First Amendment Issues in the Employment Context

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FIRST AMENDMENT ISSUES IN THE EMPLOYMENT CONTEXT

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Public employers have dual roles in regulating their employees' speech. On the one hand, operating as a state actor, a public employer cannot discharge or retaliate against an employee based on that employee's exercise of their free speech rights. On the other hand, operating as an employer, a public employer may regulate or restrain its employees' job-related speech. There is an inherent tension between these interests, and many potential pitfalls for a public employer.

I. Scope and limits of a public employee's First Amendment rights

It is well-settled that public employees do not leave their right to free speech at the door when they come to work. Nevertheless, their employers have a legitimate interest in efficiently providing their services to the public. From political to union activity, to whistleblowing, to simply expressing controversial or even offensive views, public employers – and by extension, the courts – must balance these competing interests to determine when an employee's First Amendment rights may be appropriately limited.

Both federal and state courts in New York perform a similar analysis in determining whether a public employee's speech is protected. The first step in that inquiry requires determining whether the employee was speaking as a citizen on a matter of public concern, rather than as an employee. If the answer is yes, the analysis turns to whether the employer had an adequate justification for treating the employee "differently from any other member of the public based on the government's needs as an employer."[1]

Relevant considerations in this balancing test include whether the speech has a disruptive or detrimental effect on working relationships or on discipline by supervisors; whether the employee's job requires loyalty or confidentiality; and whether the speech impedes an employee's ability to perform their duties or otherwise interferes with workplace operations.

This balance will tend to tip in favor of an employer where the fear of disruption is reasonable and the potential for disruption outweighs the value of the speech. In practice, the more an employee functions in a confidential or policy-making role, or has greater public contact, the greater the employer's interest in stymying speech that conflicts with its mission.

Illustrations:

A. Speaking on a matter of public concern?

Employee speech addressing issues related to their job, or speaking pursuant to their official duties, is not entitled to First Amendment protection. Only speech as a private citizen or on a matter of public concern is protected. In Weintraub v. Bd. of Educ., 593 F.3d 196 (2d Cir. 2010), for example, the Second Circuit held that a teacher's grievance made through his union complaining

[1] *See* Matthews v. City of New York, 779 F.3d 167, 172 (2d Cir. 2015).

of a supervisor's failure to discipline a child in the classroom was not entitled to First Amendment protection, as the teacher was speaking pursuant to his official duties, not as a citizen. NOTE: Employee speech, particularly union activity, may carry other protections under the Taylor Law.

In Murray v. Williamsville Cent. Sch. Dist., 535 F. Supp. 3d 164 (W.D.N.Y. 2021), a teacher alleged that his employer violated his First Amendment rights when it enjoined him from responding to students' public allegations that he had shown pornography in class and implied he was a sex offender. The district court disagreed, finding that the employer had not restricted the plaintiff's speech on a matter of public concern, but rather on a private grievance. Such speech is not protected under the First Amendment.

By contrast, in Matthews v. City of New York, 779 F.3d 167 (2d Cir. 2015), the Second Circuit found that a police officer who reported what he believed was an improper quota system to precinct leadership was speaking as a citizen, rather than an employee. In that case, the Court found that the officer's complaints were not within the scope of his official duties. Rather, he pursued his complaints in the same manner as would a concerned civilian.

B. Complaining about an employer to the media or other government agencies

In Rigle v. County of Onondaga, 267 A.D.2d 1088 (4th Dep't 1999), the two petitioners were terminated (or constructively terminated) after making public comments to other government agencies and the media alleging mismanagement of the Onondaga County Laboratory and Medical Examiner's Office and inappropriate conduct by their supervisor, the Onondaga County Medical Examiner. While the comments regarded matters of public concern, both petitioners held high-ranking, policymaking positions within their respective agencies, had contact with elected officials and influenced government programs. Given their positions, the petitioners' comments were more disruptive to the operation of the workplace than they would have been if they came from lower level employees with little authority.

C. Running for elected office

In Matter of Spence v New York State Dept. of Agric. & Mkts. Appellate Division 154 A.D.3d 1234 (3d Dep't 2017), two petitioners were employed as Dairy Product Specialists by the Department of Agriculture and Markets. Both applied to the Department for approval to campaign and serve as county legislators, and both were denied on the grounds that the activity would create the appearance of a conflict of interest. While running for office no doubt constitutes speech on a matter of public concern, the Appellate Division nevertheless upheld the denials, finding that the employer demonstrated that an employee's dual role as a county legislator would potentially disrupt its operations by casting doubt on the fairness of its operations and creating the appearance of a conflict of interest. The petitioners had discretion in conducting dairy inspections which carried the potential for greatly benefitting or harming regulated entities inside the counties in which they sought office. This, in turn, could create a public perception that the employees might leverage their employment, or bestow favorable treatment on regulated entities, to obtain financial support for their political activities.

D. Declining to hire based on previously expressed views

In Matter of Whitfield v. City of New York, 199 A.D.3d 548 (1st Dep't 2021), the petitioner applied for a job as a Youth Development Specialist, submitting, as part of his application, an essay he wrote over a decade earlier on the fundamental unfairness of the justice system. The employer declined to hire him, citing the potential that his views could disrupt the employer's mission. The First Department found in favor of the employer and determined that it did not violate the applicant's free speech rights. While the petitioner argued that his opinions would help him empathize and bond with youth in his care, "it was not irrational for the respondent to conclude that petitioner's opinions might demonstrate a cynicism that would impede his ability to counsel at-risk youth who were enmeshed in the system."

E. Disclosing confidential information

In Matter of Paladino v. Board of Educ. for the City of Buffalo Pub. Sch. Dist., 183 A.D.3d 1043 (3d Dep't 2020), the petitioner alleged, among other things, his free speech rights were violated when he was removed from the Buffalo Board of Education. The Petitioner, as an elected member of the Board, was removed from the Board after he published an article in a local magazine in which he disclosed what the Board had discussed in executive session regarding ongoing negotiations with a teacher's union. The court found that, while the petitioner's speech was a topic of public concern, he nevertheless did not have a free speech right to disclose confidential information.

Of note, in a previous article for the same magazine, Petitioner had made what others on the Board considered to be racially offensive comments about Barack and Michelle Obama. Outside counsel for the Board advised that removal of those comments would violate Petitioner's First Amendment rights.

II. Protected union activity vs. unprotected disruption

In the public employment context, employees' rights to organize under the Taylor Law very often dovetail into their First Amendment rights to speech and association. However, an employee's Taylor Law speech rights are not absolute and as with any other type of speech, the employer's interest in avoiding disruption and maintaining efficiency must be weighed.

Illustration:

A. Leafleting creates a safety hazard

In Matter of East Meadow Teachers Association, 48 PERB ¶3006, an employer disciplined a teacher for insubordination after he refused to stop distributing union-related leaflets to parents as they exited school. The employee was distributing the leaflets on his own time and on public property. However, because he was doing so as drivers exited the school grounds, his behavior had the effect of obstructing traffic and interfering with the efficient drop-off of students. The employee's actions in leafletting were protected, but the manner in which he went about it was not.

B. Union picketing disrupts safe operations

In Matter of Santer v. Board of Educ. of E. Meadow Union Free Sch. Dist., 23 N.Y.3d 251 (N.Y. 2014) – a similar matter out of the same school district – the teachers union staged a protest by parking their vehicles in front of the student drop-off area. As a result, parents were unable to pull up to the curb to let students off. The Court found this to be protected speech, but nevertheless found that the protest caused a traffic disruption and an unsafe condition for children being dropped off, and so discipline was appropriate.

III. Considerations for disciplinary action

In the context of disciplinary hearings or arbitration, an employer should be sure that its record is clear on the elements of the balancing tests above. If there is no administrative record that an employee's otherwise protected speech is disruptive, a court will have no basis to support such a finding on review.

Illustrations:

A. Corrections officer returned to work after flying Nazi flag

In New York State Correctional Officers & Police Benevolent Ass'n v. State, 94 N.Y.2d 321 (N.Y. 1999), the New York State Department of Corrections sought to terminate a corrections officer after he flew a Nazi flag at his home. It submitted the matter to disciplinary arbitration and the arbitrator concluded that there was no nexus between the officer's off-duty conduct and his employment. There was, apparently, no evidence presented at arbitration that the officer's personal conduct harmed the employer's business, adversely affected his ability to perform his job or caused any co-workers not to work with him. There was no evidence that the officer represented a security threat to the prison – and, indeed, specific findings that he did not. Based on the record before it, the Court was constrained to uphold the arbitrator's award.

IV. Whistleblower protections and retaliation

Retaliation for protected speech is unlawful, as is retaliation for reporting alleged violations of the law which present a danger to public health or constitute an "improper governmental action" (Civil Service Law § 75-b). There must nevertheless be a connection between the protected activity and the alleged adverse employment action.

Illustrations:

A. Teacher denied tenure for reporting supervisor's alleged illegal conduct stated First Amendment retaliation claim

In Nagle v. Marron, 663 F.3d 100 (2d Cir. 2011), a teacher's employer became aware of an incident in which she reported a prior supervisor for abuse at a previous school and shortly thereafter, her supervisors decided not to recommend her for tenure. The supervisors admitted that this revelation played some part in its decision, but claimed only that it only influenced them to the extent that they believed the teacher violated school rules in reporting the abuse to police rather than to a

principal. The Second Circuit held that the teacher's report of abuse was protected speech and that a jury could plausibly find this speech led to the adverse employment action.

B. Civil Service Law § 75-b does not require that a whistleblower's complaint ultimately be founded, only that it is based upon a reasonable belief

In Zielonka v. Town of Sardinia, 120 A.D.3d 925 (4th Dep't 2014), a code enforcement officer alleged that his employer terminated him for reporting that he had been directed to perform an unlawful act. The case survived a pre-answer motion to dismiss, as the plaintiff was not required to actually prove the unlawfulness of the act in question, only that he had a reasonable belief that it was unlawful when he reported it.