contrary to the position of that employee's supervisors can lead to adverse disciplinary action without violating the First Amendment.

Still, once the forum is opened a good rule of thumb is recognize that the governing body might as well hear what the employee has to say so long as it does not overtly disrupt the meeting or devolve into caustic personal attacks.

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[24] Vargas-Harris c. Racine Unified Sch. Dist., 272 F.3d at 971; *citing* Warzon v. Drew, 60 F.3d 234, 239 (7th Cir. 1995).