INTRODUCTION

Controversial “freedom of speech” issues facing municipal officials in the 1970’s and 1980’s usually received the greatest publicity when these officials tried to control purveyors of pornographic or sexually explicit material or entertainment. Even before that, in the 1960’s with the turmoil of the Vietnam conflict, the issue involved restrictions upon profane public statements made by protestors and anti-war activists.

Less controversial but not kinder and gentler has been the evolution of free speech by employees. This freedom of expression has normally taken the shape of public criticism of municipal officials. Just how public can an employee go in criticizing his supervisor or governing body? Can the employer take disciplinary action against an employee regardless of the content of the speech? Can probationary employees or those who hold their jobs at the will or pleasure of the employer be disciplined without fear of liability exposure? Can employees be removed because of their political affiliation? These are just a few of the questions that will be discussed in this bulletin.

I. First Amendment Right to Free Speech

The First Amendment to the United States Constitution provides in part:

“Congress shall make no law . . . abridging the freedom of speech...”

This amendment was made applicable to state and local governments through the adoption of the Fourteenth Amendment and passage of 42 U.S.C. §1983 which provides in part:

“Every person who under color of any . . . ordinance ... custom or usage ... subjects any citizen ... to the deprivation of any rights, privileges or immunities secured by the Constitution ... shall be liable to the party injured in an action at law . . . .”

It is well settled law that an employer cannot condition employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression. Even if an employee holds his job at the will of his employer or can be terminated for the good of the service, he may not be discharged on the basis of his protected speech. However, the employee’s right to protected speech is not absolute as will be discussed later in this bulletin.

Free Speech Test: The Analysis

To determine whether an employer has infringed
upon an employee’s free speech, courts apply a multi-level analysis:

1. Matter of Public Concern

Unfortunately there is no crystal clear definition to guide employers on what speech constitutes a matter of public concern. The court will analyze the content, form and context of the given statement to determine whether it could “be fairly considered as relating to any matter of political, social, or other concern to the community.” Generally, speech is not protected if it is merely the airing of personal grievance. Nor is knowingly or recklessly making false statements guaranteed protection under the law. If, however, the speech is of general interest on topics such as disclosure of officials’ wrongdoing or waste and inefficiency of the employer, or violations of safety codes, it will likely be considered a matter of public concern.

2. Balancing Test

The balancing test is whether the employer’s interest in promoting the efficiency of its services outweighs the employee’s right to speak on a matter of public concern. In this inquiry pertinent considerations are:

(1) whether the statement impairs discipline by superiors or harmony among co-workers,
(2) has a detrimental impact on close working relationships when personal loyalty and confidence are necessary, or
(3) impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.

What follows is a summary of recent cases decided by the U.S. Court of Appeals, Tenth Circuit, in which the analysis was applied. Oklahoma is within the jurisdiction of this appellate court.

a) A county director for community and recreational resources was fired by county commissioners for making public critical remarks which pertained to their decision to allow gravel pit operations near a golf course site and a hazardous waste disposal site near a highway project. He took the position that these projects posed a threat to public safety in areas of police response, fire protection, and emergency preparedness.

The court concluded that the director’s remarks were of a public concern and safeguarded by the Constitution. It also concluded that other than then being irritating the record failed to show that the county commissioner’s interest in maintaining a harmonious, close working relationship amongst the workers or the regular operation of the county business was detrimentally impacted by the public statements.

b) A clerical employee made a private statement to another co-worker of “if they go for him again, I hope they get him.” Her comments referred to the attempted assassination of President Ronald Reagan. When her employer learned of this, she was terminated.

The court concluded that the speech could be categorized as a matter of public concern. It then analyzed the clerk’s duties within the organization and the mission of the public employer. It held that where the employee serves no confidential, policy making, or public contact role, the danger to the public employer’s successful function from the employee’s statement was minimal. It therefore found the employee’s interest in free expression outweighed the employer’s interest.

c) A police officer wrote a letter to the state attorney general alleging various violations of state and federal law by the police chief. Acrimony between the officer and the police chief obviously heightened and the officer was fired. The police chief stated that the officer’s actions had put his loyalty and trust in question and that the other officers had been subjected to rumors in the community without facts.

The court made the initial conclusion that the officer’s remarks were protected speech which related to matters of public concern. It also stated that although it was aware of the heightened interest in a police department maintaining discipline and
harmony among employees, the record was absent any evidence of disharmony within the department other than the everyday rumor mill and scuttlebutt found in any organization. The court concluded that the officer’s letter did not interfere with the department’s regular operations and therefore, the employee’s interest in free speech prevailed over the employer’s.

d) A police officer sent a nine-page, single-spaced typewritten letter to the city council complaining generally that “internally politicking [sic], favoritism and clique deprivations” existed within the department. He then got to the point of the letter: the department’s failure to select him for training school and promotion.

The court noted that he did not allege misconduct or malfeasance on the part of government officials in the conduct of their official duties. Given these facts, it concluded that the letter simply aired his frustration rather than constituting a legitimate subject of public concern.

e) An assistant district attorney circulated an intra-office survey concerning her coworkers’ confidence and trust in various supervisors, the level of office morale, and the need for a grievance committee. The court concluded that the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. In other words, her complaints didn’t rise to the level of a matter of public concern.

II. Freedom of Association

Unions

The First Amendment protects the right of a public employee to join and participate in a labor union. Employees are protected not only from adverse employment decisions, such as termination, suspension, or transfer, in retaliation for constitutionally protected conduct, but actions short of actual or constructive employment decision can in certain circumstances violate the First Amendment.

Political Allegiances

The time-honored platitude of “To the victor belongs the spoils” has been eroded. Perhaps it should now state, “To the victor belongs those spoils that may be constitutionally obtained.” The courts have held that the First Amendment forbids government officials from discharging or threatening to discharge a public employee solely for not being a supporter of the political party in power unless party affiliation is an appropriate requirement for the position involved.

Employees who had campaigned for a losing candidate were immediately terminated by the candidate who won the election for the office of district attorney. The court held that a jury is to decide if the terminations were substantially motivated by their political affiliations during the election. It noted that such conduct, if proven, violates an employee’s First Amendment rights.

A former low-level public employee and an employment applicant brought action challenging a state governor’s use of political considerations in hiring, rehiring, transferring, and promoting. The court ruled that:

(1) promotions, transfers, and recalls based upon political affiliation or support are impermissible infringements on public employee’s First Amendment rights; and

(2) conditioning hiring decisions on political belief and association violates applicants’ First Amendment rights absent a vital governmental interest.

Although these cases dealt with state government politics and the traditional two-party system, it is expected that the identical analysis would be used by the courts in local government elections.

CONCLUSION

A famous jurist declared nearly a century ago that a public employee may have a constitutional right to talk politics, but he has no constitutional right to be a public employee. That has certainly changed. The standard now is that government officials cannot, except in specific situations, alter the employment status of an employee for exercising First Amendment guarantees under the Constitution.

Before an employer takes any adverse employment action against an employee for critical remarks, filing of grievances, or affiliation with the opposite
political point of view, be advised to examine the recent court decisions which identify protected areas of speech pertaining to public concerns and which way the scales will likely tip in the employee-employer scale of interests.

ENDNOTES

2. Perry, supra.
4. Pickering, at 568, supra.
5. Connick, at 146, supra.
7. Pickering, p.574, n.6, supra.
8. Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989).
10. Siebert v. U. of Okla. Health Sciences Center, 867 F.2d 591 (10th Cir. 1989).
11. Considine v. Board of County Com’rs, 910 F.2d 695 (10th Cir. 1990).
12. Rankin, supra.
13. Wulf, supra.
15. Connick, supra.
17. Morfin v. Albuquerque Public Schools, 906 F.2d 1434 (10th Cir. 1990), n.3.