

Speech Protection and Black Lives Matter in the Workplace

*The College of Labor and Employment Law
Regional Program 5th and 11th Circuit Committees*

February 17, 2017

9:00-10:00 A.M.

New Orleans, Louisiana

*Michael Z. Green, Fellow and Professor, Texas A&M
University School of Law*

Rod Tanner, Fellow, Rod Tanner and Associates



Agenda

- ▶ Panel Introductions
- ▶ Brief Review of Key Precedents
- ▶ Current Hypotheticals
- ▶ Discussion
- ▶ Final Thoughts



The Fundamentals: Private Sector Legal Protections

- ▶ Title VII/Section 1981: race discrimination. *Collins v. Charleston Place*.
- ▶ NLRA: Concerted Activity.
 - ▶ The Opprobrious and Race Protection Standards, *Arthur Young, Cooper Tire, and Colin Kaepernick*.
 - ▶ Concerted Political Activity, *Eastex and NLRB Memorandum GC 08-10 (July 22, 2008)*

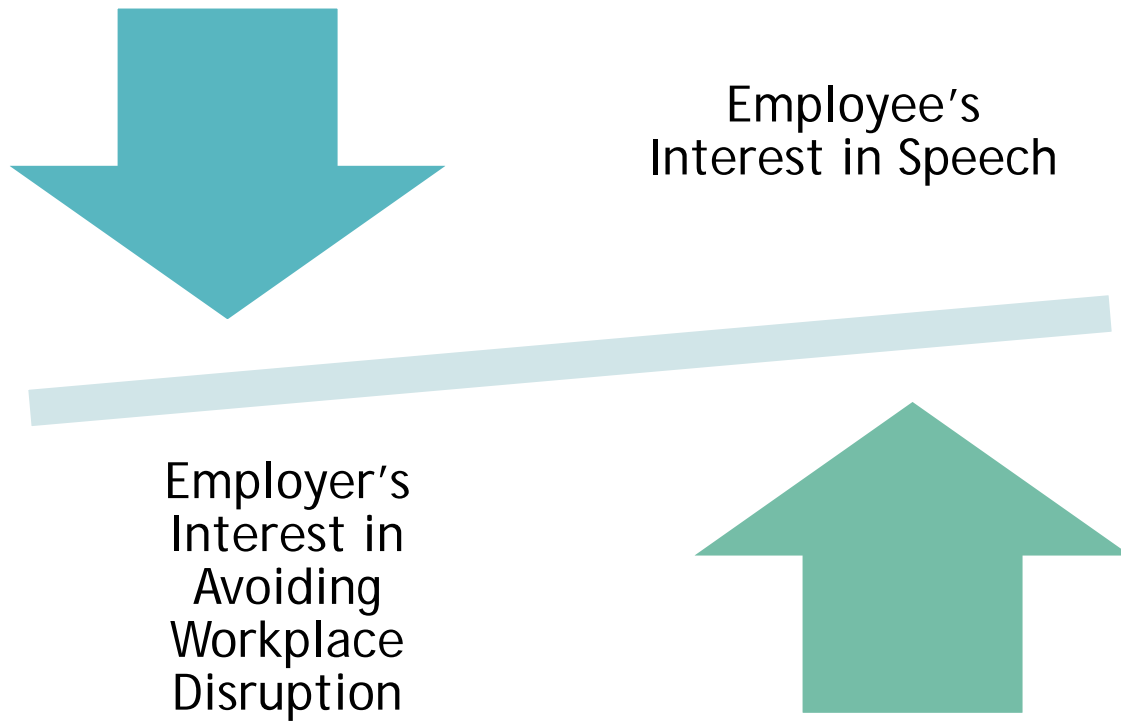


The Fundamentals: Public Sector First Amendment Legal Protections

- ▶ *Pickering:*
- ▶ *Connick:*
- ▶ *Garcetti:*
- ▶ *Lane:*



Pickering v. Board of Education, 391 U.S. 563 (1968)



Connick v. Myers, 461 U.S. 138 (1983)

- ▶ Public employee speech about private concerns - workplace gripes about working conditions and office procedures - unprotected.

Garcetti v. Ceballos, 547 US. 410 (2006)

- ▶ Speech made as part of a public employee's "official duties" is unprotected under 1st Amendment.
- ▶ Threshold question: did the public employee speak as a citizen on a matter of "public concern"?

Lane v. Franks, 134 S. Ct. 2369 (2014)

- ▶ An employee's subpoenaed testimony about corruption in a public program and misuse of state funds was still protected speech.
- ▶ It was not speech made pursuant to his job duties even though he learned about it in the course of his job duties.



Key Concepts: Public Sector Discipline

- ▶ *Was speech on or off duty?*
- ▶ *If on duty - was employee just doing her job as a public employee or speaking as a citizen?*
 - ▶ *Speech about matters learned on the job may still be protected (see Lane).*
- ▶ *Was the speech on a matter of public or private concern?*
 - ▶ *Subject matter and context inquiry*
- ▶ *Does employer's interest in avoiding workplace disruption outweigh employee's interest in her speech?*

Key Concepts: Public Sector Policies

- ▶ Overly Broad Work Rule Restrictions on Speech.
- ▶ Preemptive restraining of speech unrelated to work violates First Amendment. NTEU.
- ▶ Harms must be real and not speculative to establish a regulation on speech. Turner Broadcasting.
- ▶ Too Broad. Moonin and Liverman.
- ▶ Valid. *Graziosi v. City of Greenville Miss.*

Key Concepts: Private Sector Speech

- ▶ *Rough and tumble nature and opprobriousness standard for in-person discussions:*
 - ▶ *Picket Line. Cooper Tire and Clear Pines Moulding.*
 - ▶ *Supervisor outbursts. Atlantic Steel and Arthur Young.*
- ▶ *No purely political issues. Motorola and Firestone.*
- ▶ *Political issues must have nexus to the workplace. Eastex and GC 08-10 memo.*
- ▶ *Off duty comments on social media protected but Atlantic Steel does not apply and knowingly false or defamatory statements not protected. Three D.*¹¹

Key Concepts: Private Sector Policies

- ▶ Overly Broad Work Rule Restrictions on Speech.
- ▶ If work rule tends to chill Section 7 activity. Hyundai. GC Memo 15-4 (3/18/15).
- ▶ Trump Board, Boeing Company, 365 N.L.R.B. No. 154 (Dec. 14, 2017) (balancing “(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.”).

Key Concepts: Private Sector Legal Off-Duty Activity and Lifestyle Protection Statutes

- ▶ New York Statute.
- ▶ Colorado Statute.
- ▶ South Carolina Statute in Collins decision.

Hypo 1: Social Media Policy

- ▶ Police Chief issues General Order revising social networking policy.
- ▶ One provision states:
 - ▶ “Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.”



Hypo 1: Social Media Policy cont.

- ▶ Another provision states:

- ▶ “Officers may comment on issues of general or public concern (as opposed to personal grievances) so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer.”



Hypo 1: Social Media Policy cont.

- ▶ Lucy and Addison are veteran officers. While off-duty, Lucy posted the following comment to Facebook:
 - ▶ “Over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill/knowledge required to teach. Yet, in today’s Black Lives Matter world, we have rookies in specialty units, working as field training officers and instructors because of their race and not their skill/knowledge.”
- ▶ 30+ people “liked” this post. Addison, also off-duty, commented:
 - ▶ “I agree 110%... Not to mention you are seeing more and more of these untrained black officers being promoted to a supervisor. It makes me sick to my stomach. Supervisors should be promoted by experience.”

Hypo 1: Social Media Policy cont.

- ▶ When Chief learns of the exchange, he issues Addison and Lucy a written warning.
- ▶ Does the speech enjoy First Amendment protection?
- ▶ Would your answer change if the officers had communicated their concerns about supervisory skills directly to the Chief while on duty?
- ▶ If in the private sector for a security firm, do they have NLRA protection from the disciplinary action from an overly broad social media policy?



Hypo 2: Workplace Politics or Harassment?

- ▶ City workers are discussing proposed furloughs when one of them argues for collective action and says that “We all should take a page from Black Lives Matter and really organize.”
- ▶ Another city worker agrees that action is critical but says : “F... Black Lives Matter. That is nothing but a bunch of n-word criminals who deserve what they got. All lives matter. This is about fairness in overall wages and our jobs.”
- ▶ Several black employees who heard the statement were offended by the remark as a whole and especially the n-word and complained. Can the speaker be disciplined or was the comment protected by the First Amendment?



**BLACK
LIVES
MATTER**

Hypo 3: Take a Knee - But Not if You are a Public Employee?

- ▶ An NFL player kneels when the National Anthem is played to support Black Lives Matter and is suspended by NFL guidelines.
- ▶ Although the teams are owned privately, the game is being played in a stadium financed with \$72 million in public funds.
- ▶ The White House says that since the stadium was publicly financed everyone should stand for the anthem or be fired.
- ▶ Does player have First Amendment, Title VII or NLRA defense?
- ▶ What if our kneeler is a public high school coach who kneels at 50 yard line to pray at the end of each game on his own or because his players do it and he joins them?
- ▶ Does the coach have a First Amendment defense if the school disciplines him and refuses to renew his contract?
Private school?



Hypo 4: Parade Off-Duty: Speech Protection?

- ▶ Several firefighters normally participate in an annual local Thanksgiving Day parade during their off hours.
- ▶ Prior parade floats have focused on breast cancer awareness, organ donation, and military veteran rehabilitation services.
- ▶ This year they have decided to organize a float called “Blue Lives Matter” with pictures of fallen police officers and statements criticizing Black Lives Matters as a “Big Fraud.”
- ▶ All the firefighters are terminated for not representing their department in a professional manner.
- ▶ Do they have First Amendment protection?



20



Final Thoughts and Questions?

I CAN'T
STOP
THINKING!!



THANK YOU!!!!

