NEW YORK FEDERAL COURTS BRING CLARITY TO WHAT IS, AND IS NOT PROTECTED EMPLOYEE SPEECH

Hodgson Russ Media Law & First Amendment Alert
March 26, 2019

Last week two federal courts sitting in New York addressed the contours of what is, and is not, employee speech protected by the First Amendment. In *Cole-Hatchard v. County of Rockland*, 2019 WL 1300814 (S.D.N.Y. Mar. 21, 2019), the federal district court denied the defendants' motion for summary judgment seeking dismissal of the plaintiffs' First Amendment retaliation claim, holding that a reasonable jury could find that under the circumstances the plaintiffs had engaged in protected speech and suffered an adverse employment action as a result of such speech.

The plaintiffs were employees of the Rockland County Probation Department. In the spring of 2016, Rockland County debated relocating its Probation Department from New York City to Pomona, New York. The employees wrote a letter to the Rockland County Legislature outlining their concerns regarding the proposed relocation. The employees concerns ranged from a detrimental effect on departmental moral and safety, to practical difficulties for criminal defendants on probation to report to the new, more remote, location. The employees copied the Director of Probation and other elected officials on the letter but not the media.

Shortly after the letter was issued, the Director of Probation held a meeting with the employees to announce that the relocation would not be occurring. During the meeting she specifically stated that their letter had nothing to do with the decision but noted that the employees who signed the letter had gone outside the chain of command, that the letter reflected poorly on the department, and that any future public speech on the issue could result in disciplinary action. The same day, each employee who signed the letter received a "Memorandum of Warning" which, essentially, reiterated the comments made at the meeting and again threatened disciplinary action for any future public speech about relocation of the department.

The plaintiffs sued, claiming that their First Amendment rights had been violated. The defendants moved for summary judgment, claiming that the speech was not protected and, in any event, there had been no adverse employment action. The court began its analysis with the bedrock principles that a First Amendment retaliation claim requires the plaintiff to prove that: (1) the subject speech was protected by the First Amendment, (2) the defendant took an adverse action against him, and (3) there was a causal connection between the adverse action and the

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protected speech. For the first prong, the court noted that "[f]or a public employee's speech to be protected by the First Amendment, the employee must be speaking as a citizen on a matter of public concern, rather than speaking pursuant to her official duties." As for the second prong, the court stated that "a plaintiff must show that the employer took an adverse employment action against the plaintiff that would 'deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'"

The court held that a reasonable juror could find that the employees' letter was done, at least in part, as private citizens on a matter of public concern. It was not part of the employees' job duties and responsibilities to formulate or comment on proposed department policies. And the letter itself addressed a number of matters of public concern that were not specific to the employees' job duties, such as the ability of criminal defendants to report to the new location. In addition, the employees were not simply taking their concerns up the administrative chain. In fact, they were criticized for *not* doing so. Rather they were commenting to a separate branch of the government, the County Legislature, which is what a typical citizen would do. Finally, the court held that the "Memorandum of Warning" was a sufficient adverse employment action to constitute retaliation. Accordingly, the defendants' motion for summary judgment was denied and the matter will now proceed to settlement or trial.

The opposite conclusion was reached the next day in *Bell v. New York State Department of Correction, et al.*, 2019 WL 1305809 (N.D.N.Y. Mar. 22, 2019). The plaintiff was a corrections officer at Riverview Correctional Facility. He filed suit alleging, among a number of other things, that the Department of Corrections violated his First Amendment rights by retaliating against him for complaining to his union and supervisors that overtime shifts were being assigned unfairly and for subsequently issuing a newsletter to his fellow officers proposing a voluntary overtime system. The defendants moved to dismiss the claim on the grounds that the speech was not protected by the First Amendment. The court agreed with the defendants. The court began its analysis with the well-established principle that "[t]he First Amendment does not protect all private ventings of disgruntled public employees." "[A]n employee's complaints about scheduling and overtime pay are not matters of public concern; such claims are the quintessential employee grievance not protected by the First Amendment." The plaintiff's claim was not saved by the fact that he included allegations that the reason his proposal was not accepted was because "corrupt officers" prevented it and "his proposal would have stopped alleged theft of overtime pay due to preferential overtime job assignments." The court noted that a personal grievance is not transformed into a matter of public concern by referencing a public interest in the way public institutions are run. Because the plaintiff's speech was not done as a private citizen on a matter of public concern, it was not subject to protection under the First Amendment.

The takeaway from these two cases is relatively straightforward. When evaluating whether a public employee has engaged in protected speech, the question should be asked: is the subject of their speech something that a citizen at large could say? Stated another way, is the subject matter of the speech particular to the employee's job duties and responsibilities? If the answer to the former is "yes," or the latter "no," then the employer should tread lightly when it comes to disciplining the employee for that speech.

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