

## **NAVIGATING PUBLIC EMPLOYEES' SPEECH RIGHTS**

### **I. INTRODUCTION**

The First Amendment prohibits public employers from taking adverse employment action against public employee, such as demoting or discharging the employee, in retaliation for the employee's protected speech. A public employee has a First Amendment right to freedom of speech. However, the right applies to speaking as a citizen on a matter of public concern but not to speech that is personal in nature or within the scope of the employee's duties for the public employer. A proper analysis of whether the public employee has engaged in protected speech under the First Amendment is very fact specific and requires careful consideration of several factors.

### **II. FIRST AMENDMENT ANALYSIS**

When analyzing First Amendment claims brought by public employees against their current or former employers, courts utilize a multi-factor test.

First, courts consider whether public employees are speaking out in their capacity as a private citizen, or in their capacity as a public employee. Where the individual is speaking on matters that arise from or are related to their work as a public employee, First Amendment protections are not triggered. As the United States Supreme Court has stated, when "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." *Garcetti v. Ceballos*. The critical question is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Factors such as the employee's job description, whether the speech

occurred at the workplace, and whether the speech concerned the subject matter of the employee's job may all be considered.

Second, courts consider whether the subject matter of the speech concerns an issue about which the public has an interest. Matters that are more personal in nature, or matters about which the public at large would have little if any interest are not protected.

Third, assuming that the speech is of the type that would be protected by the First Amendment, courts consider the extent to which the governmental employer has an interest in regulating the speech for the sake of maintaining efficient operations. On this point, courts must weigh a public employee's First Amendment interests against the governmental employer's interest in regulating the speech to promote "the efficiency of the public services it performs through its employees."

According to the United States Court of Appeals for the Eleventh Circuit, which hears appeals from federal courts in Florida, speech involves a matter of public concern when it relates to a "matter of political, social, or other concern to the community" but not when it involves only a matter of personal interest to the employee. For example, the Eleventh Circuit concluded in one case that an employee's formal complaints of sexual harassment in the workplace did not implicate a matter of public concern where the employee did not attempt to involve the public and the speech was motivated by the employee's desire to improve the conditions of her employment. *Hollis v. W. Academy Charter, Inc.*, (11th Cir. 2019).

**A. Speech As A Citizen**

The first factor to consider is whether the public employee was speaking out in her or his capacity as a private citizen. If not, there is no First Amendment protection for their speech. The following are examples of cases in which the outcome of the case hinged upon this issue.

In *Batz v. City of Sebring*, the Eleventh Circuit Court of Appeals concluded that a fire chief spoke in his role as a city employee when he expressed concerns about efforts to undermine and delay his efforts to enforce the state fire code against a historic building owned by persons with connections to the city council and administration. Therefore, the Eleventh Circuit concluded that the fire chief's speech was not protected by the First Amendment.

In *Levitt v. Ionine*, the Eleventh Circuit decided that a public school teacher's complaints regarding the union's appointment of a shop steward and his request to the union that he be allowed to run for shop steward arose from his job as a school teacher and was not protected by the First Amendment.

In *Bott v. Bradshaw*, the Eleventh Circuit decided that a deputy sheriff's testimony at a criminal court proceeding was part of the performance of his duties as a law enforcement officer, rather than as a private citizen, and therefore not protected by the First Amendment.

#### **B. Matter of Public Concern**

The second factor to consider is whether the public employee was speaking out on a matter of public concern. If not, there is no First Amendment protection for their speech. The following are examples of cases in which the outcome of the case hinged upon this issue.

In *Rabon v. Roberts*, the federal court ruled that an a deputy sheriff's report of misconduct by a co-worker and complaint about lack of discipline within the agency was not a matter of public concern and therefore not protected by the First Amendment. The court reasoned that the report of misconduct was within the scope of the deputy's public duties, and that the complaint about discipline was "a personal gripe," not a comment about a matter of public concern.

In *Keller v. City of Tallahassee*, the federal court ruled that a police officer's speech, including his critiques of his training officers, was not on a matter of public concern and therefore

not entitled to First Amendment protection. The court explained that the officer was motivated primarily by a desire to improve his own chances of advancing in the police department training program and airing his gripes with training officers he did not like, rather than by a desire to expose police wrongdoing.

**C. Employer's Interests**

Assuming that the speech is of the type that would be protected by the First Amendment, courts consider the extent to which the governmental employer has an interest in regulating the speech for the sake of maintaining efficient operations.

In *San Diego v. Roe*, the United States Supreme Court held that a police officer's First Amendment rights were not violated when his employer terminated him for selling sexually explicit videos of himself on the internet while wearing a police uniform. The officer contended that his off-duty conduct was unrelated to his employment and constituted protected speech. The Court concluded that the officer's actions would ordinarily be protected speech under the First Amendment, but that the officer's expressions, which were widely broadcast and linked to his official status as a police officer, were detrimental to his employer, were designed to exploit his employer's image, and brought the professionalism of the police department into disrepute. Therefore, the actions were not protected.

In *Snipes v. Volusia County*, a law enforcement officer brought suit alleging unlawful retaliation under the First Amendment when his employment was terminated following racially inflammatory posts on his personal Facebook page following the Trayvon Martin case. The court concluded that the city had a right to terminate the officer because it undermined public confidence in local law enforcement. Although the court assumed without deciding that the speech would ordinarily be protected under the First Amendment, it concluded that the governmental employer's

interest in maintaining efficient operations outweighed the officer's interests in making his statements.

## **II. RECENT FIRST AMENDMENT CASES**

In *Lopez v. Gibson*, Marcos Lopez was a newly promoted sergeant in the Osceola County Sheriff's Office. Only two days after he was promoted to sergeant, Lopez launched his campaign to run for the position of sheriff on Facebook. His actions resulted in two other officers posting negative information about him on Facebook. Lopez filed an internal complaint accusing these two officers of violating department regulations. In response to Lopez's internal complaint, the sheriff opened an internal investigation. That investigation yielded information that Lopez's hands were not entirely clean with respect to his own Facebook posts. As a result, Lopez was issued a written reprimand. Unfortunately for Lopez, that was not the end of his Facebook-related problems. Shortly thereafter, Sheriff Hansell received a report that Lopez had publicly criticized the department on his Facebook page. As a result, another internal investigation was opened. That second investigation revealed that Lopez had made several disparaging comments about the department on his Facebook page. The investigation further revealed that Lopez had disobeyed the sheriff's directive that he not wear his uniform in campaign-related social media posts. As a result, Lopez received a Notice of Disciplinary Action recommending that he be demoted and serve a 40 hour suspension without pay for violating three separate standards of conduct.

Lopez appealed his Notice of Disciplinary Action to the Civil Service Appeals Board. A panel of five individuals heard Lopez's appeal, and after a two-and-one-half hour hearing, issued a final and binding ruling that affirmed his demotion, but overturned his suspension. Lopez did not challenge this decision by appealing it to the applicable Florida circuit court. Instead, he filed suit in the United States District Court for the Middle District of Florida alleging that he had been

demoted in retaliation for exercising his right to free speech. More particularly, Lopez claimed that he had engaged in campaign-related speech which was protected by the First Amendment. At the appropriate phase in the litigation, both parties moved for summary judgment.

The District Court granted the sheriff's motion for summary judgment upon the ground that Lopez had failed to demonstrate, for purposes of establishing liability under 42 U.S.C § 1983, that the sheriff was the final decision-maker whose decision constituted official county policy. The district court noted that an official is not a final policymaker if his or her decision is subject to meaningful administrative review. In this case, because the appeals board conducted a thorough evidentiary hearing after which it rendered a final and binding determination; the sheriff was not the final policymaker. Lopez appealed the District Court's award of summary judgment in favor of the sheriff.

First, Lopez argued that Sheriff Gibson had no right to demote him for making disparaging comments about the sheriff, because his statements were political speech that was protected by the First Amendment. However, the Eleventh Circuit stated that it did not need to reach the question of whether Lopez's speech was political speech protected by the First Amendment because Sheriff Gibson was not the final policymaker in regard to Lopez's demotion; the appeals board was.

Next, Lopez argued that even if the sheriff was not the final policymaker, he at least shared policymaking responsibility with the appeals board, and therefore could have rescinded his demotion if he wanted to do so. The Eleventh Circuit, however, quickly dispensed with that argument. As stated above, the board's decision was final and binding on all parties. As a result, Sheriff Gibson had no authority to rescind the demotion issued by the board, even if he desired to do so.

Last, but not least, Lopez argued that Sheriff Gibson, and not the board, was the true final policymaker, because the board's procedures were defective and did not provide him with meaningful administrative review. Specifically, he argued that the board's administrative hearing procedures – which allowed the parties to be represented during the hearing, but not by a licensed attorney, limited each party to making an evidentiary presentation of no more than 20 minutes, and a closing argument of no more than 2 minutes – deprived him of a meaningful administrative review. The Eleventh Circuit disagreed. Instead, it found that the board conducted a meaningful administrative review of the disciplinary action Sheriff Gibson had set forth in his Notice of Disciplinary Action concerning Lopez, and that the board had not merely “rubber stamped” the sheriff's disciplinary action decision. According to the Eleventh Circuit, the board's decision to overturn the 40 hour suspension without pay set forth in the sheriff's Notice of Disciplinary Action established that the board's administrative review was meaningful. Accordingly, the Eleventh Circuit affirmed the District Court's award of summary judgment in favor of the sheriff.

In *McCullars v. Maloy*, Stanley McCullars was a supervisor in the Finance Department of the Office of the Clerk of Court for Seminole County, Florida. While at home, McClullars posted comments from his Facebook account criticizing State Attorney, Aramis Ayala, after Ayala publicly declared that her office would not pursue the death penalty in capital murder cases. Ayala's comment about not seeking the death penalty was made in the wake of a particularly heinous double murder of a pregnant woman and a police officer. McCullars, in response to Ayala's pronouncement about not seeking the death penalty, posted to another individual's Facebook page that Ayala “should get the death penalty” and “should be tarred and feathered if

not hung from a tree.” Ayala is African American. She is also the first African American in the State of Florida to hold the position of State Attorney. Shortly after making that post, McCullars made a second Facebook post wherein he stated: “Yep, it was wrong of me to post that. I let my anger at her efforts to thwart justice get the better of me. No excuses.”

Unfortunately for McCullars, his Facebook posts went viral and spread across the internet with lightning speed. By the following day, the clerk’s office was inundated with telephone calls and e-mails protesting McCullar’s Facebook posts. Although McCullars denied that his posts were racially motivated, and even denied knowing that Ayala was African American, the majority of those who complained about his posts to the clerk’s office remarked that his posts were racist in nature. Many of those who called or e-mailed to complain demanded that McCullars be fired from his job. In fact, even McCullars’ own supervisor, the Finance Director for the clerk’s office, refused to work with McCullars in light of his posts. The volume of complaints the clerk’s office received was so large that its telephone and e-mail systems were soon overwhelmed. For a period of two to three days, the clerk’s office had to pull two full time staff from their normal job duties in order to handle the volume of calls and e-mails. Moreover, the entire staff of the clerk’s office had to be given training on how to respond to questions from both citizens and the media regarding McCullars’ posts. The public outcry in response to McCullars’ Facebook posts were so great, the general counsel for the clerk’s office was pulled off of her normal job duties for a period of two days in order to research First Amendment free speech issues and to review the options of the clerk’s office.

After researching the issue, the general counsel concluded that McCullars’ posts violated the clerk of court’s code of ethics, which required its employees to “avoid any activities that would impugn the dignity of the clerk’s office.” The general counsel concluded that McCullars’

comments reflected poorly upon the integrity and impartiality of the clerk's office, and undermined the public's confidence in the administration of justice. Seminole County's Clerk of Court, Grant Maloy, agreed and noted that McCullars' comments, if left unchecked, could have a negative impact on the office's morale, as well as its ability to recruit and maintain a diverse workforce. Notably, McCullars' posts drew reactions from the community at large. For example, the Orange County Democratic Party expressed outrage over what it called a "terroristic threat" that McCullars directed toward Ayala, and called for McCullars' immediate termination from employment. Similarly, Pastor Roman Oliver, an African American community leader in Sanford, Florida, who had been involved in organizing peaceful protests over the killing of Trayvon Martin, just one year earlier, met with Maloy to discuss his office's handling of the problem.

Three days after igniting this firestorm, McCullars tendered a letter of resignation to Maloy wherein he acknowledged that his posts had caused the clerk's office to expend resources answering questions from members of the public and stated: "I believe my resignation will help the clerk's office to more quickly return to the people's business." Although the published opinion in this case does not explain whether McCullars' resignation was something he submitted on his own volition, it does state that he was placed on administrative leave and provided a letter from the clerk's office providing incentives for resignation. Shortly thereafter, McCullars brought suit against Maloy, in both his individual and official capacities, alleging that he was wrongfully terminated in retaliation for exercising his First Amendment right to free speech. Although the District Court granted Maloy's motion for summary judgment with respect to the First Amendment claims brought by McCullars against him in his individual capacity, it allowed the First Amendment official capacity claim against Maloy to proceed to trial. At trial, after the

presentation of all of the evidence, Maloy moved for a judgment as a matter of law, which the District Court granted. McCullars thereafter appealed.

On appeal, the Eleventh Circuit first analyzed whether McCullars' Facebook posts had been made within the scope of his employment, or in his capacity as a private citizen. Because McCullars' posts were sent from his home computer while he was off duty and were unrelated to his professional duties, the Court of Appeals quickly concluded that McCullars' posts were made in his capacity as a private citizen. The Eleventh Circuit next evaluated whether McCullars' posts constituted speech involving a matter of public concern, as opposed to speech involving a purely personal matter. In doing so, the Court of Appeals evaluated the content, form, and context of McCullars' post and concluded that "Plaintiff's speech concerning the State Attorney's stance on the death penalty, no matter how misunderstood Plaintiff's understanding of Ms. Ayala's position may have been, is speech on a matter of public concern."

After concluding that McCullars was speaking as a citizen on a matter of public concern when he posted his comments on Facebook, the Eleventh Circuit then applied the balancing test set forth in Pickering v. Board of Education, 391 U.S. 563 (1968). Although the Court of Appeals noted that McCullars undoubtedly had a legitimate interest in speaking on a matter of public concern, it further noted that interest was diminished by the offensive and insulting manner in which it was communicated. The Court also found that because McCullars used a public forum, i.e., Facebook, to express the views contained in his posts, and because those posts went viral, the clerk's office experienced significant disruption in the performance of its normal duties. The Eleventh Circuit further concluded that Maloy's interests in operating the office of the clerk without disruption outweighed the McCullars' limited interest in speaking freely about a matter of

public concern. Consequently, it affirmed the District Court's award of a judgment as a matter of law in favor of Maloy.

In *Strang v. Albany, Georgia*, a former assistant city attorney for the City of Albany, Georgia, brought a *pro se* civil action alleging unlawful retaliation in violation of the First Amendment, after she was allegedly terminated from employment for reporting that her supervisor kept a handgun in his desk at work.

Strang's duties included ensuring "departmental compliance with all applicable city codes, laws, rules, regulations, standards, policies and procedures," and "initiating any actions necessary to correct violations." In 2009, an African American employee named Shurell Byrd – who was also a personal friend of Strang's – reported to Strang that her immediate boss had routinely used the "N" word in her presence. Strang, who is white, reported Byrd's account to Davis. In doing so, Strang repeated what Byrd had told her, and actually used the "N" word when doing so, in the presence of Jenise Smith, another assistant city attorney who happened to be African American. When Smith later confronted Strang about this incident and asked her not to use the "N" word, Strang became outraged. Strang then went into a paralegal's office and repeatedly used the "N" word over and over again. When Strang was later asked why she had done this, she claimed that she was not directing a racial slur at Smith, but was "ridiculing" Smith for suggesting that her use of that term, when reporting Byrd's account to Davis, had been motivated by racial animus.

In January of 2010, the board of city commissioners directed Davis to place Strang on a performance improvement plan after the city commission concluded that certain City department heads were refusing to work with Strang due to inappropriate behaviors by Strang. Although Davis placed Strang on a coaching plan that required her to: (1) attend training classes focused on team building; and (2) develop a written strategy within 90 days to strengthen her ability to create a

collegial atmosphere, Strang completed neither of those requirements of her coaching plan. According to Strang, in March of 2010, Davis, who was upset by the cluttered condition of her office, swept papers off of her desk and into a trash can. Strang claims that as a result of that incident, she entered into Davis' office with the intention of "teaching Davis a lesson" by finding a document in Davis' office and making it "disappear." Although Strang claims she could not bring herself to follow through with this plan, she claimed that she opened one of the drawers of Davis' desk and noticed there was a handgun in it. Strang alleges that because Davis "hated her guts," she believed that Davis intended to point that handgun at her. Strang reported the fact that Davis had a handgun in his office desk to the city's equal employment opportunity manager, Niger Thomas. As a result, Davis was suspended without pay for three days.

In April of 2010, the entire staff of the city attorney's office, except for Strang, attended a professional development luncheon. When she failed to appear for that luncheon, Strang was summoned to attend a mandatory staff meeting later that afternoon by an administrative legal secretary named Christine Washington. When Strang appeared at that mandatory meeting, she claims that Washington ordered her to apologize for embarrassing the city attorney's office for reporting Davis' gun. Strang also claims that Washington repeatedly told her that she should be fired. Strang further claimed that Smith also attended that meeting and attacked her for three hours by criticizing her work and for pretending to work long hours. Although Strang acknowledges that Davis did not attend this meeting, she claims that Davis had authorized it. Shortly thereafter, on May 5, 2010, Davis requested Strang's immediate resignation. The following day, Thomas prepared a memorandum to the mayor concerning "the workplace environment in the city attorney's office," including "poor staff relations and mistrust and disrespect." Less than a week later, the city commission met in a closed executive session in which they criticized Strang for not

getting along with her colleagues, doing work outside of the city attorney's office, and for not paying her city-issued cellphone bill in a timely manner. On May 25, 2010, Strang received a Notice of Recommendation of Dismissal from City Attorney Davis. Although Strang requested, and received, a predetermination conference before City Manager, Alfred Lott on June 22, 2010, Lott terminated Strang's employment on June 30, 2010.

Almost two full years after her termination, Strang, on May 10, 2012, filed a Section 1983 civil action against the mayor, each of the city commissioners, City Manager Lott, and City Attorney Davis. In that lawsuit, Strang alleged that she had been fired in violation of the First Amendment in retaliation for reporting her discovery of the handgun in Davis' desk drawer. At the appropriate time, the defendants filed a motion for summary judgment, which the District Court granted. Strang thereafter appealed that award of summary judgment in favor of the defendants. Unfortunately for Strang, the Eleventh Circuit affirmed the District Court's summary judgment award. According to the Court of Appeals, Strang's reporting of the handgun in Davis' desk to Thomas was not activity protected by the First Amendment because she was not speaking out as a citizen on a matter of public concern. According to the Eleventh Circuit, it was Strang's job to ensure "departmental compliance with all applicable city codes, laws, rules, regulations, standards, policies, and procedures." As such, her reporting of the handgun to Thomas was in furtherance of her official duties as an employee, and not as a citizen. Moreover, the Eleventh Circuit noted that even if it had concluded that Strang's report of the handgun in Davis' desk to Thomas amounted her speaking out as a citizen, as opposed to an employee speaking in the performance of her normal job duties, her speech was not pertaining to a matter of public concern, but was instead purely related to her own personal circumstances, as she purportedly believed Davis "hated her guts" and she was afraid that Davis intended to point that handgun at her.