International Municipal Lawyers Association
2014 Annual Conference
Saturday, September 13, 2014

Employee Conduct in the Municipal Workplace

Public Employee Speech: A 2014 Update

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Pre-1960 public employee free speech rights:



1892: Justice Holmes:
There may be a constitutional right to talk politics, but there is no constitutional right to be a policeman and talk politics.

***McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 at 22 (1892)**

Evolution of Employee Free Speech

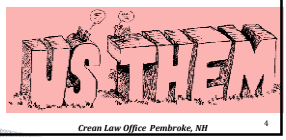


1952: Justice Minton:
If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

Adler v. Board of Education, 342 U.S. 485 (1952)

Setting Sail into the 20th Century

- *14th Amendment Developments & States' Rights*
  - *More than Civil Rights & Equal Protection -*
  - *Bill of Rights Applies to States (and Local Governments)*



Hitting Waves

- *Right of Privacy Emerges*



The new voyage gets under way . . .

- *Loyalty Oaths*
- *<u>Pickering – Connick</u> & their Offspring*
  - *And the Right to Speak Begins to Develop*



Major Chips in Foundation of At-Will Status

Pickering v. Board of Ed, 391 U.S. 563 (1968)

Absent proof of false statements knowingly or recklessly made, an employee's exercise of the right to speak on issues of public importance may not furnish the basis for dismissal from public employment unless the employee's conduct hinders the performance of the employee's duties.

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Traditional *Pickering/Connick* Public Employee "Free" Speech Test –

- **A. Threshold: Employee speech must address a matter of public concern.**
- **B. Employer may act when employee speech has an adverse effect on productivity in the workplace or the government's interests as an employer [essentially a balancing test].**
- **C. Employee must show that protected expression was a substantial or motivating factor in an adverse employment decision.**

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Pickering-Connick Offspring: Key Elements of Test as Applied

- ***Mt. Healthy*: Employers may defend discipline premised upon non-speech-related conduct.**
- ***Givhan*: Speech is protected even if expressed privately & not widely broadcast in public.**
- ***Branti/Elrod*: First Amendment protections do not apply to political (and, by later cases, confidential or policy-making) positions.**
- ***Rankin-McPherson*: Employee speech may be cause for discipline when it has a detrimental impact on the work environment.**

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More refinements

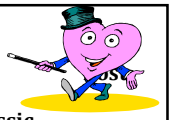
Garcetti v. Ceballos



City of Ontario v. Quon



The Tell Tale Heart Revised



- With due respect to Mr. Poe and our city of Baltimore, we begin our 2014 review with this variation on a Poe Classic.
- The Tattle-Tale Heart
  - True! --nervous --very, very dreadfully nervous I had been and am; but why will you say that I am mad? The disease had sharpened my senses --not destroyed --not dulled them. Above all was the sense of hearing acute. I heard all things in the heaven and in the earth. I heard many things in hell. How, then, am I mad? Hearken! and observe how healthily --how calmly I can tell you the whole story.

Not Poe, but still important

- Our subject here is *Lane v. Franks*
  - The author is J. Sotomayer – and that rarity of current jurisprudence – a unanimous SCOTUS opinion
- So, here's the plot -
  - Lane "tattles" on an absentee employee at "CITY" (program of CACC).
  - Who is a legislator and has been paid $175,000.
  - He's told, in effect, "Drop it, & leave it alone."
  - Lane doesn't.
  - Eventually, Lane fires her.

The Plot ~~Thickens~~ Sickens

- The media & then the FBI get involved.
- Lane testifies about the matter before the grand jury and 2 trials.
- Franks (new CACC president) fires Lane.
- Lane sues.

- Franks says under *Ceballos*, Lane spoke in official capacity, so he can't sue me or anybody.

The First Reviews Come In . . .

- Trial & Circuit Courts grant qualified immunity to Franks, saying Lane's speech:
  - Owed its existence to his professional responsibilities ; &
  - Was a product that the employer himself had commissioned or created.

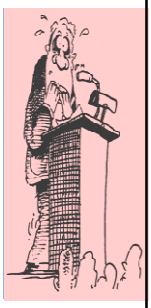
Sotomayer – Wait . . .



- First Volley:
  - Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Second Volley:

- Government employees are "often in the best position to know what ails the agencies for which they work," and the "interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."



Closing Volley:

- The importance of public employee speech is "especially evident in the context of this case: a public corruption scandal." It would be "antithetical" if the "very kind of speech necessary to prosecute corruption by public officials . . . may never be the basis for a First Amendment retaliation claim."



The Moral of the Story: Mr. Poe Speaks

- Was it possible they heard not? Almighty God! --no, no! They heard! --they suspected! --they knew! --they were making a mockery of my horror! . . . But anything was better than this agony! Anything was more tolerable than this derision! I could bear those hypocritical smiles no longer! I felt that I must scream or die! . . .
- "Villains!" I shrieked, "dissemble no more! I admit the deed! --tear up the planks! here, here! –
- **Here is the scandal of which I speak.**
  - ***"So fire me not, for it is a public concern of which I speak!"***

The Statutes Also Speak . . .

New Hampshire RSA 98-E:

Punish not, lest ye be punished!

Right to criticize – with no apparent balancing test

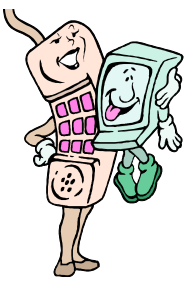


The Circuit Courts Also Speak

- ***Right to Intimate Association***
  - ***Matusick v. Erie County***, __F. 3d__, Nos. 11-1234 and 11-1618 (2nd Cir., Jan. 6, 2014).
- ***Speech within Scope of Duty & Impact on Workplace***
  - ***Durham v. Jones***, __F. 3d__, No. 12-2303 (4th Cir., Dec. 10, 2013).
- ***Garcetti's Breadth***
  - ***Gibson v. Kilpatrick***, __F. 3d__, No. 12-60905 (5th Cir., Oct. 29, 2013).

Social Media – the Iceberg Groweth





More thoughts to remember

- Social media and electronic communications leave electronic footprints.
- But can they be accessed and used in employment proceedings?



Social Media: Dangerous Waters

- Municipal Web Sites
  - Possible 1st Amendment "Public Forum"
- Employee "Blogs"
  - Traditional 1st Amendment Analysis + RSA 98-E
- Public Officials
  - Use of Web site
  - Their own "sites" & are they speaking "officially"?
  - Email
    - Don't forget Right-to-Know – FOIA Laws

Concluding Thoughts

- Think, examine employee speech before acting.
- Beware prior restraint arising from blanket prohibitions on speech.
- If speech is protected, is there still justification for employer action?
- Consider "real" effects/impacts on the workplace.
- Consider employee performance (but "*caveat user*," have support for any disciplinary action).
- Consider if there is a less restrictive/intrusive means of regulating speech/expression.
- Document! Document! Document!

Questions or Comments?

Thank you.

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