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IMLA's Annual Report



Avoiding Workplace Free Speech Claims in the Upcoming Election

Tips to Prevent Liability

— by Lawrence L. Lee —

VOTE

ELECTION

08



During the second half of 2008, public employers need to be aware of the established legal principles of the Constitution and relevant state statutes that apply to the ability of a public employee to exercise political speech rights at work. Employers with the government need to be especially careful before disciplining an employee for political expression in the months prior to this November's election. As the election approaches, political activism is close to an all-time high. An African-American candidate has been nominated as the Democratic candidate in this year's Presidential runoff for the first time in American history. His opponent and Republican candidate is a decorated war veteran who has been nominated during a time of internal significance, as evidenced by the Iraqi War. Seemingly, more candidates for State Senate and House slots have announced their candidacy to try and win designated districts. And of course, within the important city and municipal council and mayoral races, local candidates appear to have more of a focus on the important issues than in years past.

Potential legal issues may arise under 42 U.S.C. § 1983 ("Section 1983") for freedom of speech or association claims made under the First Amendment in the workplace. The typical issues are:

- Can an elected official take employment action against an employee of a different party?
- Does a public employee have a First Amendment right to express his political views or allegiances while on the job?
- If so, to what extent can he express his political preferences?
- To what extent do state whistleblower statutes become a factor?

The U.S. Supreme Court has, over the past 40 years, established legal standards for situations in which a public employee claims that his right to political expression in the workplace under the First Amendment was illegally violated. Such claims,

typically filed by public employees under Section 1983, include political patronage discrimination, unjust termination of employment after engaging in protected conduct, and, of course, retaliation. Depending on the state and its law, the employee may also seek relief and redress under a state whistleblower statute.

Political Patronage

Elected officials frequently want the non-civil-service positions of their municipality to be occupied by members of the same political party with which the official is affiliated. Such a desire is typically based on the following reasons: "My office and our citizens will be better served if I have people who share the same beliefs and values as I do," or "I would be crazy to have a political opponent working for me," or "I have a trust issue with opponents who will be evaluating and second-guessing my decisions." These reactions are not a proper basis for terminating employees based on their political beliefs. Public officials and their counsel should fully consider the basis for discharging an employee prior to taking any action. Government employers should avoid the ill-advised decision to "clean house" upon taking office based solely on political considerations and affiliation.

In 1976, the U.S. Supreme Court held that an elected Democratic sheriff could not constitutionally replace certain Republicans within his office staff with members of his own party when such employees failed to affiliate with the Democratic party.¹ The Court stated that the cost of the practice of patronage was the unquestionable restraint it placed on the constitutionally-protected right to freedom of belief and association.² In 1980, in *Branti v. Finkel*, the Supreme Court further clarified its decision in *Elrod* by holding that public employees do not have to prove they were coerced into changing their political allegiance.³ Rather, it is sufficient for public employees to prove that they were about to be discharged "solely for the reason that they were not affiliated with or sponsored by" a certain political party.⁴

In 1990, the Supreme Court expanded the *Elrod-Branti* doctrine to include limitations on retaliatory work practices equivalent to termination.⁵ The Court held that the First Amendment not only protects public employees from termination based on political affiliation, but also, from demotions, transfers, recalls, and other hiring practices conditioned on their political beliefs.⁶ Ultimately, the Court has determined that the government's interest in maintaining a system of political patronage is outweighed by an individual's interest in exercising his First Amendment rights.⁷

Political Speech in the Workplace

Any governmental office or department may have situations in which employees post political signs on their office door or cubicle. Intra-office debates concerning political issues may also arise between government employees. Such forms of political expression in the public workplace are generally protected by the First Amendment.

The Supreme Court has held that when a citizen enters government service, the citizen, by necessity, must accept certain limitations on his freedoms.⁸ However, the Court has also recognized that a citizen who is working for the government is still a citizen, so a State may not discharge an employee on any basis that infringes upon his constitutionally-protected interest in freedom of speech.⁹ Even a probationary employee, who may be terminated for any reason or no reason at all, may not be terminated for exercising his First Amendment right to freedom of expression.¹⁰

The Pickering-Connick Doctrine

Forty years ago, the Supreme Court concluded that, in order to determine the validity of a restraint on the speech of a government employee, the Court needed to "arrive at a balance between the interest of the [public employee], as a citizen, in commenting upon *matters of public concern* and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees."¹¹

The *Pickering-Connick* doctrine was extended, in *Board of County Commissioners, Wabaunsee County, K.S. v. Umbehr*, to include independent contractors.¹² In *Umbehr*, the Court held that an independent contractor was protected, under the First Amendment, from retaliatory action by public employers for exercising his right to freedom of speech, just as a government employee with a property interest in his contract would enjoy.¹³

The *Pickering-Connick* doctrine exposes two levels of inquiry. First, the court must determine if the government employee is speaking as a citizen about "matters of public concern."¹⁴ "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, revealed by the entire record."¹⁵ If not, the employee has no First Amendment cause of action against the government employer's reaction to his speech.¹⁶ Further, when a public employee makes statements pursuant to his official duties, the employee is not speaking as a citizen for the purposes of the First Amendment and is not protected from employer discipline.¹⁷ The Supreme Court held,

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in *Garcetti v. Ceballos*, that a deputy district attorney's memorandum, which was written pursuant to his official duties, was not protected speech under the First Amendment.¹⁸ As a general rule, the greater the degree of public concern (e.g., public safety, public health, the "public fisc," or civil rights in general) raised by the issues, the greater the likelihood that the court will balance the competing interests in favor of constitutional protection. Second, once it has been established that the employee was addressing a matter of public concern, the court must determine if the government employer's reaction was justified. To execute the *Pickering-Connick* balancing test, the time, place, and manner of the employee's expression in the context in which the matter arose are relevant.¹⁹ In *Rankin v. McPherson*, the Supreme Court held that a public employee's statement—expressing her thoughts in the event of a second assassination attempt on then-President Ronald Reagan's life—was protected speech, and the interest in discharging her was outweighed by her interest in exercising her constitutional rights.²⁰ The court must consider that public employers are *employers*, concerned about the effective operation of the public services they have been commissioned to render.²¹ On the other hand, the threat of dismissal from employment is a powerful means of inhibiting speech, and "vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse...simply because superiors disagree with the content of employees' speech."²² The government employer's burden of justifying a particular retaliation will vary depending upon the nature of the employee's expression.²³

Buttons, Bumper Stickers, and Other Speech

The *Pickering-Connick* doctrine has also been applied to situations in which a government employer seeks to restrict a significant type of political speech by a large number of potential speakers, including using bumper stick-

ers, buttons, and yard signs to express their opinions about elections.²⁴ Because this type of action "chills" speech before it even happens, the Supreme Court has ruled that a government's burden is greater with respect to this type of preemptive restriction on expression than with respect to an isolated disciplinary action.²⁵ The government must show that the interest of both potential audiences and a vast group of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the government.²⁶

State Whistleblower Statutes

Public employers should always factor in potential liability of a state whistleblowing claim before discharging a government employee for disclosing information to the public about abuse of authority, mismanagement, or the waste of public funds.²⁷

Employer Defenses

A public official, through his or her counsel, may assert certain defenses in response to a claim that an employee was exercising his protected political speech. Before disciplining or terminating an employee who has engaged in political expression in the workplace, governmental employers should consider certain negating factors that may either limit or eliminate liability on a First Amendment claim.

A. Political Affiliation as a Job Requirement. In *Elrod v. Burns*, the Supreme Court concluded that, although political affiliation may be an acceptable requirement for some public positions if an employee's private political beliefs interfere with the effective and efficient discharge of her public duties, the duties of the chief deputy of the process division, the bailiff, the security guard, and other employees in the sheriff's office were "non-policymaking, non-confidential" employees.²⁸ Accordingly, the government can justify patronage dismissals by proving that the employee is in a "policymaking position," and that political

affiliation is an important precondition for that government position.²⁹ Although what constitutes a policymaking position is unclear, factors to be considered in determining if political affiliation is an appropriate precondition include whether the employee: has duties that are non-discretionary or non-technical, participates in discussions or meetings, prepares budgets, possesses the authority to hire and fire other employees, retains power over others, and can speak in the name of policymakers.³⁰

B. Disruption of Office Functions.

In *Rankin*, the Supreme Court held that while avoiding an employee's interference with office work, personnel relationships, or job performance can be a strong state interest, there was no proof that a public office employee's comments about the President's policies interfered with the functioning of the constable's office.³¹ Consequently, it is clear that the government can justify its actions in limiting an employee's political speech by proving that the employee's expression disrupted office functions.³²

C. Mixed-Motives Defense. To establish a political patronage claim, the burden is initially placed on the claimant to show that his conduct was constitutionally protected, and that it was a substantial or motivating factor for the employer's action.³³ In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, the Supreme Court held that a school district could escape Section 1983 liability for terminating an untenured teacher for engaging in protected expression (among other reasons), by showing that the school district would have fired the teacher anyway, without regard to the protected expression.³⁴ "The proper test is one that protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."³⁵ Although the teacher in the *Mt. Healthy* case satisfied the burden of showing that his conduct was constitutionally protected and was a motivating factor in the school district's decision not to rehire him, the district court should have

made a determination that the school district had shown, by a preponderance of evidence, that it would have reached the same decision in the absence of the protected conduct.³⁶ Thus, a public employer that takes employment action against an employee who exercises his free speech rights may avoid liability by proving that it would have made the same decision without the impermissible motive.³⁷

Tips

The following analysis should be considered before any adverse employment action is taken in respect of a governmental employee who has exercised his or her First Amendment rights:

- Determine the speaker's motive. The test is whether the employee's speech was related to a matter of broader public concern, or whether it was calculated to redress a personal grievance.
- Determine the context in which the speech was made. In other words, what were the circumstances in which the public employee was exercising his speech?
- Are "mixed motivations" applicable? While the speaker's motive is relevant to determine the context of the speech, it may not be dispositive. The employee may be a poor performer who is on a corrective action or probationary plan, subject to discipline or termination. Determine whether the public employer's decision to discipline after the employee's exercise of protected speech is based on the employee's exercise of protected speech as the motivating or substantial factor. Public employers can avoid liability if they are able to demonstrate that they would have taken the same adverse employment action against the employee in the absence of the protected conduct.³⁸
- What was the content of the speech? Was the political expression made by the employee within his role as a private citizen, or as a frustrated employee? There is no "town hall meeting" requirement under the First Amendment for an employee's complaints over internal or personnel issues.

- Consider that when a public employer makes the decision to discipline an employee for his exercise of free speech, it will likely be considered an adverse employment action, which is a key element for a retaliation claim made under the First Amendment. An adverse employment action may include a discharge or termination, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.³⁹

Additionally, make sure that legal counsel for the public entity has a strong understanding of your applicable state whistleblower statute and can articulate whether the elements of state law apply to the factual circumstances of the adverse employment action.

If possible, a "what if the employee files a future claim or lawsuit" analysis should be conducted by your legal counsel during the time that the public employer is contemplating whether to terminate an employee who has exercised his right to political expression. Analyzing potential liability under Section 1983 and the statutory limitations for state whistleblower claims may factor into a decision on whether to discharge the employee. Determining a "worst case scenario," which may be hard to calculate at the pre-termination stage for the employee, may also be helpful.

Notes

1. *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion).
2. *Id.* at 359.
3. *Branti v. Finkel*, 445 U.S. 507, 517 (1980).
4. *Id.* (quoting *Elrod*, 427 U.S. at 350).
5. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990).
6. *Id.*
7. *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976).
8. See *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (concluding that the government, acting as employer, has much broader powers than the government acting as sovereign).
9. See *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).
10. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 248-85 (1977) (acknowledging that government employees are constitutionally protected from dismissal for publicly or privately criticizing their employer's policies).

11. *Pickering v. Bd. of Educ. of Tp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968) (emphasis added); see also *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
12. 518 U.S. 668 (1996).
13. *Id.*
14. *Pickering*, 391 U.S. at 568.
15. *Connick*, 461 U.S. at 147.
16. *Id.* at 143.
17. *Garcetti*, 547 U.S. at 421.
18. *Id.*
19. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (citation omitted).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Connick v. Myers*, 461 U.S. 138, 143 (1983).
24. See *Goodman v. City of Kansas City, Mo.*, 906 F. Supp. 537 (W.D. Mo. 1995).
25. *U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) (the case involved the constitutionality of a ban in the Ethics in Government Act of 1978 that prohibited a member of Congress, federal officer, or other government employee from accepting an honorarium for making an appearance or speech or writing an article).
26. *Id.* (citing *Pickering*, 391 U.S. at 571).
27. These states and the District of Columbia have recognized a public policy exception to the "employment at will doctrine": Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Further, some states have explicit statutory protections for whistleblowers, including: California, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, and Washington. There are also state laws that offer special protections just for their own state or local government employees: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

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28. *Elrod v. Burns*, 427 U.S. 347, 350 (1976); see also *Branti v. Finkel*, 445 U.S. 507, 517 (1980).

29. *Id.*

30. *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986); see also *Elrod*, 427 U.S. at 367.

31. 483 U.S. 378, 390 (1987).

32. *Id.*

33. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

34. *Id.* at 285.

35. *Id.* at 287.

36. *Id.*

37. *Id.*

38. *Id.*

39. See *Waters v. Churchill*, 511 U.S. 661, 673 (1994). **ML**

ORDINANCES

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3. S.B. 1137, 2007-2008 Leg. Sess. (Ca. 2008).

4. Dallas, Tex., Ordinance No. 27147 (May 25, 2008).

5. *Id.*

6. Wilmington, Del., Municipal Code §4-27, Vacant Property Registration Fee Program.

7. Washington, DC., Municipal Code § 42-3131.12, Vacant Property Registration Ordinance.

8. Cincinnati, OH., Municipal Code § 1179, Vacant Building Maintenance License. **ML**

LISTSERV

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SUPREME COURT

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of private monuments.⁶ IMLA has filed an *amicus* brief in support of the City, authored by Professor Mary Jean Dolan, arguing that when a municipality accepts, owns, and installs a monument in a public park, that monument is government speech, regardless of who originally conceived or funded the project.⁷

At least one of Summum's aphorisms—nothing rests; everything moves—appears to be accurate. The Tenth Circuit's ruling is sending waves of concern throughout the local government community, including the City of Casper, Wyoming, the hometown and burial place of Matthew Shepard. In 1998, Matthew was attacked because he was gay, and later died. Pastor Fred Phelps of the Westboro Baptist Church now seeks to use the Tenth Circuit's ruling to force the City to erect a monument in its Historic Monument Park, reading: "MATTHEW SHEPARD Entered Hell October 12, 1998, in

Defiance of God's Warning 'Thou shalt not lie with mankind as with womankind: it is abomination.' Lev. 18:22."⁸ The *amicus* brief filed by Casper notes it "provides the starkest example of the egregious consequences of the decision below," in which it may be forced to add the Phelps monument to its park. "The city dreads that prospect for reasons any person who values civility can easily understand."⁹

Notes

1. Summum also offers "modern mummification." More information on Summum is available at their website, <http://www.summum.us/about/purpose.shtml>.

2. *Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007).

3. *Id.* at 1176.

4. *Id.*

5. *Id.* at 1179.

6. *Pleasant Grove City, Utah v. Summum*, 128 S.Ct. 1737 (U.S. Mar. 31, 2008) (No. 07-665).

7. Brief of Amicus Curiae, 2008 WL 2550618 (U.S. Jun. 23, 2008).

8. Brief of Amicus Curiae, 2008 WL 2550620 (U.S. Jun. 23, 2008).

9. *Id.* **ML**

Model Ordinance Service to Go Online in Late 2008

As IMLA increasingly moves into the online realm, we are proud to announce that our Model Ordinance Service (MOS) will also be moving online in late 2008. This improved service will be available to members who currently receive the MOS. Access will be provided through MyIMLA, IMLA's members-only Web site. In addition to this new project, IMLA will also be releasing new model ordinances for your use, including releases in 2008 and early 2009, of a Model Public Gathering Ordinance, Model Green Building Ordinance, Model Tree Preservation Ordinance, Model Pit Bull Ordinance, and more. In addition to these new releases, IMLA anticipates releasing updates to our existing database, such as an updated Model Solicitation Ordinance. If you are interested in authoring a model ordinance for IMLA (or providing suggestions for topics), please contact Mr. Devala Janardan at djanardan@imla.org.

Municipal Lawyer

The next issue of *Municipal Lawyer* takes a look at the Supreme Court and City Hall, with articles on the landmark ruling in *D.C. v. Heller*; a review of the Court's employment decisions over the last Term; and an analysis of the ruling in *Kentucky v. Davis*.