



Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

Port Administration & Legal Issues Seminar

San Francisco
Thursday, April 14, 2011
1:15 pm - 3:45 pm

Employment Issues

Agenda:

- 1:15 – 1:20 Introduction - Tom Schroeter
- 1:20 – 1:35 First Amendment Rights in the Public Workplace – Tom Schroeter
- 1:35 – 2:10 Current Developments in Employment Law – Kit Flanagan
- 2:10 – 2:25 Social Media - Tom Schroeter
- 2:25 – 2:30 Questions
- 2:30 – 2:40 Break
- 2:40 – 3:00 FMLA – Kit Flanagan
- 3:00 – 3:15 FLSA – Kit Flanagan
- 3:15 - 3:45 NLRA – Rob Hulteng

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The Public Workplace Today

Consider the following:

1. Sheer size of the public workforce. 23,000,000 public employees.
2. Political institutions.
3. Social Media.
4. Job Insecurity in Present Economy.
5. Aging population.
6. Importance of First Amendment to Americans.
7. Look at Wisconsin – union issues in the public arena
8. Issues such as free speech, religion, fair pay and fair treatment are fundamentally important and of deep concern to all human beings.
9. The Government is under pressure to perform – efficiently, competently, professionally.

Result: Public employment issues are especially important today, and HR Managers and their legal counselors need to think about them carefully, get good counsel, and act prudently.

FIRST AMENDMENT RIGHTS IN THE PUBLIC WORKPLACE

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“Disclaimers”



- My presentation and the opinions expressed in this PowerPoint and in my audio presentation are solely my own and not those of the AAPA or the Port of Houston Authority.
- If you have a real-life situation on the issues herein, please consult legal counsel and do NOT depend on this presentation. This presentation is an introduction only on workplace First Amendment issues; there may well be law (or application of law to fact patterns) in your jurisdiction that distinguishes or otherwise differs from the cases discussed herein.
- Thanks for the opportunity to speak today!

First Amendment: Breaking It Down

FIRST AMENDMENT – It covers:

1. religious freedom (first part), and
2. freedom of speech (second part).

“Congress shall make no law” :

1. Religion:
 - A. ***“respecting an establishment of religion, or”*** (Establishment Clause)
 - B. ***“prohibiting the free exercise thereof.”*** (Free Exercise Clause)
2. Speech:
 - A. ***“abridging:***
 1. ***freedom of speech,***
 2. ***[freedom] of the press; and***
 3. ***the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”***

I. Speech

The Seminal Case:

Pickering v. Board of Education

(U.S. Supreme Court, 1968)

From 2010 Faculty Notes of Marquette University Law School*:

“[I]n public employment law, ... the most important case is the public employee free speech case of ***Pickering v. Board of Education***, decided by the United States Supreme Court in 1968.”

- [*http://law.marquette.edu/facultyblog/2010/10/25/the-most-important-public-employment-law-case-pickering-v-board-of-education-391-u-s-563-1968/](http://law.marquette.edu/facultyblog/2010/10/25/the-most-important-public-employment-law-case-pickering-v-board-of-education-391-u-s-563-1968/)

Pickering

Facts:

High school teacher Marvin Pickering was fired by the local School Board in Will County, Illinois, for writing a blistering letter to the local newspaper about the Board and Superintendent.

In his letter, Pickering strongly criticized the School Board and the School District's Superintendent for their use of tax money, saying such money would be better spent on non-athletic matters including teachers' salary, funding for school lunches for non-athletes, and other educational needs.

Pickering – The Key Holding: A Two-Part Test

FIRST:

A government employee has first amendment rights when the employee speaks:

1. as a ***citizen*** (rather than as an employee)
2. on a matter of ***public concern*** (rather than on a matter solely of work-related concern)

SECOND:

If first test met (and thus employee has first amendment rights), then must **balance employee's first amendment rights against employer's interest in efficiency, orderly administration.**

Pickering – Balancing the State's Interest

- “[T]he *interest of the State, as an employer*, is in promoting the ***efficiency of the public services it performs through its employees.***” (Productivity)
- Otherwise stated: “***the need for orderly administration.***”
- State has in interest in ***not having substantial disruptions.***
- State can take corresponding action to **ensure "competence, honesty, and judgment" from its employees and civility and competency in the workplace.** (*Garcetti v. Ceballos, 2006*)
- “**Inflammatory or misguided**” speech, rather than merely “**unwelcome speech**” (*Garcetti v. Ceballos, 2006*)
- ***Preventing official wrongdoing***
- ***Preventing threats to health and safety***
- Again, you only get to the **balancing test** if you have first concluded that the employee is speaking as a **citizen** on matters of **public concern**.

Pickering

Pickering met the two-part test:

- Part One: Spoke as a **CITIZEN** when writing his letter on a matter of legitimate **PUBLIC CONCERN** (the issue of what constitutes proper school system funding).
- Part Two: Balancing employee's interests vs. employer's interests: His letter did not cause a substantial problem in school system **EFFICIENCY/ ORDERLY SCHOOL ADMINISTRATION.**

Pickering

- **Note that Pickering won even though he:**
 - Criticized his superiors who thought he was therefore insubordinate
 - Spoke on a matter of public concern in connection with the operation of the public schools in which he worked.
 - These aspects resurface in the Supreme Court's ruling in 2006

- **Underpinnings of Court's rulings:**

First amendment requires that teachers, who as a class are most likely to have informed and definite opinions as to how school funds should be spent, be able to speak out freely on such questions without fear of retaliatory dismissal – even when the speech is directed at the teacher's superiors (School Board, Superintendent).

What Are Issues of “Public Concern”?

Speech involves a matter of **public concern** when it involves an issue of social, political, or other interest to a community.

The place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace.

***Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).**

Examples of Issues of “Public Concern”:

- Public Fraud, Mismanagement
- Racial and Other Illegal Discrimination
- Sexual Harassment
- Use of Public Monies, Assets
- Public Policy
- Ethics, Professional Responsibility
- Statutory and Other Duties of Governmental Entities

Garcetti v. Ceballos:

***Pickering* Distinguished**

When is a public employee speaking out as a
“**citizen**”?

Pickering was later distinguished by ***Garcetti v. Ceballos***, 547 U.S. 410 (2006), where the Supreme Court held that **statements by public employees made pursuant to their employment have no First Amendment protection.**

Garcetti v. Ceballos

Pickering Distinguished

- In ***Garcetti***, a deputy district attorney for Los Angeles County, Richard Ceballos, was subjected to adverse employment actions for speaking out (in a memo) about an allegedly defective search warrant in a criminal case.
- Although the ***Garcetti*** Court reiterated the existence of public employee free speech rights, Justice Kennedy for the 5-4 majority nonetheless held that **if employees are engaged in speech “pursuant to their official duties” at work, they are not speaking as “citizens”** and thus, enjoy no First Amendment protection for their speech.
- Because Ceballos was **engaged in speech pursuant to his job duties**, he was not speaking ***as a citizen*** on a matter of public concern, **but only as a government employee**.
- As such, the Court concluded that Ceballos did not have any First Amendment protection and there was **no need to conduct a *Pickering* balancing of interests**.

Garcetti v. Ceballos

Kennedy's majority (5-4) opinion:

- There is not “a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.”
- Public employees are not speaking as citizens when they are speaking to fulfill a responsibility of their job.
- Though the speech at issue concerned the subject matter of his employment, and was expressed within his office rather than publicly, the Court did not consider either fact dispositive, and noted that employees in either context may receive First Amendment protection.
- The "**controlling factor**" was instead that his **statements were made pursuant to his duties as a deputy district attorney.**

Garcetti v. Ceballos

- The Court **limited First Amendment protection to public statements made outside the scope of official duties**
- **Barring First Amendment claims based on "government employees' work product," would not prevent those employees from participating in public debate.**

Ceballos v. Garcetti

Strong Dissents from Stevens, Souter, Breyer

Stevens' dissent:

- Although a supervisor may take corrective action against "**inflammatory or misguided**" speech, would distinguish merely "**unwelcome speech**" that "**reveals facts that the supervisor would rather not have anyone else discover.**"
- Court created senseless incentive for employees to bypass their employer-specified channels of resolution and voice their concerns directly to the public.

Garcetti v. Ceballos

Souter's dissent:

- The interests in addressing **official wrongdoing and threats to health and safety, may trump the employer's interest, and that in such cases, public employees are eligible from the protections of the First Amendment.**
- Souter underlined that government employees may often be in best positions to know the problems that exist in their employer agencies.
- **The *Pickering* balance test -- should not be abandoned when the employee happens to speak on issues that his job requires him to address.**

Garcetti v. Ceballos

Breyer's dissent:

- Breyer agreed that the **First Amendment protections exist only** when such protection does not **unduly interfere with governmental interests**.
- Breyer noted that prior cases did not decide what screening test a judge should utilize in circumstances where the government employee both speaks upon matters of public concern, and speaks in the course of his public employee duties.
- **Like Souter, Breyer believed that the majority's holding that the First Amendment protections do not extend to public employees speaking pursuant to their official duties was too absolute.**
- In the instant case, the speech was professional speech, as it was uttered by a lawyer. As such, it is governed also by "**canons of the profession**"; **these canons contain an obligation to speak in certain instances. In cases where this occurs, the government's interest in prohibiting that speech is diminished.**

Garcetti v. Ceballos

Possible Effects

- ***Garcetti*** arguably has the effect of making government less transparent, accountable, and responsive.
- Public employees may now be less secure in their ability to speak out against governmental fraud, abuse, and waste, without facing retribution from their public employers.
- Public employees may feel forced to air their dirty laundry outside of the job so that they can be seen as speaking as citizens outside their normal job duties.

II. Religion

Review of First Amendment – Religious Freedom:

“Congress shall make no law respecting an **establishment of religion** (*Establishment Clause*), or prohibiting **the free exercise thereof** (*Free Exercise Clause*);...”

The Issue:
In Today's Diverse Culture,
How to Reconcile the
“Establishment” and “Free Exercise”
Clauses of the First Amendment

– **Establishment Clause:**

Congress shall make no law respecting an **establishment of religion**, or prohibiting the free exercise thereof.

– **Free Exercise Clause:**

Congress shall make no law prohibiting the **free exercise of religion**.

The Landmark Case:

Everson vs. Board of Education, 330 U.S. 1 (1947)

Two Major Holdings and an Important Dicta of the Supreme Court:

Holding No. 1:

The **First Amendment is applicable not only to the Federal Government but also to the States and their local governments** (e.g. public port authorities) – 14th Amendment due process clause.

- Before this holding, not much litigation in this area
- Now, **everything** seems to be in play: Prayer in Schools, Display of Religious Items in Public Squares and Workplaces, Proselytizing by Public Employees in the Workplace; Prayer on Government Premises; Actions, Dress, and Appearance Mandated by Religious Beliefs, Etc.

The Landmark Case:

Everson vs. Board of Education,

330 U.S. 1 (1947)

Major Holdings/Dicta:

No. 2:

Justice Black's "**Separation of Church and State**" Dicta:

"The '**establishment of religion**' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. **Neither can pass laws which aid one religion, aid all religions or prefer one religion over another.** Neither can force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. **No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.** No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. **Neither a state nor the Federal government can participate in the affairs of any religious organizations or groups and vice versa.**

"In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between Church and State.'"

The Enigma of Thomas Jefferson: *Where Did He Really Stand on Religious Liberty?*

Words:

“In the words of Jefferson, the clause against establishment of religion by law was intended to erect a **‘wall of separation between Church and State.’**”

Deeds:

Jefferson did not write the Constitution or any of the Amendments or participate in the Constitutional Convention (he was in France at that time). His “wall of separation” comment came from a letter he wrote to a member of a church. He did not object to prayers in school or aid to church schools. As President, Jefferson supported giving federal monies to Christian schools. In Virginia, his concern was State establishment an official church.

Everson vs. Board of Education

Major Holdings/Dicta:

No. 3:

- Notwithstanding Black's dicta in ***Everson***, the Court held that the state law allowing reimbursement of school travel expenses to all students within the school district was constitutionally permissible because reimbursement was offered to all students regardless of religion and because they were made to parents and not any religious institution.
- Rutledge dissent: the Constitution forbids "every form of public aid or support for religion." (Foreshadowed future court cases.)

Since *Everson* – The Pendulum Swings between Abolitionists and Accommodationists

Abolitionists

Focus on prohibition of government **establishment** of religion

Rutledge dissent in *Everson*: the Constitution forbids “every form of public aid or support for religion”

vs.

Accommodationists

Focus on individuals’ right of **free exercise** of religion

President Reagan: “Unfortunately, ...we’ve experienced such an onslaught of such twisted logic that if Alice were visiting America, she might think she’d never left Wonderland....[Preventing a student from praying in school]...infringes on the freedom of those who choose to pray, the freedom taken for granted since the time of our Founding Fathers. ...To prevent those who believe in God from expressing their faith is an outrage. The relentless drive to eliminate God from our schools ... should be stopped. ...The First Amendment was not written to protect the people of this country from religious values; it was written to protect religious values from government tyranny.”

Brown v. Polk County

(8th Circuit, 1995)

Government (Public) Workplace:

Both Title VII and First Amendment Apply:

“Where a government is the employer, we must consider ***both (1) the first amendment and (2) Title VII*** in determining the legitimacy of the county administrator’s action [against the employee].”

Title VII was part of the Civil Rights Act of 1964, passed after the ***Everson*** case (1947)

Brown vs. Polk County: Employee's Title VII Rights

1. **Religious Discrimination Prohibited.** Title VII (42 U.S.C. §§ 2000 et seq.), and similar state laws, forbid an employer to fire an employee (or take other employment actions) because of that employee's **religion**.

2. **Employer's Duty of Reasonable Accommodation without Undue Burden.**

The employer must reasonably accommodate to an employee's religious observance or practice ***without undue hardship on the conduct of the employer's business.*** Title VII, 42 USC § 2000e(j)

Brown vs. Polk County:

Details of Accommodation and Undue Hardship

- No attempt was made in Brown to accommodate any of Mr. Brown's religious activities.
- Court held that Employer could only prevail if it could show that allowing those activities 'could not be accomplished without undue hardship.' **Burden on Employer.**
- **"Undue hardship" is not defined under Title VII.**
- To require an employer to bear more than a *de minimis* cost ... is an undue hardship.
- E.g. the **cost of hiring an additional worker** or the **loss of production** that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship."
- *De minimis* cost "entails not only monetary concerns, but also the employer's burden in conducting its business."
- Any hardship asserted must be "real" rather than "speculative."
- Undue hardship requires more than proof of some fellow worker's **grumbling**....An employer... would have to **show...actual imposition on co-workers or disruption of the work routine."**

Brown vs. Polk County: Employee's **First Amendment Rights**

First Amendment test:

Did the employer's action place a "**substantial burden**" on the **employee's free exercise of his religion**? Was the conduct in question mandated by the Employee's religious belief? If so, balance against State's legitimate interests (*Pickering*).

"With specific reference to the ***free exercise clause***, we hold that in the governmental employment context, the first amendment protects at least as much religious activity as Title VII does."

Brown vs. Polk County,

61 F.3d 650 (8th Cir. 1995)

Holdings (taking into account both First Amendment rights and Title VII rights):

County not liable for the following (undue burden on Employer, no substantial burden on Employee's exercise of religion):

1. Reprimanding Director (a supervisor-level public employee) for directing county employee to type his Bible study notes
2. Reprimanding Director for allowing prayers in his office before start of work day

Brown vs. Polk County,

Holdings (taking into account both First Amendment rights and Title VII rights):

County liable for the following :

1. Reprimanding Director for occasional and spontaneous prayers and isolated references to Christian belief
2. Prohibiting Director from “engaging in activities that **could** be considered to be religious proselytizing, witnessing, or counseling while Director was on the job” – this was a violation of his First Amendment as a substantial burden on Employee with no offsetting employer interest)
3. Removing poster, Bible and other religious items from Brown’s office – violation of First Amendment rights (substantial burden on Employee)

Religion in the Public Workplace: Some Final Thoughts

- HR, Legal, Public Affairs Groups need to think through these issues carefully (“speed kills”)
- Don’t downplay the “Free Exercise” side of the First Amendment – be prepared to make reasonable accommodations while taking into account the bona fide interests of both Employer (no undue burden required) and Employee (avoid placing substantial burdens on employee’s exercise of religion). If possible, work together with the Employee to create a “Win-Win” result.)
- HR Managers: you have to be models of impartiality and evenhandedness
- Don’t overplay the “Establishment” side of the First Amendment – although be careful when the actor is in a supervisor/management position
- As in *Pickering* and other “speech” First Amendment cases, the Public Employer has a legitimate interest in workplace functioning and efficiency – accommodation and balancing is required

First Amendment Rights in the Public Workplace

- So, we end where we started, with ***Pickering*** and the need to balance the **Employee's and Employer's** legitimate interests:

Pickering recognizes a public employee's right to speak on matters that lie at the core of the first amendment, that is, matters of public concern, so long as 'the effective functioning of the public employer's enterprise' is not interfered with."

- **Questions?**
- **Thanks for Listening!**