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First Amendment Rights of Public Employees

This presentation focuses on First Amendment rights of public employees and considerations for school boards and administrators when seeking to impose discipline against such employees for their public comments.

As always, NHSBA recommendations and training materials are intended for guidance only. Aside from the materials in this presentation, and aside from the NHSBA Sample Policies and Appendices, NHSBA has a variety of other materials and related documents necessary to assist school boards and administrators in this area. Additionally, NHSBA is always available to provide training on this topic.

I. Review of Pertinent Federal Law:

(1) Public employee speech involving matters of public concern constitutes protected speech under the First Amendment. Pickering v. Board of Education, 391 U.S. 563 (1968).

(2) **"The threshold question . . .** is whether [an employee's] speech may be 'fairly characterized as constituting speech on **a matter of public concern**.'" Rankin v. McPherson, 483 U.S. 378, 384 (1987).

(3) "The interests of the [employee] as a citizen, in commenting on matters of public concern" **must be balanced against** "the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563 (1968).

(4) "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. **And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters.**" Waters v. Churchill, 511 U.S. 661, 674 (1994)

(5) "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." Connick v. Myers, 461 U.S. 138, 147-48 (1983).

II. Applicable NH Supreme Court Cases and Analysis:

(1) Porter v. City of Manchester, 151 N.H. 30 (N.H. 2004):

- Facts: Porter became increasingly concerned about "certain office practices." Porter was troubled that Lafond discouraged caseworkers from reporting client fraud, child abuse, child neglect and threats to public safety. Porter informally expressed his concerns to Hobson, the human resources director. Porter was, however, unwilling to come forward formally, and, as a result, the issues he raised with Hobson were not communicated to Lafond. Porter was terminated and sued for wrongful termination.

- Important fact: Porter sued the City under 42 U.S.C. § 1983 (federal law). He did not sue under the NH Constitution or applicable NH statutes.

- The following factors must be considered in order to determine whether Porter has established a violation of his First Amendment rights:

  (1) Whether the speech involves a matter of public concern;

  (2) Whether, when balanced against each other, the First Amendment interests of Porter 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 Porter.

- 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." Connick v. Myers, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

  - "Porter's speech directly implicated a topic of inherent concern to the community; namely, the efficient and effective management and operation of the city government."

- Balancing interests:

    - The next step in determining whether Lafond violated Porter's constitutional rights is to balance the interests of Porter and the public in Porter's speech "against the interest of the [city], as an employer, in promoting the efficiency of the public services it performs through its employees."

    - On the other side of the Pickering balance, we must consider Lafond's interest "in preventing unnecessary disruptions and inefficiencies in carrying out [the department's] public service mission."

(2) Snelling v. City of Claremont, 155 N.H. 674 (N.H. 2007):

- Facts: Snelling began working for the City as a contract assessor in 1993. In March or April 2000, Porter hired Snelling as the city assessor. In August 2000, Snelling was contacted by a reporter from the Claremont Eagle Times. Snelling participated in a series of interviews and an article incorporating those interviews was published on August 27, 2000. Snelling indicated that certain members of the city council were taking unfair, but not illegal, advantage of the City's tax abatement system.

- Court employed a three-step process:

    (1) The plaintiff must speak as a citizen on a matter of public concern. The plaintiff then must demonstrate that his interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees.

    (2) The second step requires the plaintiff to show that the protected activity was a substantial or motivating factor in the alleged retaliatory action.

    (3) Finally, the public employer can rebut the claim by demonstrating that it would have reached the same decision, absent the protected conduct.

- Other important statements from the court:

    (1) "On the employee's side of this balance, the public's interest in exposing potential wrongdoing by public employees is especially powerful.... Moreover, the public's substantial interest in unearthing governmental improprieties requires courts to foster legitimate whistleblowing."

Baldassare, 250 F.3d at 198.

(2) Turning to the defendants' side of the balance, we consider whether the expression impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

III. Test of Whether First Amendment Rights of Employees has Been Violated:

(1) Is the employee an employee of the school district?

(2) Has the employee been punished or disciplined for his/her speech? Non-renwed, dismissed, demoted, or transferred?

(3) Did the speech for which the employee was disciplined relate to a matter of "public concern?"

(4) If the school district alleges that it had additional reasons for punishing the employee that do not relate to the employee's expression on matters of public concern, would those additional reasons have resulted in the same punishment that the employee faced? The school district has the burden of proof of showing that the other reasons would have resulted in the same punishment being implemented.

(5) If the employee's speech did relate to a matter of public concern, is the government's ability to "efficiently provide services" nonetheless adversely affected in a substantial way? Or does the speech negatively reflect on the employee's job performance?

(6) Was the employee punished for speech that was pursuant to his or her duties as an employee? If so, the First Amendment will generally not afford protection to the employee.

IV. Examples of courts finding the topic was a "matters of public concern."

(1) Criticizing the Board of Education's **allocation of school funds** between educational and athletic programs. (Pickering)

(2) Whether the college should be elevated to 4-year status. (Sindermann)

(3) Where speech **criticizes government inefficiency and waste**, not as an aggrieved employee, but as a concerned citizen, the speech is protected. Voigt v. Savell, 70 F.3d 1552, 155960 (9th Cir. 1995)

(4) **Matters of health, safety and illegality should be well within the ambit of public concern**. "Public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law." Marohnic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986); Charvat v. Eastern Ohio Regional Wastewater Auth., 246 F.3d 607, 618 (6th Cir. 2001) (environmental violations at wastewater treatment plant).

(5) The Court of Appeals in Cincinnati reinstated an elementary school teacher who claimed she was fired **for inviting actor Woody Harrelson to come speak to her class about the environmental benefits of hemp.** The Court found that a teacher's choice of an in-class speaker was a form of expression entitled to at least some First Amendment protection. Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001).

(6) **Matters of elections, pending legislation, corruption, race discrimination, public health and safety are in the zone. Matters of internal employment policy that do not touch on these public concerns are normally unprotected.** Other matters may or may not be of "public concern" depending on the scope of media attention, controversy, or, conversely, how deeply they disrupt the function of the public office.

V. Was the speech given as a "citizen" or was it within the scope of employee duties?

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

   - Sheila Myers circulated a petition asking other Assistant District Attorneys about the office's transfer policy, office morale, whether a grievance committee was needed, and whether they felt pressured to work on political campaigns. Harry Connick, the DA, claimed that the questionnaire created a "mini-insurrection" within the office.

   - 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, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

   - The Court concluded that Myers' question about pressure to work on political campaigns was a matter of public concern. However, "the manner, time, and place in which the questionnaire was distributed . . . supports Connick's fears that the functioning of his office was endangered." The Court concluded her survey was most accurately characterized as an employee grievance concerning internal office policy.

2. Garcetti v. Ceballos, 547 U.S. 410 (2006).

   - The plaintiff in the case was a district attorney who claimed that he had been passed up for a promotion for criticizing the legitimacy of a warrant. The Court ruled that because his statements were made pursuant to his position as a public employee, rather than as a private citizen, his speech had no First Amendment protection.

   - Public employees are not speaking as citizens when they are speaking to fulfill a responsibility of their job.

   - The Court found that Ceballos did not act as a citizen when he wrote the memo that addressed the proper disposition of a pending criminal case; he instead acted as a government employee. "The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance."

VI. Balancing Test Between Employee Speech and Employer Rights:

(1) Once a plaintiff states a claim for unlawful retaliation, a court must decide if "the interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer's interest in promoting the efficiency of the public services it performs through its employees."

(2) Some balancing factors for a court to consider include whether the statement impairs discipline by superiors or harmony among co-workers, whether the statement has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, and whether the speech in question interferes with the normal operation of the employer's business.

(3) The extent of the government's burden to show disruption depends on the nature of the employee's expression. The more important the First Amendment interest, the more disruption the government has to show. Roth v. Veteran's Administration, 856 F.2d 1401, 1407 (1989). A speaker's "personal stake" in a controversy does not prevent speech on the issue from involving a matter of public concern.

(4) A principal may lawfully discharge teachers for disobeying an order to quit talking about this subject. The Court of Appeals in St. Louis held that the speech "resulted in school factions and disharmony among their coworkers and negatively impacted [the principal's] interest in efficiently administering the middle school." Fales v. Garst, 235 F.3d 1122 (8th Cir. 2001).

VII. NH Statutes and Case Law for Consideration:

(1) RSA 98-E – Public Employee Freedom of Expression:

- 98-E:1 Freedom of Expression. – Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.

- 98-E:2 Interference Prohibited. – No person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee.

- 98-E:3 Confidential Records. – Nothing in this chapter shall suspend or affect any law relating to confidential and privileged records or communications. For the purposes of this chapter, confidential records and communications shall include communication or records relating to investigations for law enforcement purposes and collective bargaining proceedings.

(2) RSA 275-E – Whistleblowers' Protection Act:

- RSA 275-E:2. – I. No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because:

  (a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

- RSA 275-E:9. – No governmental entity shall threaten, discipline, demote, fire, transfer, reassign, or discriminate against a public employee who files a complaint with the department of labor under RSA 275-E:8 or otherwise discloses or threatens to disclose activities or information that the employee reasonably believes violates RSA 275-E:2, represents a gross mismanagement or waste of public funds, property, or manpower, or evidences an abuse of authority or a danger to the public health and safety. Notwithstanding this provision of law, public employers may discipline, demote, fire, transfer, or reassign an employee so long as the action is not arbitrary or

capricious and is not in retaliation for the filing of a complaint under this chapter. Any public employee who files such a complaint or makes such a disclosure shall be entitled to all rights and remedies provided by this chapter.

(3) Appeal of Booker, 139 N.H. 337 (N.H. 1995):

- Facts: DCYS employee gives quotes to reporter researching an article about "what it was like to be an employee at an agency that was being so heavily criticized." Director of DCYS had also provided the reporter with information. Employee was disciplined for various comments he made to the reporter.

- Applicable passages from the decision:

  - "The only limitation on a State employee's exercise of free speech under the statute is that one may not disclose confidential or privileged records or communications. RSA 98-E:3 (1990)."

  - "A plain reading of RSA 98-E:1…indicates that the section protects State employees' rights to freedom of expression more broadly than the United States [Constitution]."

  - "Accordingly, we will not balance the petitioner's first amendment interests against the government's interests under [the U.S. Constitution]. **We analyze the DCYS warning letter solely under RSA chapter 98-E.**"

  - "Most important to our analysis is the language of RSA 98-E:1 itself, that a State employee may "give opinions as an individual" on matters of State concern. No one contests that the content of the petitioner's statements addressed a matter of great State concern. Therefore, we must consider whether the petitioner gave his "opinions as an individual" in this case."

  - "The conclusion as to where the line [between observations by a public official in conversation in private life and the same observations expressed in an official capacity] must be drawn is driven by the facts of the case."

    - In other words, there is no bright-line rule.

VIII. Final considerations:

(1) Aside from the complexities of the First Amendment considerations, a school district should first analyze RSA 98-E and RSA 275-E to see if they are applicable.

(2) Courts often give the employee great latitude when determining whether the speech relates to a matter of public concern.

(3) While RSA 98-E affords public employees greater protection than they have under a federal case law analysis of this issue, that statute still allows for school districts to impose discipline or take job action if the speech adversely affects the "need of the employer to protect legitimate confidential records, communications, and proceedings."

(4) School districts would be wise to memorialize in writing the adverse affect the speech has had on school district operations – has the speech caused instances of insubordination? Mini-insurrections among staff? Have administrators needed to hold staff meetings to address the matter?

(5) Likewise, RSA 189:13 allows school boards to dismiss staff for insubordination and/or failure to adhere to "regulations prescribed" (directives, policies, administrative regulations, etc.) Are RSA 98-E and RSA 189:13 incompatible?

(6) How does RSA 98-E impact local school board policies relative to staff ethics and staff behavior?