WHAT IS DIFFERENT ABOUT PUBLIC SECTOR LAW?

by

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I. FREE SPEECH, EMPLOYEES AND DUTY OF LOYALTY AS A PRIVATE CITIZEN

In City of San Diego v. John Roe, No. 03–1669 (S. Ct. 2004), John Roe, a police officer with the city of San Diego was fired for selling videotapes on eBay that showed him stripping off a police uniform and engaging in lewd acts, along with other related unsavory behavior. Roe sold the video along with other adult items on the "adults-only" section of eBay. In his eBay profile, he identified himself as being in law enforcement and used a police-related user name.

Roe's supervisor, a police sergeant, discovered some of Roe's eBay offerings. The city confronted Roe and ordered him to stop selling these items, but Roe failed to fully comply. The city then fired Roe.

Roe filed a lawsuit claiming that the city violated his First Amendment right to free speech when it fired him. On December 6, 2004, a unanimous U.S. Supreme Court upheld Roe's termination, holding that his right of free speech was not violated.

In reaching its decision, the Court noted that a government employee does not give up all of his First Amendment rights that are enjoyed by other U.S. citizens when they become a public employee. However, **a government employer may impose certain restraints on its employees' speech that would be unconstitutional if applied to the general public.**

In general, the limits on a public employer's right to restrict employees' speech fall into two categories.

First, a public employee comments on matters of public concern must be balanced against the interest of the state, such as the interests of the employer, in promoting the efficiency of the public services it provides. However, a matter of "public concern" must be a subject of **legitimate news interest**, which is a subject of general interest and of **value** and **concern** to the public. Typically, that would involve government policies that are of interest to the public at large, **NOT** policies that apply only to the employees of the public entity that relate to the employer's right to run its operations.

The limits of a public employer's control over employee speech are also set forth in cases in which the government employees speak or write on their own time about topics **unrelated** to their employment. That speech will have First Amendment protection absent some strong governmental justification to regulate it.

The Court then concluded that Roe's "speech" in this case was not a matter of public concern, so protection for his speech was not protected under this first category.

The Court next held that Roe's conduct was closely related to his employment. The Court reasoned that Roe took deliberate steps to link his videos and other wares to his police work, all in a way that was injurious to the reputation of the San Diego Police Department. The Court then concluded that the speech in question was detrimental to the mission and functions of the employer.

Specifically, the Court reasoned that, "**When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.**"

Therefore, the Supreme Court ruled that Roe's firing did not violate the employee's Constitutional rights.

II. FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT AS A PRIVATE CITIZEN DURING WORK HOURS

In Klosowski v. City of Bay City, 2017 WL 2684113 (6th Cir. June 21, 2017), Ron Klosowski was a contracted bridge tender in Bay City. Klosowski's conflict with the city began when he told the mayor of Bay City that the government could save a considerable sum if it closed two bascule bridges in December, when the Saginaw River freezes over. Although the mayor and other public officials liked Klosowski's idea, it angered many of the other bridge tenders who wanted to work through December.

So, Joe Ledesma, Klosowski's supervisor, asked Klosowski not return the following season.

Unhappy with this decision, Klosowski sued Ledesma and Bay City, together referred to as the "Defendants," claiming that they violated his rights under the First Amendment to the U.S. Constitution.

The district court found that Klosowski had not put forth sufficient evidence to support his claims and awarded summary judgment against him on all counts.

Klosowski appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit reversed and found for Klosowski.

Ledesma and the city argued that they did not violate Klosowski's rights because:

(1) Klosowski was speaking as an employee, rather than a citizen, on matters of public concern and

(2) Klosowski did not establish that his interests outweighed those of the government.

The key distinction between protected and unprotected speech among public employees is "whether the employee was speaking as a citizen and whether the topic was a matter of public concern." Boulton v. Swanson, 795 F.3d 526, 531–32 (6th Cir. 2015).

First, the court was not convinced by Ledesma and the city's argument that Klosowski was speaking as an employee pursuant to his "official responsibilities." Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

Defendants are correct that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." Id.

However, the court reasoned that the critical question in this regard "is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." Boulton, 795 F.3d at 533–34 (quoting Lane v. Franks, 573 U.S. —, 134 S. Ct. 2369, 2379 (2014)).

The answer to that question here is simple: criticizing unnecessary government spending is not "ordinarily within the scope of [Klosowski's] duties." Instead, his duties were limited to tending bridges. The court found that the First Amendment encourages the expression of these opinions.

The court reasoned that, "criticizing unnecessary government spending is not "ordinarily within the scope of [Klosowski's] duties." Instead, his duties as an at-will contractor were limited to tending bridges.

The court therefore held that Klosowski had established that he was speaking on a matter of public concern. As long as a public employee's speech "relates to any matter of political, social, or other concern to the community at large," it "is properly considered speech on a matter of public concern." Leary v. Daeschner, 349 F.3d 888, 899 (6th Cir. 2003)

Specifically, "speech addresses a matter of public concern when it alleges corruption and misuse of public funds." Boulton, 795 F.3d at 532 (citing Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1, 131 F.3d 564, 576–77 (6th Cir. 1997)).

Ultimately, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 534 (quoting Connick, 461 U.S. at 147–48).

The court reasoned that this is not a case where the criticism of minor inefficiencies is held up as a matter of public concern simply because the use of public funds are implicated. Instead, this is a case where public officials, including the mayor, public-works director, state legislators, and the Coast Guard, actually took an interest in Klosowski's proposal to close the bridges.

Under these circumstances, and particularly when the City is trying to save money, a reasonable jury could conclude that spending a relatively large sum of money is of public concern. Therefore, Klosowski's termination violated his First Amendment right of free speech.

III. INTENTIONALLY OR RECKLESSLY FALSE STATEMENTS MADE AS A PRIVATE CITIZEN ARE NOT PROTECTED BY THE FIRST AMENDMENT

In Westmoreland v. Sutherland (6th Cir 12/06/2011), Bay Village decided to eliminate the diving team in June of 2008. The elimination was done for budgetary purposes.

On September 1, 2008, a 7-year old boy tragically drowned at Huntington Beach. Huntington Beach is located within Bay Village and is under the jurisdiction of the Metro Parks. The Bay Village Police Department received a 9-1-1 call reporting a possible drowning. Metro Parks Rangers were dispatched first, along with the Bay Village emergency response team. Westmoreland was part of the emergency response team. Eventually, additional emergency personnel arrived on the scene, including individuals employed by Rocky River, Avon Lake, Westlake, the U.S. Coast Guard, and the Ohio Department of Natural Resources. In addition, search boats, jet-skis, and a helicopter were part of the search effort.

Nearly an hour and a half after the 9-1-1 call was made, a Bay Village firefighter located the child. He was found in approximately three feet of water after rescue personnel employed the "human chain" approach. Although approximately 12 divers were on the scene, no divers were used for diving purposes in the efforts. Medical revival efforts were unsuccessful and the child died.

On September 15, 2008, Ron Westmoreland attended the Bay Village City Council meeting. Westmoreland identified himself as a 16-year member of the Bay Village Fire Department and a former trainer of the dive team. He further indicated that he is an International Public Safety Diver Trainer and an expert in the area of public safety diving. During the public address segment of the meeting, Westmoreland made the following statements, in part:

- Now a seven-year-old kid is dead that last year would have been found in about twenty minutes by the Bay Village Dive Team;
- ... this Council, this administration, is partly responsible for condemning that child to death;
- I knew I was watching a seven-year-old boy being condemned to death because we had no dive team. We could not go get this kid;
- The child was on the bottom. Divers have [sic] to go and get him;
- You don't care. That's why I am speaking today;
- The citizens need to know that their safety is jeopardized by the cuts in the manpower and the funding for the safety forces;
- ...what price did you put on a child's life? How much did you save? Did you save enough that it was worth letting a seven-year-old die?
- A little boy had to die but you guys saved some money.

Defendant Sutherland, the mayor of Bay Village, concluded that the remarks made by Westmoreland constituted **"insubordination, malfeasance, misfeasance, dishonesty, failure of good behavior, and conduct unbecoming of an officer of the Bay Village Fire Department."** On October 9, 2008, Bay Village served Westmoreland with a Notice of Disciplinary Action for his speech at the September 15, 2008 meeting. Westmoreland had previously been disciplined for conduct unrelated to the drowning incident. Bay Village employs a system of progressive discipline and, as a result of his previous discipline, he received a three tour unpaid suspension for his speech at the city council meeting. Westmoreland appealed his suspension. The appeal was denied and the grievance was ultimately submitted to arbitration. The arbitrator upheld the suspension.

Westmoreland filed this lawsuit against Bay Village, claiming that suspending him for his comments violated his First Amendment Right of Free Speech under the U.S. Constitution.

Bay Village claimed that Westmoreland's speech at the meeting was not protected by the First Amendment.

The Sixth Circuit Court of Appeals reasoned that "Not all speech by a public employee is protected by the First Amendment." Banks v. Wolfe County Bd. of Edu., 330 F.3d 888, 892 (6th Cir. 2003). "**When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.**" Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

Therefore, in determining whether a public employer has violated the First Amendment by firing an employee for engaging in speech, the U.S. Supreme Court has instructed courts to engage in a three-step inquiry.

First, a court must ascertain whether the relevant speech addressed a matter of public concern. If the answer is yes, then the court must balance the interests of the public 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 the public services it performs through its employees.

Finally, the court must determine whether the employee's speech was a substantial or motivating factor in the employer's decision to take the adverse employment action against the employee.

With regard to the first step, employee statements are protected only if the public employee speaks "as a citizen," regarding a matter of "public concern." Therefore, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes...."

In other words, an employee speaking out of personal interest purposes is not entitled to First Amendment protection.

As an initial matter, the court rejects Bay Village's argument that Westmoreland spoke at the city council meeting as an employee of Bay Village. Bay Village argues that:

> "[s]ince it is undisputed that Westmoreland is not a Bay Village resident but rather a resident and citizen of Amherst,

> Westmoreland was arguably speaking in his official capacity as an employee of the City of Bay Village, rather than expressing concerns to his fellow citizens."

This is the extent of Bay Village's argument. Absent any factual analysis, the court rejects the argument.

As an initial matter, there is no indication that the speech was made pursuant to Westmoreland's duties as a firefighter. Bay Village does not suggest that Westmoreland was required to speak at the meeting as part of his employment.

Moreover, the speech occurred at a public city council meeting; Westmoreland did not express his views inside the workplace.

These factors tend to support the conclusion that Westmoreland made the statements as a private citizen. Bay Village fails to point to any case law holding that, because Westmoreland did not live in Bay Village, the speech is unprotected. Therefore, the court rejected Bay Village's argument.

Next, the court determined whether Westmoreland's speech was a matter of public concern. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." **Generally speaking, public concerns include "any matter of political, social, or other concern to the community." Speech is of a "public concern" if it "involves 'issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government.'"**

Therefore, "public concern" speech includes speech pointing out the failure of the government to discharge its duties or identifying actual or potential wrongdoing by the governmental entity.

Additionally, in distinguishing between matters of public and private concern, the court did not focus on what might incidentally be conveyed by the fact that the employee spoke in a certain way, but the **point of the speech** in question. Thus, controversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection. However, the employee's entire speech does not have to focus on matters of public concern, **as long as some portion of the speech does.**

Bay Village also argued that, even if the subject matter of Westmoreland's speech involved a matter of public concern, the speech itself cannot be considered a matter of public concern because it is false. **According to Bay Village, the First Amendment does not protect knowingly false speech.**

Westmoreland responded by saying his speech is not false and, therefore, relates to a matter of public concern.

It is well-settled that false statements are not per se undeserving of protection. Thus, the Sixth Circuit addressed Bay Village's argument regarding the falsity of the speech in step one of the analysis, i.e., ascertaining whether the speech involves a matter of public

concern. Upon review, the court agrees with Bay Village and concluded that certain statements made by Westmoreland during the city council meeting were false statements made with a reckless or intentional disregard for the truth.

Specifically, Westmoreland stated "now a seven-year-old kid is dead, that last year would have been found in about twenty minutes by the Bay Village Dive Team." In addition, Westmoreland stated, "I knew I was watching a seven-year-old boy being condemned to death because we had no dive team. We could not go get this kid."

Westmoreland further indicated that, "the child was on the bottom. Divers had to go and get him."

It is undisputed that Westmoreland was present at the scene and aware of the details of the rescue effort. Additionally, it is undisputed that approximately 12 divers were present at the scene and that none of these divers were deployed for diving purposes because the child was located in three feet of water and the "human chain" approach was used. Westmoreland does not refute any of these facts.

Therefore, Westmoreland, at a minimum, was reckless in attributing the death of the child to the lack of a dive team. Westmoreland offered no evidence or argument as to how the existence of a Bay Village dive team would have had any impact whatsoever on saving the child's life.

However, Bay Village offered the affidavit of James Sammon, the Bay Village Fire Chief, who worked as a firefighter for Bay Village for 34 years. Sammon avers that the Bay Village dive team has never rescued an individual from drowning. Not one.

Sammon further stated that it took approximately 30 minutes from the time the 9-1-1 call was received until firefighters could establish control of the scene. Therefore, it would not have been possible for divers to save the child within "twenty minutes." Again, none of these facts are disputed by Westmoreland.

Given that Westmoreland was admittedly an experienced diver and long-time firefighter, who was present at the scene, he knew that no divers were deployed into the water and that the child was found in shallow water. As such, his statement that "now a seven-year-old kid is dead, that last year would have been found in about twenty minutes by the Bay Village Dive Team" was made with a reckless, if not intentional, disregard for the truth. The same holds true with regard to his statement that the boy was "condemned to death" because of the lack of a dive team.

Westmoreland also indicated that the boy was on the bottom and that "divers had to go in and get him." Like the first statement, both of these statements are recklessly or intentionally false. Westmoreland was at the scene and fails to offer any evidence indicating that he was unaware of the fact that divers were at the scene but not deployed in a diving capacity that day.

Having concluded that these false statements were made with a reckless or intentional disregard for the truth, the court concluded that Westmoreland's statements were not "matters of public concern." Therefore, they are not entitled to First Amendment

protection and so Bay Village did not violate Westmoreland by disciplining for what he said at the public meeting.

IV. SELF-INTEREST IN SPEECH ***DOES NOT*** PRECLUDE FIRST AMENDMENT RETALIATION CLAIMS

In Kristofek v Village of Orland Hills, No. 12-2345 (C.A. 7, Mar. 11, 2013), David Kristofek was a part-time officer for the Village of Orland Hills Police Department. On Nov. 12, 2010, about two months after Kristofek was hired, he ran a license plate on a 2000 Kia vehicle and found the registration was suspended. Kristofek pulled over the car and found a man driving and a woman sitting up front. The man did not have proof of insurance, so Kristofek arrested him.

In November 2010, Kristofek arrested a driver for traffic violations, but the driver turned out to be the son of a former mayor of a nearby town. The man told the officer he is the son of a former mayor of the area and asked to be released, the suit claims.

Kristofek was then handed a cell phone. He then heard a woman tell him she was the driver's mother and she also asked that he not be arrested.

Still, Kristofek continued to take the man into custody and towed the car.

While Kristofek was filling out paperwork at the police station, two Orland Hills officers told him to stop, to give all paperwork to Orland Hills Deputy Chief Michael Blaha and delete anything about the traffic stop that he had written into the station's computers.

A couple of days later, Blaha told Kristofek that the arrest was done well, but releasing the driver was a decision "above you and I."

Later, Kristofek learned in a training seminar that he might have committed a crime. Kristofek learned "in a case with similar facts, an Illinois appellate court ruled that a police officer is a public employee under the 'official misconduct' statute and can be prosecuted for a violation."

Based on an attorney's advice, Kristofek reported the incident to the FBI as "possible political corruption in the Orland Hills Police Department and/or Village of Orland Hills."

On April 21, 2011, about three weeks after taking the training course and after telling other Orland Hills officers that he spoke with the FBI, Orland Hills Police Chief Thomas Scully confronted Kristofek.

Scully gave him a choice between resigning or being fired from the force. Scully and said he couldn't trust Kristofek anymore because he spoke with people outside the department about the release.

Kristofek refused to resign, and he was immediately escorted out of the police station, the suit claims.

The Village of Orland Hills objected to Kristofek's claim for unemployment benefits on the basis that Kristofek was "insubordinate."

Kristofek sued Scully and the village of Orland Hills, claiming that he had been fired in retaliation for exercising his First Amendment rights. The complaint stated that his statements to other officers and the FBI were made in his capacity as a citizen "contesting the unequal application of the laws to its citizens."

The City defended the suit by asserting that the speech did not involve a matter of public concern, so it was not protected speech. The City supported its defense by arguing the speech was motivated entirely by Kristofek's self-interested desire to protect himself from civil and criminal liability, and that courts have found "speech of public importance is only transformed into a matter of private concern when it is motivated *solely* by the speaker's personal interests."

Finding that Kristofek's speech did not involve matters of public concern, U.S. District Judge Samuel Der-Yeghiayan dismissed the complaint. Kristofek's statements were motivated by his self-interested fear of prosecution rather than by a desire to address a public concern in his capacity as a private citizen, Der-Yeghiayan reasoned. The statements were thus not entitled to First Amendment protection.

Kristofek appealed to the Seventh Circuit Court of Appeals.

The Seventh Circuit reversed the trial court's decision, holding that the officer's motive, by itself, does not conclusively determine whether a public employee's speech involves a matter of public concern and is thus protected.

"The mere fact that Kristofek was motivated by his self-interest does not make it implausible that he was also motivated to help the public," Judge Ann Claire Williams wrote for a three-member panel.

"Any reasonable person would understand that a report to the FBI could potentially result in widespread changes to police practices in Orland Hills. ... Because it is plausible that Kristofek's motives were mixed, Orland Hills's sole argument on appeal fails. We may reverse on that basis alone."

The court reasoned:

> [i]n sum, if the objective of the speech—as determined by content, form, and context—is simply to further a purely personalized grievance, then the speech does not involve a matter of public concern. But if an objective of the speech was also to bring about change with public ramifications extending beyond the personal, then the speech does involve a matter of public concern.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Seventh Circuit Court of Appeals in this case basically rules that someone who exercises their speech cannot have both a "public" and a private interest in making this speech. According to this court, the two are mutually exclusive.

Therefore, in determining if employees have a First Amendment right to exercise their speech, you need to determine if their speech was for their own benefit or for the benefit

of the public. However, in this case, as well as in the Sixth Circuit, the speech can be for the employee's benefit as well as the public's.

Also …

One of the defining issues in a public-employee First Amendment case is whether the employee spoke on a **matter of public importance** or merely engaged in a private grievance. The U.S. Supreme Court for many years has said that in order to have a valid free-speech claim, a public employee must speak on a "matter of public concern."

In Mosholder v. Barnhardt, 679 F. 3d 443, (6th Cir. 2012), a prison employee in Lapeer, Michigan, Ruth Mosholder, challenged her transfer from a school officer to a general corrections officer position as retaliatory. She alleged that officials transferred her in part because of a letter she wrote to several state representatives and senators.

In the letter, Mosholder objected to prison officials' failure to maintain inmate discipline at a rap contest. She alleged that many inmates frequently flashed gang signs at the event and that prison officials ignored "a very volatile situation." Her letter also claimed the prison suffered from an overall lack of discipline.

Mosholder sued prison officials, alleging a violation of her First Amendment rights. Originally, a lower court denied the officials' motion for summary judgment in February 2010, but then in November 2010 granted the officials' motion, finding that Mosholder had engaged in private speech not deserving of First Amendment protection.

However, the 6th Circuit reversed the lower court in its decision, recognizing that Mosholder's letter clearly addressed issues of public importance.

"Mosholder disagreed with the operation of an institution charged with protecting the public," the appeals court wrote.

Clearly, Mosholder had a private interest in writing the letter. The 6th Circuit Court of Appeals specifically stated that she was "almost certainly motivated, at least in part, by personal disagreement" with prison administrators. However, the court stated that didn't mean that her letter didn't address important public issues or was merely a standard employee grievance. She raised the vital issue of public safety in a public institution.

The 6th Circuit recognized this: "A public concern/private interest analysis does not require that a communication be utterly bereft of private observations or even expressions of private interest."

In this case, the Fourth Circuit affirmed summary judgment for the Defendant superintendents of a correctional facility on a claim that they had violated certain employees' First Amendment rights. The court held that the superintendents had not violated the employees' rights by terminating their employment in alleged retaliation for filing discrimination complaints because the Plaintiffs' speech did not involve a matter of public concern.

However …

In Brooks v. Arthur, 685 F. 3d 367 (4th Cir. 2012), James Brooks and Donald Hamlette, were corrections officers at a Virginia Department of Corrections ("VDOC") facility who were fired after Brooks discussed with the VDOC's Equal Employment Opportunity ("EEO") that he was being singled out for unfair workplace treatment and Hamlette, a minority, filed a complaint with the EEO that he was being discriminated against on the basis of his race and religion. Shortly after they were fired, the VDOC Department of Employment Dispute Resolution reinstated both employees and awarded them back pay. The Plaintiffs subsequently brought a 42 U.S.C. § 1983 claim against the Defendants, alleging that the VDOC superintendents had violated their First Amendment right to free speech by firing them in retaliation for making their employment discrimination claims.

The District Court for the Western District of Virginia granted summary judgment for the Defendants, and on appeal the Fourth Circuit upheld that order. The court found that the speech that the Plaintiffs alleged had been curtailed was not a matter of public concern but pertained only to personal grievances with an employer. Thus, the First Amendment could not be invoked to protect the Plaintiffs' complaints regarding employment favoritism. The court concluded by stating that it was not offering any view on the merits of any other claims the Plaintiffs may have, but rather, that the First Amendment was not violated in this employee-grievance dispute between these two parties.

Brooks alleged that he was retaliated against based on speech uttered in the course of his lodging an internal employment-related complaint. The United States Supreme Court has not specifically defined a test for determining whether an employee's speech touches on a matter of public concern in this context. The court noted, however, that the Supreme Court has recently "expressed skepticism that speech in the context of an employment grievance proceeding addresses a public concern meriting constitutional protection…." Addressing the "boundary between protected speech and personal grievance," the court concluded that speech is protected when the conduct underlying the grievance at issue "crosses a line to the point that it imperils the public welfare…."

Applying this standard, the court ultimately agreed with the trial court's determination that Brooks' speech didn't touch on a matter of public concern – and affirmed.

V. FREE SPEECH, EMPLOYEES AND THE DUTY OF LOYALTY *NOT* AS A PRIVATE CITIZEN (ON THE JOB)

In Garcetti v. Ceballos, No. 04-473 (U.S. May 30, 2006), Richard Ceballos, a supervising Los Angeles Deputy District Attorney, was asked by defense counsel to review a case in which it was suspected that the affidavit used by police to obtain a critical search warrant was inaccurate. After reviewing the affidavit, Ceballos concluded that the affidavit did include serious misrepresentations. Ceballos relayed his findings to his supervisors and followed up with a disposition memorandum recommending dismissal. Ceballos' supervisors disagreed with his conclusions and proceeded with their prosecution.

At a hearing, the affidavit was challenged. Ceballos recounted his observations about the affidavit, but the trial court rejected the challenge. Claiming that petitioners then retaliated against him for his memo in violation of the First and Fourteenth Amendments, Ceballos filed this lawsuit. The District Court ruled that the memo was **not protected speech** because Ceballos wrote it pursuant to his employment duties. The case was eventually appealed to the U.S. Supreme Court.

The U.S. Supreme Court held that when public employees make statements pursuant to their official duties, they are **not** speaking as citizens for First Amendment purposes. As a result, the Constitution does **not** insulate their communications from employer discipline.

In reaching its decision, the Supreme Court reasoned that two questions must be asked in determining whether Constitutional protections will be afforded to public employee speech. The first question lies in determining whether the employee spoke as a citizen on a matter of public concern. If the answer is "no," the employee has no First Amendment protections.

Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Therefore, a public entity has broader discretion to restrict speech when it acts in its role as an "employer." However, the restrictions the employer imposes must be directed at speech that has some **potential** to affect its operations.

On the other hand, a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. As long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

The key factor at issue in this case is that Ceballos' expressions were made pursuant to his duties.

Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his

performance. 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. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

This result is consistent with the Court's prior emphasis on the potential societal value of employee speech and on affording government employers sufficient discretion to manage their operations. The public employer may have to tolerate certain types of employee speech made publicly that is a matter of public concern…however, public employers do not have to tolerate speech made pursuant to an employee's assigned duties that are contrary to the organization's goals.

Public employees do not have the right to perform their jobs however they see fit. Public sector employers, just as with private sector employers, must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department.

Therefore, if Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

ALSO…

In Gasper v. Washington Township, (2003) Case No. 02AP-1192, Robert Gasper, a captain with the Washington Township Fire Department, was accused of committing acts of sexual harassment against a female Firefighter/Paramedic. In a meeting held on May 1, 2001 with Washington Township Administration, Gasper was presented with these allegations.

At the end of the meeting, and in subsequent verbal and written supervisory directives, Gasper was instructed to keep the allegations and investigation confidential. However, Gasper ignored the directive of his superiors and openly discussed his comments and the allegations with others.

On May 11, 2001, Gasper was given a verbal warning, and on May 22, 2001 Gasper was issued a written warning for breaching the confidentiality orders. The warnings reprimanded Gasper for "failure to follow orders of a supervisor."

Gasper then started making very disparaging remarks regarding his superiors, which included referring to them as "idiots," as well as refusing to cooperate in the Township's investigation.

As a result, the Township terminated Gasper's employment.

Gasper filed a lawsuit contesting his discharge. Gasper's main contention was that none of the allegations made against him dealt with his ability to fight fires "in the performance of his official duty" as a firefighter. However, the Appeals Court ruled for the Township.

Specifically, the court ruled that this was not a case where Gasper's skill, ability, technique, or courage as a firefighter was being challenged. Instead, the charges dealt with **purely interpersonal matters (ATTITUDE)**, totally unrelated to Gasper's firefighting skill (**TECHNICAL SKILLS**).

The parties did not dispute that Gasper's official duties as a fire captain also included non-firefighting duties of:

1. Maintaining discipline, morale, and good order (**as determined by Township management**) and

2. Carrying out the directives of his superiors.

Further, the court also held that it was permissible for the Township to use evidence of past events for which Gasper already had been disciplined to terminate his employment.

The court held that Gasper not only made inappropriate and derogatory comments and engaged in inappropriate conduct toward members of the Fire Department, but also made repeated negative and inappropriate comments regarding his superior officers and the Fire Department.

Consequently, Gasper's termination was upheld by the court.

Also …

In Mills v. City of Evansville, No. 05-3207 (7th Cir. 06/20/2006)**,** Brenda Mills was a sergeant with the Evansville, Indiana Police Department. Her duties included supervising "crime prevention officers" (CPOs) during the first shift in the city's west sector. According to Mills, "CPOs are part of the patrol division and are assigned throughout the city to, in part, interact with neighborhood associations in an effort to reduce the incidence of crime, foster good community relations and deal with quality of life issues."

However, when a manpower shortage arose, Chief David Gulledge decided to move some officers from CPO duties to active patrol. Gulledge's plan was to reduce the number of CPOs under Mills by one officer.

In January 2002, Mills attended a meeting where Chief Gulledge described what would be happening under this plan. After the meeting, Mills and other officers, including Chief Gulledge, Deputy Chief Reed and Assistant Chief Burnsworth, discussed the subject in the building's lobby. Mills told these senior managers that the plan would not work, that community organizations would not let the change happen, and that sooner or later they would have to restore the old personnel assignment policies. Others present at this meeting

in the lobby got the impression that Mills would try to enlist community organizations and politic against the plan rather than describe its virtues.

In the months that followed, two things happened to Mills. First, Captain Brad Hill put a "Summary of Counseling" into her personnel file. This letter said that Hill disapproved of Mills' attitude at the meeting, her choice of time and place for presenting her views, and her failure to work through the chain of command in voicing her objections.

Second, Mills was removed from her supervisory position and assigned to patrol duties. Even thought this reassignment increased her pay by $1,200 per year (because of a shift differential), it cost her the use of a departmental car, which had previously been at her disposal 24 hours a day. After about a week on patrol she was moved back indoors to the support services division but did not regain supervisory responsibilities or personal use of a car.

Mills filed a lawsuit against the City of Evansville for violating her Constitutional rights of free speech by retaliating against her for voicing her opinions regarding the new manpower plan. Mills claimed that the city's actions against her were politically motivated for the purpose of keeping her quiet due to an upcoming election.

In reviewing this case, the court held that it must first determine whether Mills was speaking as a "private citizen" or as part of her public job. Only when government penalizes speech that a public employee makes as a "citizen" must the court determine whether the subject matter of particular speech is a topic of public or private concern. (See previous discussion of the U.S. Supreme Court's decision in Roe and Cellabos.)

In this case, Mills was on duty, in uniform, and engaging in a discussion with her superiors, all of whom had just emerged from Chief Gulledge's briefing when she made her comments. She spoke in her capacity as a public employee contributing to the formation and execution of official policy. It was from this conversation that the City of Evansville concluded that Mills would not be "zealously" supporting the Chief's plans and may even try to undermine it.

The court reasoned that an employer has a powerful interest in ensuring that all of its employees will stand behind the direction set by their superiors rather than subvert the decisions they make. In reviewing this decision, the court looked to the U.S. Supreme Court's decision in Garcetti v. Ceballos, No. 04-473 (U.S. May 30, 2006), which held that…

> "[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."

Public employers must be able to change assignments in response to events (including statements) that reveal whether employees will be faithful agents of the decisions made by the accountable managers. It promotes rather than undermines first amendment values when those who make decisions, and are held accountable for them at the polls, can ensure their implementation within the bureaucracy. Chief Gulledge was entitled to insist that his

subordinates not undermine his directions. Therefore, the actions taken against Mills did not violate her Constitutional rights.

Also …

In Dibrito v. City of St. Joseph, 675 Fed. Appx. 593, 597 (6th Cir. 2017), after an extensive career with the Federal Bureau of Investigations ("FBI"), Albert DiBrito began working for the City of St. Joseph ("City") as the deputy director of the Public Safety Department (PSD). As deputy director, DiBrito reported to Mark Clapp, PSD's director.

From the beginning, DiBrito began keeping notes of actions that Clapp took, and that DiBrito disapproved. In 2013, a city resident called the PSD requesting that a firearm be removed from her residence after her husband's death. Officer Tom Vaught met with the citizen, obtained the firearm, and obtained permission to destroy or auction the firearm. Vaught then turned the firearm over to Clapp. After deciding that he would like to keep the firearm for himself, Clapp began discussing with several individuals if he should purchase it. DiBrito advised Clapp not to purchase the firearm. However, Clapp took the firearm home with him and the next day he paid the city resident $50 for the firearm.

DiBrito decided to "check some legal issues" related to Clapp's purchase of the firearm, including contacting the United States Attorney's office, but was unable to find any city policy or federal law that Clapp had violated.

In 2014, DiBrito had a disagreement with Jim Crowe, who was the command equal of DiBrito on the fire department side of the PSD. Crowe believed DiBrito had a role in Crowe's rejection from a police chief training program. After the incident, DiBrito met with Clapp to discuss the issue. At this meeting, Clapp threatened DiBrito's termination if DiBrito had a role in Crowe's rejection.

The same day as the DiBrito-Clapp meeting, Clapp met with Vaught to discuss a promotion that Vaught did not receive. To counteract Vaught's questioning of the unfairness of the hiring process, Clapp told Vaught that the hiring of DiBrito was also unfair. Clapp went on to explain that the City's former city manager hired DiBrito even though other candidates had better qualifications because DiBrito was investigating the former city manager. Clapp told Vaught that DiBrito dropped the investigation in exchange for this job and project money.

Vaught told DiBrito about Clapp's comments. The next business day DiBrito filed a formal complaint with Lewis regarding Clapp's firearm purchase that occurred four months prior. Although DiBrito admitted that he could not find any policy that had been violated and that the United States Attorney's office had stated no federal law was violated, DiBrito suggested that Lewis contact the Michigan State Police to investigate. While DiBrito did not mention Clapp's comments to Vaught in the formal complaint, DiBrito did tell Lewis about the comments the following day.

Due to the complaint, Lewis investigated and placed Clapp on administrative leave. Lewis sent a copy of DiBrito's complaint to the Michigan State Police. The state police responded that it would not conduct a criminal investigation because "the elements to prove that a crime was committed and prove it beyond a reasonable doubt to a jury would

be extremely unlikely." Lewis also determined that no city policy prohibited Clapp's conduct. To avoid this happening again in the future, Lewis directed DiBrito to draft a policy prohibiting the conduct.

The investigation left Lewis "troubled by the background of the complaint," and he believed that DiBrito's "own words and statements" indicated that DiBrito knew Clapp had not violated the law. The investigation also revealed numerous management issues within the PSD. Therefore, the City hired Theresa Smith Lloyd, an attorney, to conduct a third-party investigation.

After interviewing a number of city employees, Lloyd submitted a report in 2014. The report concluded that Clapp's statements to Vaught regarding DiBrito's hiring were "inappropriate statements for a commanding officer to make regarding a second in charge," and the "issue should be dealt with appropriately within the department." The report also stated that many employees had raised issues regarding DiBrito's "honesty, inappropriate statements to subordinates regarding a commanding officer, favoritism, and retaliation," and such issues "must be addressed with DiBrito."

After receiving this report, Lewis terminated DiBrito and suspended Clapp for five days without pay.

After his termination, DiBrito sued the City, Lewis, and Clapp ("Defendants").

DiBrito claimed that Lewis and Clapp fired him due to his constitutionally protected speech in violation of the First Amendment. In particular, DiBrito argued that he made two constitutionally protected statements:

(1) The complaint about Clapp's purchase of the firearm and

(2) The complaint about Clapp's statements to Vaught.

The district court granted summary judgment to the Defendants on the federal claims and declined to exercise jurisdiction over the state-law claims.

Dibrito then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit held for the defendants.

First, the court ruled that DiBrito's complaint about his superior's firearm purchase was made pursuant to his official duties as Deputy Director of Public Safety ***and*** a police officer rather than a private citizen.

This complaint DiBrito wrote regarding his superior was prepared on department letterhead, referenced a police report regarding the turned-in firearm, made recommendations regarding additional investigations that should be undertaken, and was signed 'Deputy Director Al DiBrito.' These facts prove that DiBrito was acting as Deputy Director of the PSD rather than a 'concerned' citizen."

Consequently, DiBrito had no First Amendment protection he was acting in his official capacity.

Second, DiBrito's complaint about his superior's comments to a subordinate did not relate to a matter of public concern, but was instead a private intra-office employment dispute.").

Therefore, the Sixth Circuit upheld Dibrito's termination.

Also …

In Holbrook v. Dumas, 2016 WL 4376428 (6th Cir. 2016), Jonah Holbrook was the fire chief for the Village of Lincoln Heights.

The Village of Lincoln Heights, Ohio received notice that its liability insurance coverage would be terminated due to the volume of claims against the village, which amounted to more than double the premiums the village had paid over a 14-year period. After the village manager advised the fire chief that the safety departments would not be able to run without coverage, the fire chief messaged all employees in the department that they could potentially be "**out of a job**." A follow-up Facebook post directed to all current and past employees of the police, fire, and safety departments reiterated that the departments were in "jeopardy."

The village manager requested an explanation for the chief's actions and asked for his resignation; when the chief refused, the manager fired him citing his "disruptive activity," "insubordination," "unauthorized disclosure," and "unsatisfactory performance."

Holbrook was then terminated from his position. He filed suit and the case went to the Sixth Circuit Court of Appeals.

Holbrook claimed that his comments were protected by the First Amendment, but the Sixth Circuit disagreed. The court found that nothing in the record supported the chief's position that he was speaking as a private citizen regarding the mismanagement of the village government.

However, the court reasoned that it was clear that his speech owed its existence' to his responsibilities as fire chief because he testified that his employees had a 'right to know' about the insurance issue, **from him in particular**, **and that he was obligated as their chief to inform them.**

Further, Holbrook used his official Village e-mail account to send this email to his employees. Also, he signed the email, "Fire Chief."

The court held that this was enough to render the speech "'**pursuant to his duties'** as a public employee and ***not*** speech 'as a citizen.'"

VI. TRUTHFUL REPORTS MADE *NOT* AS A PRIVATE CITIZEN (ON THE JOB)

In Jackler v. Byrne, 658 F. 3d 225 (2nd Cir 2011), Jackler sued the municipal employer and individual defendants, asserting a 1st Amendment retaliation claim under 42 USC Section 1983. The trial court dismissed the claim, based on its determination that the claim fell within the scope of Garcetti v. Ceballos, 547 US 410 (2006). The 2nd Circuit reversed.

Jackler alleged that he was discharged from his job as a probationary police officer, because he refused to withdraw a **truthful report** he submitted about an "**excessive force**" incident regarding a fellow officer and substitute a false report in its place. The employer argued that Jackler's claim was precluded under Garcetti, which held that speech made by an employee in the course of his official duties is not entitled to 1st Amendment protection. The court rejected that argument.

The court differentiated Jackler's allegations from the more common situation where an employee is discharged based on statements actually made, and concluded that **Garcetti was inapplicable**. The court rejected the employer's argument that an employee's refusal to retract a report is the equivalent of making a report for purposes of Garcetti.

The court reasoned,

> "[m]ost of the [cases interpreting Garcetti] deal[ ] with government employees who complained that they were **penalized by their employers on account of statements the employees affirmatively made**. **Jackler, in contrast, contends that he was penalized for his refusals to follow defendants' instructions that he retract his Report and make statements that would have been untrue, and that his refusals are protected by the First Amendment**."

VII. TRUTHFUL REPORTS MADE UNDER SUBPOENA

In Lane v. Franks, 573 U.S. ___ (2014), Edward Lane served as the Director of Community Intensive Training for Youth (CITY), a program for underprivileged youth operated by Central Alabama Community College (CACC). While conducting an audit of the program's expenses, he discovered that Alabama State Representative Suzanne Schmitz was on CITY's payroll, although she never reported to work. Lane eventually terminated Schmitz' employment. As a result of a subsequent FBI investigation, Schmitz was indicted on charges of mail fraud and theft. Lane testified, under subpoena, about Schmitz's termination from CITY, and she was ultimately convicted.

Shortly thereafter, Lane was laid off along with 28 other employees in a purported effort to address CITY's ongoing financial difficulties. However, CACC's president, Steve Franks, rescinded all but 2 of the 29 terminations, those of Lane and one other employee. Lane sued Franks in his individual and official capacities under 42 U. S. C. §1983, alleging that Franks had violated his free speech rights under the First Amendment.

First Amendment free speech claims by public employees are subject to a complicated legal test.

It is well established that citizens do not surrender all of their First Amendment rights when they accept a job in the public sector, although they certainly do surrender some of them.

Under Garcetti v. Ceballos, 547 U.S. 410 (U.S. 2006), in order to prevail on a First Amendment freedom of speech claim, the employee first must prove he or she was acting as a citizen, and ***not*** as an employee pursuant to his or her official duties. Employees speaking out pursuant to their official duties have been found to have ***no*** First

Amendment protection under Garcetti because they have been hired by the government to engage in that speech and the public employer has substantial discretion in running an efficient government service.

If the employee can prove that he was speaking as private citizen, then the employee must still show that he was speaking on a **matter of public concern** (Connick v. Myers, 461 U.S. 138 (1983)) ***and*** that the **employee's right to free speech outweighs the employer's right to run an efficient government service**. (Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U. S. 563, 568 (1968))

In Pickering, the U.S. Supreme Court specifically ruled that determining whether certain speech is protected requires balancing "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 the public services it performs through its employees."

However, even if the "employee spoke as a citizen on a matter of public concern," the court must still evaluate "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Of course, after the Garcetti decision, the courts have struggled over what constitutes ***citizen speech vs. work speech***.

Therefore, the issue in this case was whether Lane was acting pursuant to his official duties when he discovered that Schmitz was being paid without reporting to work and, therefore, had no free speech protection under Garcetti.

In this case, the U.S. Supreme Court ruled that because Lane's sworn testimony was ***outside*** the scope of his ordinary job duties, he was entitled to First Amendment protection.

The Supreme Court ruled that the First Amendment "protects a public employee who provided truthful sworn testimony, compelled by subpoena, **outside the course of his ordinary job responsibilities.**"

Specifically, the Court said:

> Sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer.

With regard to whether Lane's speech was made pursuant to his ordinary job duties, the Court found that the Eleventh Circuit Court of Appeals got it wrong when it concluded that Lane did not speak as a citizen when he testified simply because he learned of the subject matter of that testimony in the course of his employment.

The Court went onto clarify that:

> "Garcetti said nothing about speech that relates to public employment or ***concerns information learned in the course of that***

employment. The 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***"

With regard to whether Lane's speech was a matter of public concern, the Court found that corruption in a public program and misuse of state funds **clearly qualify**. The justices also easily found that the interests of the employee outweighed those of the state, noting that there was no evidence that Lane's testimony was false or revealed confidential information.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Lane helps to clarify the Garcetti holding by narrowing it to speech that is actually part of the public employee's job. As a concurrence written by Justice Thomas points out, the case may well have come out differently if the employee, like a police officer, had a job description which did require him to testify under subpoena. But that is another case for a future date.

The other important point is that the holding of Garcetti, which I have roundly criticized for being overly formalistic in its distinction between public employees speaking as citizens or employees, but never both, was not under reconsideration. My personal hope is that someday the Court will reexamine the Garcetti precedent and recognize the errors it made in unnecessarily narrowing the First Amendment free speech rights of public employees.

VIII. NO FIRST AMENDMENT PROTECTION FOR WHISTLEBLOWER

In McArdle v. Peoria School District No. 150, No. 11-2437 (7th Cir 01/31/2013), Julie McArdle was the principal of Lindbergh Middle School in Peoria, Illinois in August 2008. Her employment contract extended for two years, but allowed the school district to terminate her after one year with payment of severance. Lindbergh's previous principal, Mary Davis, served as the district's Academic Officer, which made her McArdle's superior.

According to McArdle, she began to discover irregularities in prior practices at Lindbergh shortly after she came to the school. These irregularities included:

1. Davis' use of school funds and a school credit card for personal purposes;

2. her decision to pay student teacher in violation of district policy; and

3. The fact that she circumvented of rules regarding admission procedures for nonresident students.

McArdle alleged that she questioned Davis about some of these practices and received evasive responses.

Davis put McArdle on a performance improvement plan in February 2009. McArdle asserts that Davis cited parental complaints as part of the reason for the performance warning, but would not identify those who complained.

On April 21, 2009, Tom Broderick, the district's human resources director, informed McArdle that the district's board would soon be considering early termination of her contract. On April 23, McArdle consulted an attorney and filed a **police report** which **accused Davis of theft of school funds**. She also sent a letter to Broderick, district superintendent Ken Hinton, and the vice president of the district's board which listed improprieties by Davis as Lindbergh principal and in her subsequent position.

At an April 27, 2009 meeting of the district's board, Hinton recommended that McArdle's contract be terminated at the end of its first year. His recommendation was supported by a presentation from Davis. Davis was excused from the meeting, and the board then discussed McArdle's allegations of impropriety against her. Hinton told the board that he thought McArdle was not a good fit at Lindbergh, and that the school was declining as a result. The board voted 4-1 to terminate McArdle's contract at the end of the 2008-09 school year.

Davis was later prosecuted for theft of the school's funds.

McArdle contends that Davis orchestrated her termination to prevent her from revealing the improprieties she discovered. She argued that Hinton relied on Davis' input and that his recommendation to the district board was influenced by Davis' improper motive. McArdle claims that Davis and the district both violated the First Amendment in acting upon that motive. She also claims that the district breached her employment contract and that Davis tortuously interfered with that contract.

The district court granted summary judgment motions by the district and Davis on all of McArdle's claims.

McArdle appealed to the Seventh Circuit Court of Appeals.

In assessing the viability of a public employee's First Amendment claims, the court must determine whether the speech that allegedly motivated the employer's adverse action was protected by the Constitution. In order for a public employee to raise a successful First Amendment claim for her employer's restriction of her speech, the speech must have been made in her capacity as a private citizen and not as an employee:

> "[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."

The court also noted that the United States Supreme Court has noted that protection of a government employee's exposure of misconduct involving his workplace is more properly provided by whistleblower protection laws and labor codes. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

McArdle argued that oversight of Davis' practices was neither required of her by Illinois law nor part of her job duties, and that these facts establish that her comments on those practices were not made as an employee.

The court held that whether speech is made "pursuant to" a public employee's duties is not answered by mere reference to the definitions of the speaker's legal obligations or job description. A public employee's commentary about misconduct affecting an area within her responsibility is considered speech as an employee even where investigating and reporting misconduct is not included in her job description or routine duties.

Similarly, an educator's criticism of his superior's use of grant funds provided to their department is speech as an employee, not a private citizen.

These principles were equally applicable here. The school's reputation, its adherence to district policies, and its finances were all matters within McArdle's oversight as the school's principal, and were all allegedly impacted by Davis' misconduct. In reporting on that alleged misconduct, McArdle spoke about matters that directly affected her area of responsibility.

The court therefore concluded that McArdle's reporting of that misconduct was speech as a public employee and was not shielded from her employer's response by the First Amendment.

McArdle claims that there are unresolved issues of fact regarding the motives of Davis and the district board, but since her speech was unprotected, her constitutional claims fail, and questions as to the defendants' motives are not material. Summary judgment was properly granted to defendants on McArdle's First Amendment claims.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Free Speech First Amendment rights of public employees have been greatly reduced in recent years. This case further exemplifies that the courts clearly want public employees to use the state's Whistleblower Law for protection in such instances and not the First Amendment.

IX. FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT: PICKERING BALANCING TEST

A. Facts

In Gillis, et al. v. Miller, Bay County Sheriff's Department, Nos. 16-1245/1249 (6th Cir. 2017), Matthew Gillis and Fred Walraven were Correctional Facility Officers at the Bay County Jail. Walraven was also a sergeant at the jail, and Gillis was the President of the Bay County Corrections Officers Union. Gillis resigned his employment with the Bay County Jail on February 27, 2014, and Walraven's employment was terminated on April 15, 2014.

Defendant John Miller is the Sheriff of the Bay County Sheriff's Department, the other named defendant in this case. The Bay County Sheriff's Department is the law enforcement agency tasked with administering the Bay County Jail.

In early 2014, an investigation began into alleged misconduct at the jail. Sheriff Miller learned that one of his deputies had procured prescription mouthwash for an inmate. The inmate suffered from severe halitosis and periodontal disease, and was unable to receive treatment for the condition at the jail. The deputy's wife worked as a dental assistant and procured a prescription in her name for a periodontal mouth rinse. The deputy then picked up the prescription that had been written for his wife, scratched off her name and their home address, and placed the prescription in a jail office with specific instructions about giving the medicine to the inmate.

News quickly spread around the jail that an inmate had been given this prescription mouthwash, and several inmates began to speculate that the mouthwash contained codeine, a controlled substance. This news prompted prison management to conduct an investigation into potential prescription drug trafficking at the jail, which concluded on February 27, 2014.

During the investigation, Gillis began receiving complaints from staff regarding management's conduct during the investigation. At least five individuals complained to Gillis about management's interrogations. Two individuals reported that management threatened them and said "[i]f you don't have anything to hide, why would you need union representation?"

The record reflects that some of the jail's staff felt intimidated by management's investigation tactics.

In response to the complaints he received from other jail staff, Gillis worked with Walraven to draft and post a memorandum informing jail staff of their rights under NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). The Weingarten memorandum is central to both Walraven's and Gillis' cases. Both plaintiffs allege that they were retaliated against by Defendants because they were involved with posting the memorandum.

The memorandum was addressed to the "Bargaining Unit" from "President Matt Gillis" and stated, in part:

> **Re: Weingarten Rights**
>
> Many deputies have been notified they need to report to a superior officer for some type of investigatory interview or investigation. When you are summoned before a superior officer, I strongly suggest you state these words before you say anything else. "If this discussion could in any way lead to me being disciplined or discharged, I request that my Union representative be present at the meeting. Without representation, I choose not to answer any questions."
>
> These rights also cover yourself in the event someone else may be disciplined due to your statement. I am in no way advising you not to cooperate with management, just advising you of your rights.

Sheriff Miller summoned Gillis to the Undersheriff's office on February 13, 2014, the day after Gillis posted the Weingarten memorandum. Sheriff Miller threw the notice across the table, asked who wrote it, and declared to Gillis that "I will have you know I can have you prosecuted for interfering with an ongoing investigation for posting this memo."

Gillis was terminated for posting this memo.

Gillis then filed in federal district court. The court found for the employer.

The district court concluded that Plaintiffs failed to establish that their speech was constitutionally protected because:

- It did not touch on matters of public concern; and
- Even if it had touched on such matters, Plaintiffs could not prevail under the *Pickering* balancing test, which weighs any First Amendment interests possessed by the plaintiff against a public employer's interest in efficiently managing a public agency. (See Pickering v. Bd. of Educ., 391 U.S. 563 (1968))

Plaintiffs appealed to the Sixth Circuit Court of Appeals.

B. Pickering Balancing Test

The Sixth Circuit agreed with the district court that Plaintiffs' claims failed under the Pickering balancing test, so it did not matter if Gillis' speech was a matter of public concern.

The court reasoned that when conducting a Pickering analysis, the court must weigh "the employee's interest in 'commenting upon matters of public concern'"

against "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Leary v. Daeschner, 228 F.3d 729, 737 (6th Cir. 2000) (quoting Pickering, 391 U.S. at 568).

The Supreme Court has "previously recognized as pertinent considerations:

- Whether the statement impairs discipline by superiors or harmony among co-workers,

- Whether the speech has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or

- Whether the speech impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."

The court reasoned that it has given substantial weight to government employers' reasonable predictions of disruption, **even when the speech involved is on a matter of public concern.**

Rather, like the majority of our sister circuits, we "do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."

Applying this standard, the court reasoned that it was clear that the Defendants could reasonably have predicted that the Weingarten memorandum might disrupt legitimate law enforcement interests in the jail. The memorandum expressly counseled the correctional officers not to speak with management without first having a union representative present. The memorandum went so far as to provide a script for correctional officers to use in case they were questioned by management. Defendants could have legitimately predicted that this advice would hinder their ability to conduct a timely and efficient investigation, and halt the flow of illegal contraband into the prison.

Moreover, the memorandum also expressly encouraged all guards to violate their superiors' orders and disclose to Plaintiffs the substance of interviews with jail officials. It is patently obvious that speech urging public employees to disobey their superiors carries a serious risk of undermining the functioning of public agencies, and we have previously observed that law enforcement officials are "not required 'to tolerate an action which [they] reasonably believe would disrupt the office, [or] undermine [their] authority.

C. Matter of Public Concern

A public employee's speech is only protected by the First Amendment to the extent that it "touche[s] on matters of public concern." Leary, 228 F.3d at 737 (citing Connick, 461 U.S. at 146).

Matters of public concern include speech that "relat[es] to any matter of political, social, or other concern to the community." [Connick, 461 U.S. at 146.] In other words, we must determine whether the relevant speech "involves 'issues about

which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government.'" Brandenburg v. Hous. Auth. of Irvine, 253 F.3d 891, 898 (6th Cir. 2001) (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)).

Thus, speech falling into this category includes informing the public that a governmental entity failed to "discharg[e] its governmental responsibilities" or "bring[ing] to light actual or potential wrongdoing or breach of public trust [on the part of a governmental entity or any officials therein]." [Connick, 461 U.S. at 148.]

Here, Plaintiffs argued that the Weingarten memorandum touched on matters of public concern because it was aimed at:

- Exposing alleged corruption by Defendants; and
- Ensuring that Defendants did not violate correctional officers' *Weingarten* rights during the investigation into prescription drug trafficking at the prison.

However, because the court first concluded that the Plaintiffs' claims failed under the Pickering balancing test, it did not matter whether or not the Plaintiffs' speech touched on matters of public concern.

X. NO PUBLIC POLCY CLAIM FOR FIRST AMENDMENT FREE SPEECH

In Barnett v. Aultman Hospital, No. 5:11-CV-399 (S.D. Ohio) Wendy Barnett was a registered nurse who worked in the psychiatric unit at Aultman Hospital in March of 2002. Lisa Summer became the Unit Director of the psychiatric unit some time thereafter. Barnett considered Ms. Summer "abusive" because of a series of disciplinary actions she received from Summer. Barnett believed Summer was out to fire her.

In January of 2011, while Barnett was at home on vacation, she received word that Summer had been fired. This was not true but, believing it to be true, Barnett sent an e-mail through Facebook to at least 14 addressees, including 9 present or former employees of Aultman Hospital.

The email, sent on January 4, 2011, read:

> Lisa got officially ax [sic] today! I am singing DING DONG THE WITCH IS DEAD[,] THE WICKED WITCH, DING DONG THE WICKED WITCH IS DEAD.
>
> How poetic[—]this comes the same day Sexton died[.] I would much rather get f__cked up the ass with hot pepper than endured [sic] what that souless [sic] bitch put me through for 4 years . . . including turning me into [sic] the board. . . . God does grind a fine mill when revenge is taken on by him. . . . [B]ack when I was off due to drug accusations and praying, and praying, never would I have imagined she lose [sic] her job, marriage, and

family, friends all at the same time! Karma[.] Now I should tell you how I really feel!

Love and fuzzies, Wendy

Of course, as always happens in this kind of situation, the e-mail was given to Summer, who sent it further up the chain of command. Eventually, an investigation was initiated. When confronted with the e-mail, Barnett denied that she had typed it and intimated that someone had hacked into her Facebook account. She was suspended pending the results of the investigation.

While Barnett continued to push her hacking theory, the investigation worked its way back to the employee who originally gave the e-mail to the supervisor. She confirmed that Barnett had admitted to sending the "celebratory" e-mail. Another employee came forward and offered to show the investigator text messages she had received from Barnett. Although she was unable to retrieve the text messages, she confirmed that they said something along the lines of, "The witch is dead. . . . Lisa got fired."

The investigator and the hospital's vice president of HR decided to terminate Barnett for dishonesty, in accordance with the hospital's employee handbook. Barnett was specifically told she wasn't being terminated because of the content of the e-mail, but because she had repeatedly lied about sending it. She was given the opportunity to resign, which she accepted, but she still maintained the lie about not sending the e-mail. Barnett later admitted that she had sent the email at her deposition.

In her subsequent lawsuit against the hospital, Barnett claimed she was terminated in violation of Ohio's **public policy** protecting freedom of speech.

The court found for Aultman.

First, the court noted that there is no clear public policy forbidding private employers from restricting free speech. Instead, the First Amendment guarantee of freedom of speech is a restraint on governmental employers only. Therefore, the court concluded that the guarantees of freedom of speech under the federal and state constitutions cannot provide the basis for a public-policy exception in a wrongful discharge claim involving a private employer.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Here is another court stating that there is no public policy for a First Amendment Right of Free Speech in Ohio. Private sector employees often try to claim that they do have a right of Free Speech under the First Amendment, but none exits.

Also, Aultman was smart to terminate Barnett on the basis of her dishonesty. That decision probably helped it avoid a dispute over whether similarly situated employees had been terminated for similar comments being made about their supervisors.

Also, this e-mail probably wouldn't have been protected by Section 7 of the National Labor Relations Act (NLRA) had Barnett filed an unfair labor practice charge. This speech appears to fit under the NLRA's prohibited language:

Employees are not to engage in conduct that is deemed to be **vulgar, obscene, threatening, intimidating, harassing, and/or unlawfully discriminatory.**

XI. THE HATCH ACT

Public employees are prohibited from taking an active role in campaign management or campaign politics, although they are permitted to maintain their constitutional rights as citizens and may vote freely and express political beliefs privately. The Hatch Act has been upheld repeatedly by the United State Supreme Court as "a reasonable price to pay to protect the civil service system from political pressures."

The Supreme Court has cited 5 justifications of the Hatch Act's restrictions in Rutan v. Republican Party of Illinois:

1. Civil service employees "should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party";

2. It is essential that the civil service remain politically neutral "if confidence in the system of representative Government is not to be eroded as a disastrous extent";

3. Given the large number of government employees, it is imperative that they not be manipulated by political parties wanting to "build a powerful, invincible and perhaps corrupt political machine…paid for at public expense";

4. Employment and promotional opportunities should "not depend on political performance"; and

5. Such employees should remain: free from pressure and from express or tacit invitation to vote in certain way or perform political chores in order to curry favor with their supervisors rather than to act out their own beliefs."

XII. EMPLOYEE CONSTITUTIONAL RIGHTS … "KINDA"

A. Fifth and Fourteenth Amendments:

- **Procedural Due Process**

"No person shall be … deprived of life, liberty, or property, without due process of law..."

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. "LOUDERMILL" RIGHTS

In McDonald v. City of Dayton (2001), 146 Ohio App.3d 598, Dayton Police Officer Michael McDonald was on duty on February 17, 1998 when he went to a Wendy's restaurant and ordered dinner. When the order clerk allegedly gave McDonald the wrong change, an argument ensued. When the argument escalated, McDonald shot the clerk with pepper spray and arrested her.

On February 18, 1998, McDonald was ordered to attend a "show cause hearing" concerning the allegations surrounding the attack and any discipline that may be imposed. McDonald was then suspended with pay.

However, on March 18, 1998, the clerk who was pepper sprayed by McDonald filed criminal charges against him. As a result, the city suspended his pay as well. The city failed to conduct any form of hearing before suspending McDonald's pay while he was on leave.

In June 1998, McDonald was cleared of all charges.

On July 21, 1998, a predisciplinary hearing was held by the city on the matter. On July 24, 1998, McDonald was terminated by the city.

McDonald argued that his rights under "Due Process Clause" of the Fourteenth Amendment of the U.S. Constitution were violated. The "Due Process Clause" of the Fourteenth Amendment of the U.S. Constitution states that no state shall "deprive any person of life, liberty, or property without due process of law." A two-step analysis is used when considering whether a public sector employee's due process rights have been violated.

Under Cleveland Bd. of Edn. v. Loudermill (1985), 470 U.S. 532, first, a court must determine if the individual has a right or interest that is entitled to due

process protection. If such property rights exist, then the court must determine what due process is due.

In deciding the first question, whether McDonald possessed a Fourth Amendment property interest in continued employment with the city police department, property rights are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

McDonald possessed a property interest in his employment as a police officer that came from his position as a "classified" employee pursuant to R.C. 124.11. In addition, the collective bargaining agreement between the FOP and the city established his property right. Therefore, the first prong of the due process inquiry is satisfied with respect to and on the basis of his deprivation of a property interest or some right associated with it. Therefore, the courts next turn to the second prong of Loudermill, which is to determine what process McDonald was due.

Generally, when a plaintiff is deprived of a protected property interest, a predeprivation hearing of some sort is required to satisfy the dictates of due process. The predeprivation process need not be elaborate, depending upon the importance of the interests at stake. When determining the amount of process due, a balance must be struck between the private right in retaining the property interest, the governmental interest in swift removal of unsatisfactory employees and avoidance of administrative burdens, and the risk of an erroneous decision.

In this case, a predeprivation hearing was held on February 18, 1998 to determine McDonald's suspension and another one was held on July 21, 1998 to determine his termination on July 24, 1998. McDonald argued that these hearings were insufficient to satisfy due process requirements because the decision maker, Chief Lowe, had determined prior to the hearing to terminate McDonald. In other words, McDonald argues that these predeprivation hearings were both "shams."

Even though a predisciplinary hearing may only confer a limited "right of reply," a predeprivation hearing is designed "to invoke the employer's discretion, its sense of fairness and mutual respect, its willingness to reconsider." In addition, predeprivation hearings do not require the kind of neutral and independent decision maker that independent, quasi-judicial appeals from the deprivation would require.

There was evidence that Chief Lowe had condemned and repudiated McDonald's use of pepper spray in the Wendy's incident. Also, there was evidence that Chief Lowe and the city were under considerable public pressure to avoid such conduct, which was alleged to arise from a racial bias and poor management. This evidence portrays the possibility of bias. However, it does not portray a resolve to terminate McDonald's employment that was so fixed and absolute as to render McDonald's hearing before Chief Lowe on July 21, 1998, a sham. Therefore, no

genuine issue of material fact exists concerning whether McDonald's due process rights were violated in that respect.

However, since no predeprivation hearing occurred before McDonald's pay was suspended, his Loudermill rights were in fact violated. Therefore, back pay for McDonald while he was on leave is appropriate.

It is important to note that in some instances, a post-disciplinary hearing may satisfy the requirements of the predisciplinary hearing. The courts have traditionally balanced three factors to determine what process is constitutionally due:

1. The private interest that will be affected by the official action,

2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally,

3. The Government's interest.

Therefore, it is possible to preserve the employee's rights under Loudermill if a post-disciplinary hearing is held soon after the action is taken against the employee.

C. Preferred Process

Employees facing a disciplinary action should be given written notice containing the following information:

- A statement of the charges and evidence being brought against the employee,
- The date, time and place of the pre-disciplinary hearing,
- The right to have a representative of his/her choice present,
- The Defendant's rights to cross-examine any witnesses and
- The right to have voluntary witnesses present to offer testimony on behalf of the employee.

This notice should also inform the employee that, absent of any extenuating circumstances, his/her failure to appear at the hearing will result in a waiver of the employee's right to such a hearing.

Disciplinary Notice-EXAMPLE OF A NOTICE OF SUSPENSION

(This notice is to be given to the employee at least three (3) days in advance of the pre-disciplinary conference.)

DATE:

TO: Affected Employee

FROM: Appointing Authority

Dear _____:

Notice is hereby given that the Appointing Authority for (Agency Name), intends to suspend you without pay for a period of _____ days, based upon the following evidence.

(List evidence, dates, times, and describe the incident.)

Said incident being in violation of:

(List applicable Rules and Regulations, Personnel Policies, and violations of the Ohio Revised Code 124.34.)

A conference on the within matter will be held on (date) at (time) at (location).

At this hearing, you may substantiate why you believe the proposed suspension is not justified. Should you decide to exercise your right to such a hearing, you may obtain the assistance of legal counsel or other representative, present witnesses on your behalf, and question any witnesses against you. The Appointing Authority will also have the opportunity to submit evidence and call witnesses to support the proposed action.

After the hearing, I will consider the evidence and testimony submitted and make a written recommendation to the Appointing Authority. You should be provided with a copy of my recommendation.

This letter will be the only formal notice of the hearing. If there are any changes, you will be notified. Absent any extenuating circumstances, failure to attend this meeting as scheduled will result in a waiver of your right to a hearing.

Sincerely, (Signed by the Neutral and Detached Administrator)

D. "GARRITY" RIGHTS: SELF INCRIMINATION

If the employee refuses to answer questions in an investigation based upon the employee's fear of self-incrimination, then the employee is to be given a "Garrity Warning." (See Garrity v. New Jersey, 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).) An employee must be given his/her "Garrity Warning" before being disciplined for refusal to answer.

In short, under Garrity, employees cannot be forced to choose between self-incrimination and job loss. However, if the employee being interviewed has not been threatened with discipline, then Garrity does not apply and the employee must answer the employer's questions. It is the appointing authority's responsibility to investigate the allegations/violations prior to imposing discipline.

An Appointing Authority may discharge an employee for failure to answer questions which specifically, directly and narrowly related to his/her performance of duties. (See Jones v. Franklin County Sheriff, 52 Ohio St. 3d 40, 555 N.E. 2d 940 (1990).)

As a note, unionized employers should consult the collective bargaining agreement prior to initiating the disciplinary process to ensure compliance.

E. Fourth Amendment: Search and Seizure

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As a general rule, due to the 5th Amendment's "Unreasonable Search and Seizure" provision, public sector employers are not permitted to test their employees for substance abuse without also having a reasonable suspicion of such abuse. Therefore, for public sector employers, all types of testing for employees must be accompanied by "Reasonable Cause Testing."

Therefore, as a general rule, public sector employers are not permitted to conduct "Random Test," "Annual Testing," "Promotion or Transfer Testing" or Customer Required Testing."

However, if a public sector employer wants to conduct "Post Accident" testing, it should also be accompanied by "Reasonable Cause" testing.

Also, conducting "Follow Up Testing After Return To Work From Assessment Or Treatment" is permitted for public sector employers because this type of testing is based upon "reasonable cause." Since people subject to this type of testing have already tested positive on a substance abuse test, or they have voluntarily come forward and admitted a substance abuse problem, there is a reasonable basis for testing the person.

Public sector employers are allowed to conduct "Safety-Sensitive-Position Testing" in certain instances. Under this type of testing, positions that are classified as being "Safety Sensitive" are typically tested at random on a regular basis without any showing of a "reasonable basis" for the testing.

However, unlike private sector employers who can pick and choose whatever positions they want to classify as being "Safety Sensitive," the public sector has very strict restrictions on which positions can be classified as "Safety Sensitive." In the public sector, "Safety Sensitive" positions must directly relate to "public safety," such as police officers, firefighters, life guards, and so on. Before a public sector employer classifies any position as being "Safety Sensitive," it would want to research the position to see if a court has classified the position as being "Safety Sensitive."

Public sector employers can conduct "Pre-Employment Testing" because the person is not an employee yet, so they do not enjoy these same protections.

F. Fourteenth Amendment: Equal Protection and Privacy

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

XIII. STATE SOVEREIGN IMMUNITY

A. U.S. SUPREME COURT: Age Discrimination in Employment Act

In Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), Daniel Kimel, along with other employees working at Florida State University, believed they were discriminated against on the basis on their age since the University of Florida would not adjust their wages according to recent market data. The employees filed suit against the state of Florida, claiming age discrimination under the ADEA.

The state of Florida defended itself by claiming that the ADEA could not be enforced against Florida based upon the Eleventh Amendment to the U.S. Constitution, which grants states "sovereign immunity."

The U.S. Supreme Court sided with the state of Florida. The U.S. Supreme Court held that even though Congress attempted to waive state sovereignty when it passed the ADEA in 1967, it had no authority to do so. The Court reasoned that age-based distinctions are often rational, so no "Constitutional suspect" distinctions exist upon which congress would have authority to subject the states to the ADEA.

B. U.S. SUPREME COURT: Americans With Disabilities Act

In Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), Patricia Garrett was a registered nurse working as the Director of Nursing for the OB/GYN/Neonatal Services Department for the University of Alabama in Birmingham. In 1994, she was diagnosed as having breast cancer. Garrett underwent surgery and chemotherapy for her condition, all of which required her to take a substantial leave of absence. As a result, Garrett was told that she would have to relinquish her position as Director of Nursing. Garrett then accepted a transfer to a nurse manager position, which was a lower paying position. Garrett filed suit against the University of Alabama for violating her rights under the ADA by failing to accommodate her condition by granting her a leave of absence.

The University of Alabama defended itself by claiming that the ADA could not be enforced against the states since the Eleventh Amendment to the U.S. Constitution gave states "sovereign immunity." Under the doctrine of sovereign immunity, a state cannot be sued by its citizens unless:

1. Congress clearly intended to abrogate the states' sovereign immunity, however, Congress only has the authority to waive the sovereign immunity of the states when it determines that the states may be violating the Constitutionally rights of its citizens, or

2. A state waives its immunity.

In a 5-4 decision, the U.S. Supreme Court sided with the state of Alabama. The Court reasoned that Congress did not show that it found that the states were committing "Constitutionally suspect" discrimination against disabled individuals. Without such a showing, Congress has no authority to waive the sovereign immunity of the states.

Therefore, the Court upheld the states' sovereign immunity from ADA lawsuits from its citizens.

C. Family and Medical Leave Act

In Hibbs v. Dept. of Human Resources, No. 99-16321 (9th Cir. 2001) William Hibbs worked for the Nevada Department of Human Resources. When his wife became very ill, he requested the use of 380 hours of leave. He was granted only 200 hours of leave. Hibbs then sued the state of Nevada, alleging that it had violated his rights under the FMLA. The state of Nevada claimed that it was immune from FMLA lawsuits under the Eleventh Amendment.

However, the 9th Circuit found for Hibbs, holding that Congress had effectively eliminated the sovereign immunity of the sates in passing the FMLA, and that Congress had the authority to do so. The court reasoned "the FMLA should be treated differently from both the ADA and ADEA because the FMLA is aimed at remedying gender discrimination, which is subject to heightened scrutiny."

The court reasoned further that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional *** legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional."

The court based its holding that the FMLA was a valid exercise of Congress' powers on the conclusion that "[d]efendants have failed to show that there is not a widespread pattern of gender discrimination by states regarding the granting of leave to care for sick family members or a historical record of state enforcement of stereotypical family roles."

Therefore, the court allowed Hibbs to sue the state of Nevada for violating his rights under the FMLA.

D. State's Acceptance Of Federal Funds Under The Rehabilitation Act Waives Its 11th Amendment Immunity To A Claim For Damages

In Douglas v. California Dep't Of Youth Authority, No. 99-1714 (9th Cir. 2001), Douglas was not hired by the California Department of Youth Authority due to the fact that he was colorblind. Douglas sued the state employer alleging disability discrimination in violation of the Americans With Disabilities Act (ADA) and the Rehabilitation Act.

The state defended itself by claiming that it enjoyed immunity from ADA claims under the 11th amendment as a result of the U.S. Supreme Court's decision in Board of Trustees of the Univ. of Ala. v. Garrett, 531 US 356 (2001) decision. However, in spite of the decision in Garrett, the 9th Circuit Court of Appeals allowed Douglas to proceed with his claim.

In short, the 11th Amendment protects states from suits brought by citizens in federal courts. There two exceptions to this general rule that are at issue in this case:

1. A state may waive immunity and

2. Congress may abrogate this immunity.

In reaching its decision, the court looked to one of its previous decisions in Clark v. State of California, 123 F.3d 1267 (9th Cir. 1997). In Clark, the court held that states may be sued in "federal court under the Rehabilitation Act **if** they accepted federal Rehabilitation Act funds." Since California has accepted such funds, it has therefore waived 11th Amendment immunity from Rehabilitation Act claims.

What the court said in Clark is still good law in light of the U.S. Supreme Court's decision in Garrett. The Court in Garrett held that states enjoy 11th Amendment

immunity from employee suits under the ADA, but the issue in that case was whether **Congress had validly abrogated the states' immunity**. **Waiver was not an issue in Garrett, so the holding in Clark remains valid.**

The 9th Circuit also noted that other circuits, such as the 4th and 8th Circuits, have come to similar conclusions, as have the majority of district courts to address the issue.

XIV. DOL FINALIZES PAID SICK TIME RULE FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS

A. Rule Overview

The U.S. Department of Labor (DOL) has issued final regulations requiring federal contractors to provide employees with up to seven paid sick days each year. The DOL says it expects the rule to provide sick leave to 1.15 million employees, and its reach may be even broader if employers attempt to alleviate their administrative burden by offering paid sick days to all employees, rather than exclusively to those working on government contracts.

These new regulations require federal contractors and subcontractors provide employees with up to seven days (56 hours) of paid sick time per year, accrued at the rate of one hour for every 30 hours worked. The order affects contracts solicited or entered into outside the solicitation process after January 1, 2017.

The DOL said that one of the major things it did was define the exact type of contracts that bring an employer under the Executive Order's coverage and those that don't, such as grants.

The DOL also spelled out which employees are covered. The new rule also covers employees who qualify for an exemption from the Fair Labor Standards Act's (FLSA) minimum wage and overtime provisions and certain contracts with the U.S. Postal Service (USPS).

The rule also details compliance requirements when a contractor is dealing with special circumstances, such as the existence of a collective bargaining agreement or a multiemployer plan.

B. Accrual Requirements

The order allows workers to carry accrued leave over from one year to the next and requires that accruals be reinstated for employees rehired by a covered contractor within 12 months of a job separation. Employers do not, however, have to pay employees for unused sick time at the end of their employment. But if they do, employees aren't entitled to any reinstated accruals if they are rehired.

Of particular note is the rule's cap on sick-time rollovers. This final by the DOL requires employers to allow employees to roll up to 56 hours over at the end of each year.

The DOL also made clear that the new rule does not create any new timekeeping requirements for employers. If a contractor is not already required to track an employee's hours under another law, such as for an exempt employee under the FLSA, employers may estimate a worker's hours. Employers do, however, have to inform employees in writing of the amount of leave they have available at the end of each pay period or month, whichever interval is shorter.

If an employer prefers not to track accruals at all, it may instead award an employee 56 hours of paid sick leave at the beginning of each accrual year.

C. Leave Use

The Executive Order says that employees must be allowed to use the leave for their own illness, to care for a family member or in the event of domestic violence, sexual assault or stalking.

Employees must give their employers seven days' notice if the need for leave is foreseeable, and approval of the leave request cannot be contingent on an employee finding someone to cover his shift. Employees must be able to request paid time off (PTO) verbally or in writing, but contractors must put any denials in writing.

The Executive Order permits an employee to use accrued leave in increments as small as one hour, except when her work makes it physically impossible to leave or return during a shift.

Also, the time off can run concurrently with Family and Medical Leave Act (FMLA) leave or other sick leaves required by state laws. Additionally, employers may require certification if the leave lasts three consecutive days, with a few limitations.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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