Free Speech

BY KARY LOVE

A public employee is allegedly fired for discussing a union drive by other city employees on a public access TV program he hosts, successfully grieves his termination, and sues for damages under the First Amendment.

A public school teacher advocates for the rights of disabled students and successfully sues when her teaching contract is not renewed, allegedly in retaliation for her free speech rights in violation of the First Amendment.

Rights of Public Employees

Public Employees Are Protected from Job-Related Retaliation by the First Amendment for Speech on Issues of Public Interest

The First Amendment is the bedrock of American democracy. It protects from governmental interference and retaliation the rights to freedom of speech, to associate with others for political and other purposes, and to petition for redress of grievances, in addition to the commonly known freedom of the press and of religious belief and exercise. Especially important, in the author's view, based on years of experience representing governmental employees, is the protection of whistleblowers and other governmental employees who speak out on matters of public concern they could not have learned but for their employment experience. If those persons cannot speak without fear of retaliation or job termination without recourse, the public will be deprived of an unequalled source of information concerning public matters, thus undermining a fundamental principle of democracy: only an informed citizenry can effect change through the ballot box.

The First Amendment Has Grown as the American Commitment to Freedom Has Grown

The First Amendment has not always provided much protection in the courts for Americans; in fact, the Supreme Court did not decide any First Amendment cases for the first 150 years after the adoption of the Constitution. However, First Amendment protection of public employee speech has made tremendous strides since Justice Holmes articulated his view in 1892 as "[a policeman] may have a constitutional right to talk politics, but he has not constitutional right to be a policeman." The Supreme Court has since expanded the protection afforded public employees to the full range of rights the general public is guaranteed.

The free speech component of First Amendment jurisprudence evolved from the standard first established in *Pickering v Board of Education*[1] (announcing the balancing requirement for First Amendment claims in the context of government employment). In *Pickering,* a public school teacher wrote a letter to the local paper that was critical of his school board's funding decisions. The Court's holding struck a "balance between the interests of the teacher, 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." The Court's balancing test weighed in favor of *Pickering,* and as such, the First Amendment protection afforded public employee speech was upheld.

Mt. Healthy City School District v Doyle[2] created a two-part test, complete with shifting burdens. In *Mt. Healthy,* a local teacher was fired because of comments he made during a local radio station telecast concerning the school's bond issue. The Court vacated the lower court's holding that the speech was protected and remanded the case. The Court held that the proper standard to employ on remand was for the teacher to prove that his speech was a "substantial" or "motivating" factor that the school administration considered in its decision to terminate his employment. If the teacher carried this burden, the school could only be exonerated of a First Amendment violation if it could prove, by preponderance, that the same employment decision could have been reached in the absence of the teacher's comments to the radio station.[3]

A NATURAL RESOURCE FOR DEMOCRACY

Two years after *Mt. Healthy,* the Court decided *Givhan v Western Line Consolidated School District.*[4] In *Givhan,* the local school board refused to renew a teacher's contract for allegedly making "petty" demands and criticisms of the employment policies and practices of the school district. The appellate court held that because the teacher's expression was made privately to the principal, the expression was not protected. The Court, per Justice Rehnquist, disagreed and vacated the decision, stating that: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."

In *Connick v Myers,*[5] an assistant district attorney in New Orleans was told she was being transferred to another department. Myers disapproved of the transfer and circulated an office questionnaire. Her superior dismissed her on grounds of refusal to accept the transfer, that the questionnaire amounted to "insubordination," and that many of the questions were objectionable. The Court reversed a lower court decision that ordered reinstatement and awarded back pay. In doing so, the Court added two principle qualifications to the balancing formula established in *Pickering.*

The Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, [that] a federal court is not the appropriate forum in which to review the . . . decision." This part of the holding established as a matter of law, that a public employee's speech must meet a threshold test of "public concern" before it may be balanced against any government interest.

The second qualification outlined the appropriate criteria for determining whether the government interest outweighs the public employee's First Amendment rights. The government employer has a "legitimate" interest to assure "efficiency and integrity" in the operations it oversees.

Four years later the Court got the opportunity to apply the new standards and tests espoused in *Connick.* In *Rankin v McPherson,*[6] the Court held that the First Amendment protects all speech, except that which relates to purely private concerns. Furthermore, the *Rankin* majority reaffirmed the concept put forth in *Pickering,* that public employers cannot prohibit a public employee's speech merely because they disagree with the content.

The plurality opinion in *Waters v Churchill,*[7] written by Justice O'Connor, sought to reach a compromise between the competing interest of government employers and employees. In *Waters,* the Court decided whether the *Connick* test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said. Cheryl Churchill was fired from her job as a nurse at McDonough District Hospital in Macomb, Illinois. The basis for her dismissal involved a conversation she had with another nurse, Melanie Perkins-Graham. The exact nature of Churchill's comments was a matter of dispute, but can generally be described as relating to a hospital "cross-training" policy. Hospital administrators claimed that Churchill's conversation was disruptive because it discouraged Perkins-Graham from transfering to obstetrics. Churchill also denied any negative statements about petitioner Waters.

Justice O'Connor relied on a number of cases to establish the First Amendment principle that: "Government action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected. Any government action that regulates speech must be precisely targeted in order to receive deferential treatment by the Court."[8]

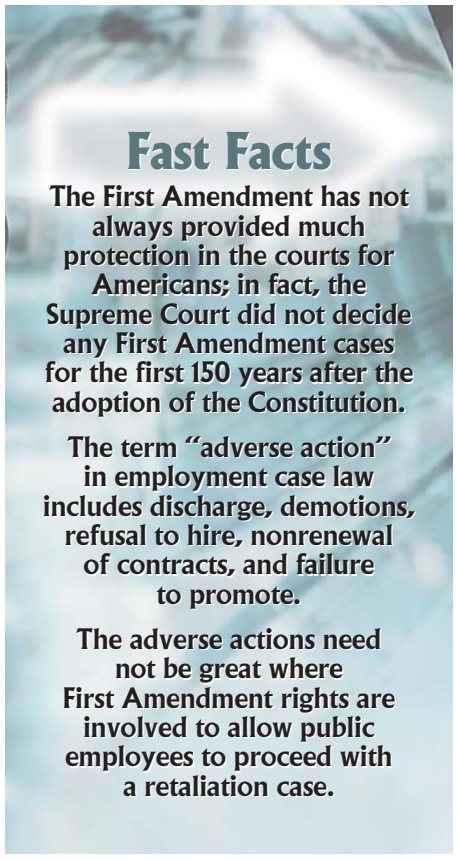
The Court remanded the case for a determination of a material issue of a disputed fact: Whether Churchill was fired for her disruptive behavior or for another independent reason.

While no written opinion garnered a majority, six members of the Court agreed that the Free Speech Clause would be violated if a government employer's conduct did not comport with the plurality's reasonableness test. Justice Souter agreed with the plurality opinion that a reasonable investigation is required by government employers. He filed a separate opinion to discuss his views on the reasonableness standard, stating he would additionally require the government employer to not only carry out a reasonable investigation, but also to "actually believe it."

Justice O'Connor's decision explained: "If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case."

The Retaliation Need Not Be Severe to Be Actionable When Related to Protected First Amendment Actions

The term "adverse action" in employment case law includes discharge, demotions, refusal to hire, nonrenewal of contracts, and



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failure to promote.[9] To determine whether actions of lesser severity merit being deemed "adverse" for purposes of a retaliation claim, the Sixth Circuit in *Thaddeus-X v Blatter*[10] adopted the standard in *Bart v Telford*[11] that an adverse action is one that would "deter a person of ordinary firmness" from the exercise of the right at stake. In *Bart,* a public employee First Amendment retaliation case, Judge Posner stated that "since there is no justification for harassing people for exercising their constitutional rights [the effect on freedom of speech] need not be great in order to be actionable." *Bart* held that "an entire campaign of harassment" was actionable because although it was "trivial in detail," it "may have been substantial in gross."[12] The determination of whether the harassment campaign was sufficient to state a retaliation claim under Section 1983 was deemed a question of fact, not dismissible as a matter of law.[13]

Bloch v Ribar,[14] a First Amendment retaliation case, incorporated the *Bart* standard in its definition of "adverse action." *Bloch* applied the following three-part definition of retaliation: "(1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights."[15]

A panel of the U.S. Court of Appeals for the D.C. Circuit, on its initial review of *Crawford-El,* approved the *Bart* standard as to the level of injury the prisoner had to show in that case, and then remanded to the district court for repleading.[16] After remand, the en banc court commented with approval on the district court's application of a "sensible" standard: whether an official's acts "would chill or silence a 'person of ordinary firmness' from future First Amendment activities."[17] The Supreme Court left this standard undisturbed.[18]

Other circuits have used the standard in the public employment retaliation context. The Fifth Circuit used a similar standard in *Pierce v Texas Dep't of Criminal Justice.*[19] The *Pierce* court mentioned an oft-cited footnote in the Supreme Court opinion of *Rutan v Republican Party of Illinois,*[20] which reads:

> *Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights."*[21]

The adverse actions need not be great where First Amendment rights are involved to allow public employees to proceed with a retaliation case.

Monell Appears Applicable to First Amendment Retaliation Claims in the Context of Public Employment Decisions

Monell v New York City Dept. of Social Services[22] held that municipalities and other bodies of local government may be sued directly under Section 1983 if it is alleged to have caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[23] The Court noted Section 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."[24] *Monell* does appear to apply to First Amendment retaliation claims in the public employee context.[25]

Monell's conclusion arose from the language and history of Section 1983, which provides for liability when a government "subjects [a person], or causes [that person] to be subjected," to a deprivation of constitutional rights. Without attempting to draw the line between actions taken pursuant to official policy and the independent actions of employees and agents, *Monell* left the "full contours" of municipal liability under Section 1983 to be developed further on "another day."[26]

Since *Monell,* the Court has considered several cases involving isolated acts by government officials and employees. The Court has ruled that an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business. In *Pembaur v City of Cincinnati,*[27] the Court held that the County may be held liable under Section 1983 for the sheriff's decisions regarding operation of the tow list, noting that municipal liability may be imposed where a "deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[28]

In *Pembaur,* Justice Brennan's opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under Section 1983 only for "acts which the municipality has officially sanctioned or ordered."[29] Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to Section 1983 liability.[30] Third, whether a particular

official has "final policymaking authority" is a question of state law.[31] Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business.[32]

Where supervisory employees have final policymaking authority to terminate subordinate employees, apparently in their unfettered discretion, their acts become the acts of the Governmental Employer for which they have official capacity liability and give rise to municipal liability of the entity.

In *Harlow v Fitzgerald,*[33] the Court established qualified immunity for governmental officials, holding: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

In First Amendment cases, the first step in qualified immunity analysis breaks down into a three-part inquiry: (1) whether the speech involves a matter of public concern; (2) whether, when balanced against each other, the First Amendment interests of the plaintiff and the public outweigh the government's interest in functioning efficiently; and (3) whether the protected speech was a substantial or motivating factor in the adverse action against the plaintiff.[34]

It has been held that *Harlow* does not stand for the proposition that inquiries into defendants' subjective motivation is inappropriate in the first step of the qualified immunity analysis, in assessing whether an intent-based constitutional violation has been alleged.[35] Thus, subjective motivation to retaliate against a public employee in such cases remains a factor to be weighed in determining liability.

Conclusion

Public employees have substantial First Amendment rights to be free from job-related retaliation for speech on issues of public importance. This protection benefits not only the employee, but the general public, by creating an environment in which those who know best what government is doing are free to report it to the public, who needs to know in order to intelligently exercise the right to vote on public issues. Without such freedom, American democracy would be greatly diminished.

Dedicated to the memory of First Amendment advocate Dirk Koning, founder and Executive Director of the Grand Rapids Media Center, and public access cable channel 25/GRTV (not to be confused with public broadcasting station WGVSU.) Dirk was a pioneer who reminded us all that the rank amateur and the well-heeled professional are equally protected by the constitutional right to free speech. ◆

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Footnotes

1. 391 US 563, 568, 20 L Ed 2d 811, 88 S Ct 1731 (1968).
2. 429 US 274 (1977).
3. When balancing interests under the second prong of the test, defendants must show "'actual injury to . . . legitimate interests' beyond the [**19] 'disruption that necessarily accompanies' such speech." *Keyser,* 265 F3d at 749 (quoting *Johnson v Multnomah County,* 48 F3d 420, 427 (CA 9, 1995)). In *Saucier v Katz,* 533 US 194, 150 L Ed 2d 272, 121 S Ct 2151 (2001), the Supreme Court held that this inquiry must be made in two successive steps: The court must first determine whether "the facts alleged show the officer's conduct violated a constitutional right;" "the next, sequential step is to ask whether the right was clearly established"—an inquiry that "must be undertaken in light of the specific context of the case." Id. at 201. *Saucier,* in part, was concerned with "'avoiding excessive disruption of government and permitting the resolution of many insubstantial claims on summary judgment,'" id. at 202 (quoting *Harlow,* 457 US at 818), and thus established an analytic framework that would enhance the likelihood that claims will be resolved at "the earliest possible stage in litigation," id. at 201 (quoting *Hunter v Bryant,* 502 US 224, 227, 116 L Ed 2d 589, 112 S Ct 534 (1991)). Once the case has proceeded to trial, these concerns fall by the wayside and the sequence in which the court decides the two issues is no longer important. Although the court must still decide both issues, it may do so in whatever order it believes would serve the interests of justice in light of the then-existing circumstances.
4. 439 US 410 (1979).
5. 461 US 138 (1983).
6. 483 US 378 (1987).
7. 114 S Ct 1878 (1994).
8. Id. at 1886–87.
9. See, e.g., *Perry v Sindermann,* 408 US 593 (1972) (nonrenewal of contract); *Pickering v Board of Education,* 391 US 563 (1968) (dismissal).
10. 175 F3d 38 (CA 6, 1999).
11. 677 F2d 622, 625 (CA 7, 1982).
12. *Bart,* 677 F2d at 625.
13. Id.
14. 156 F3d 673, 678 (CA 6, 1998).
15. Id.
16. *Crawford-El v Britton,* 951 F2d 1314, 1322 (DC Cir, 1991).
17. *Crawford-El v Britton,* 93 F3d 813, 826 (DC Cir, 1996) (quoting 844 F Supp 795, 801 (D DC, 1994) (quoting *Bart*)).
18. In *Crawford-El v Britton,* 523 US 574 (1998), the Supreme Court confirmed that, although *Harlow v Fitzgerald,* 457 US 800, 818 (1982) eliminated inquiries into the defendant's subjective state of mind in the third step of the qualified immunity analysis, it did not eliminate inquiries into the defendant's subjective state of mind in the first step of the qualified immunity analysis, when plaintiff alleges an intent-based constitutional tort. While striking down a heightened pleading requirement for motivation-based constitutional torts, the *Crawford-El* Court stated that "a judicial revision of the law to bar claims that depend on proof of an official's motive" was not justified. Id. at 592. The Court went on to explain that "there is an important distinction between the 'bare allegations of malice' that would have provided the basis for rebutting a qualified immunity defense under *Wood v Strickland* [the third step], and the allegations of intent that are essential elements of certain constitutional claims [the first step]." Id.

    Emphasizing its concern with intrusive discovery into a public official's state of mind, the Court observed that under *Wood,* prior to *Harlow,* allegations of defendant's malicious intent to cause any injury at all to plaintiff—not just constitutional deprivations—"would have permitted an open-ended inquiry into [the official's] subjective motivation." Id. In contrast, the Court found that when assessing intent as an element of a constitutional violation, the motivation inquiry is not so broad as to allow discovery on any potential theoretical basis for the cause of defendant's alleged animosity towards plaintiff: "rather, [the motivation inquiry] is more specific, such as an intent . . . to deter public comment on a specific issue of public importance." Id.

    The Court then observed that "existing law already prevents this more narrow element of unconstitutional motive [alleged as part of the underlying constitutional tort] from automatically carrying a plaintiff to trial." Id. This is true because a defendant might prevail on a qualified

immunity defense in a case alleging an intent-based constitutional tort, without need to inquire as to her motives, if (1) the relevant law was not clearly established, (2) the plaintiff's speech did not relate to a matter of public concern, or (3) the defendant showed that she would have reached the same decision even in the absence of the employee's protected speech. Id. at 592–93. In consequence, as noted by the *Crawford-El* Court, "unlike the subjective component of the immunity defense eliminated by *Harlow,* the improper intent element of various causes of action should not ordinarily preclude summary disposition of insubstantial claims." Id. at 593.

19. 37 F3d 1146, 1149–50 (CA 5), cert. denied, 514 US 1107 (1994).
20. 497 US 62 (1990).
21. Id. at 76 n 8. See, e.g., *Agosto-de-Feliciano v Aponte-Roque* (violation of employees' associational rights states a cause of action "only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations in favor of the prevailing party"); *DeLeon v Little* (denying summary judgment and remanding for trial to determine whether harassment for political affiliation was sufficient to deter an employee from holding or expressing beliefs). 889 F2d 1209, 1217 (CA 1, 1989). 981 F Supp 728, 733–34 (D Conn 1997).
22. 436 US 658 (1978).
23. *Monell,* 690.
24. Id. at 690–691.
25. *St. Louis v Praprotnik,* 485 US 112 (1988) (suit under Section 1983 on the theory that public employee respondent's First Amendment rights had been violated through retaliatory actions taken in response to his suspension appeal analyzed under *Monell*).
26. 436 US at 695.
27. 475 US 469 (1986).
28. *Pembaur,* at 480.
29. Id. at 480.
30. Id. at 483 (plurality opinion).
31. Ibid. (plurality opinion).
32. Id. at 482–483, and n 12 (plurality opinion). See, e.g., *Praprotnik,* supra; *Owen v City of Independence,* 445 US 622 (1980); *Newport v Fact Concerts, Inc,* 453 US 247 (1981); *Canton v Harris,* 489 US 378 (1989) (rejecting petitioner's contention that Section 1983 liability can only be imposed where the municipal policy in question itself is unconstitutional); *Jett v Dallas Indep Sch Dist,* 491 US 701 (1989) (in determining a local government's Section 1983 liability, a court's task is to identify those who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the violation at issue); *McMillian v Monroe County,* 117 S Ct 1734 (1997).
33. 457 US 800, 818 (1982).
34. *Mullin v Town of Fairhaven,* 284 F3d 31, 37–38 (CA 1, 2002) (discussing the Supreme Court precedents that require each of these three inquiries: *Connick; Pickering; Mt. Healthy*).
35. *Mihos v Swift,* ___ F3d ___, CA 1, 2004).