What are the limitations to a public employee's speech?

By Nicholas S. Dubrowsky, *Esq.*

It should come as no surprise that I consider free expression *the* essential liberty interest. Equally unsurprising is that the employment law section of my website receives the most views. Consequently, I figured why not write a short article on both; particularly retaliatory actions by an employer. An example of a retaliatory action is if an employer fires you because you voiced a concern or complaint.

Unions are an important part of the solution to end retaliation against public sector employees. Admittedly, over-unionization is part in parcel with economic inefficiency. However, I believe neither that we should return to the world of Charles Dickens nor dislike city or state employees. Besides, my father worked as a city employee for his entire life, and I worked for New York City. Unions are necessary, in fact vital, for any civil society. What is more, I do not subscribe to the idea that all social welfare programs are inefficient and that anyone can pull themselves up by their own bootstraps. Rather, I argue that social welfare programs are a citizen's safety net and not a parent. The reason I offer my view on municipal employment and unions is to give context to the article and context surrounding its author. In short, it is not a political manifesto of a trust-funder with a gripe against his tax bracket.

Back to the question, what are the limits on a public sector employee's free speech? The answer depends on context; context that is broad and as wide as the Brandenburg Gate. The standards below apply to a specific situation; a public employee, making the claim of retaliation under 42 U.S.C. §1983 fits the requirements.[1]

The Standard –The criteria to bring a case amounts to one complex headache. In 1977, the Supreme Court first articulated three necessary elements in *Mt. Healthy C.S.D v Doyle*, 429 U.S. 274 (1977):[2]

To bring a retaliation case you must show:

- *The speech at issue is constitutionally protected (for instance, you cannot defame someone) and that it is a matter of* ***public concern.***
- *That because of the speech in question you suffered from an "adverse employment action" and*
- *That this speech caused (substantially) your employer to discipline you*

[1] This is the section of the United States Code, which permits a citizen to sue a state.
[2] *Mt. Healthy C.S.D v Doyle*, 429 U.S. 274 (1977)

These are absurd criteria. Moreover, the Second Department[3] recently reasoned in *Weintraub v Board of Education* [4]that a union grievance spoke pursuant to his official duties is unprotected speech as well. Providing a defective explanation the Court turned to *Garcetti v. Ceballos* and reasoned that the teacher's grievance owed "its existence to a public employee's professional responsibilities."[5]

To see how let us use an example:

A Quasi-Hypothetical:

Assume that you teach in a public high school, and you are both well-intentioned and conscientious. Even so, a student in your class is disruptive to the point where you fear for your safety.[6] This student's disruptive behavior becomes worse over time and you report it to school administration. Nonetheless, the administration will not remove the child from the class or take any other remedial action to allay your fears. As a result, you turn to your union representative because conditions in the classroom are intolerable for students and yourself. Naturally, you file a grievance against the administrator responsible for discipline, stating the abhorrent lack of action by the school.

At first glance, would you consider the grievance protected by the first amendment and entitled to free expression? The Second Department did not think so.

Moreover, and the cherry on top of the mash-up of the other contrived elements, formal written job and task descriptions are irrelevant when considering an employee's official duties under the First Amendment. If you live in New York and bring a Federal retaliation claim against the state your job description is, in effect, irrelevant to your claim.

Summing up:

That leaves public employees with specific speech restrictions; it must be all of the following:

1. It is a matter of public concern [what is a matter of public concern?] and protected by the First Amendment.

2. You suffer an adverse employment decision because of your speech.

3. You do not follow formal procedure when complaining about a problematic situation or risk speaking in an "official" capacity.[7]

4. Your employer would have rendered an adverse employment decision regardless of your statements.[8]

5. Union grievances are part of your official duties and not given protection.

6. Formal job descriptions and responsibilities do not reflect your "official capacity"

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[3] The Federal Court of Appeals including, but not limited to, cases stemming from New York Federal

[4] *Weintraub v Board of Education*, 593 F.3d 196 (2d Cir. 2010),
[5] *Garcetti v. Ceballos*, 547 U.S. 410 (2006)
[6]Based off of *Weintraub v Board of Education*, 593 F.3d 196 (2d Cir. 2010),
[7] *Garcetti* 547 U.S. 410
[8] following *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

Breaking these elements down, speech is permissible on a matter of public concern through formal channels in limited circumstances.[9]

What about informal channels? Such as using the media.

And, here is the rub; such incessant rule-making always creates unintended consequences. In this case, the message is loud and clear. Do the Courts want to send the following message: "use your private time to exercise complaints against employers?" For instance, speak as a private citizen; go home, maybe take a nap, and then call up the media, or write a letter to a newspaper, perhaps send an e-mail to a co-worker with influential contacts. I am sure that any government agency would be thrilled with this idea. Yet, perhaps this would have a positive impact on state action against employees by changing the state's incentive.

Incentive:

In contrast to a private company where profit is the incentive, the state agency or department's incentive is politics. In my opinion, any state department or agency derives its motive from politics; politics where the rank-in-file worker remains a bystander. Rather, political maneuvering at the top determines what rules; protocol; policy and efficiency a state worker must follow. The result is an impressive level of inefficiency and negligence because the policies can accumulate without affecting profit. Put another way, in theory if bad policy leads to inefficiency in a private company that company's profit will decline. While a consumer cannot vote with their dollars for a state, the media can expose inefficiency. The result increases pressure on the politically ambitious bureaucrats at the top.

As a corollary, many municipal agencies have specific procedure that an employee must follow when contacted by the media. Admittedly, I have not researched the issue in-depth, but these rules come dangerously close to prior restraint[10] restricting speech before an employee speaks.

Where does this leave the near 300,000 public employees in New York if one of their employers retaliated because of unwanted speech?[11] Where do they seek legal guidance? Who knows? That seems a common theme these days.

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[9] Exceptions include: Systematic corruption, malfeasance or testimony at a hearing

[10] Prior restraint means preventing speech before it occurs. It is generally unconstitutional because there no harm exists to remedy.

[11] As of July of this year, Albany could not estimate how many public employees worked for the state: http://www.nytimes.com/2010/07/28/nyregion/28payroll.html?pagewanted=all