

An Update for Public Employers

*American Association of Port Authorities
2015 Port Administration and Legal Issues Seminar*

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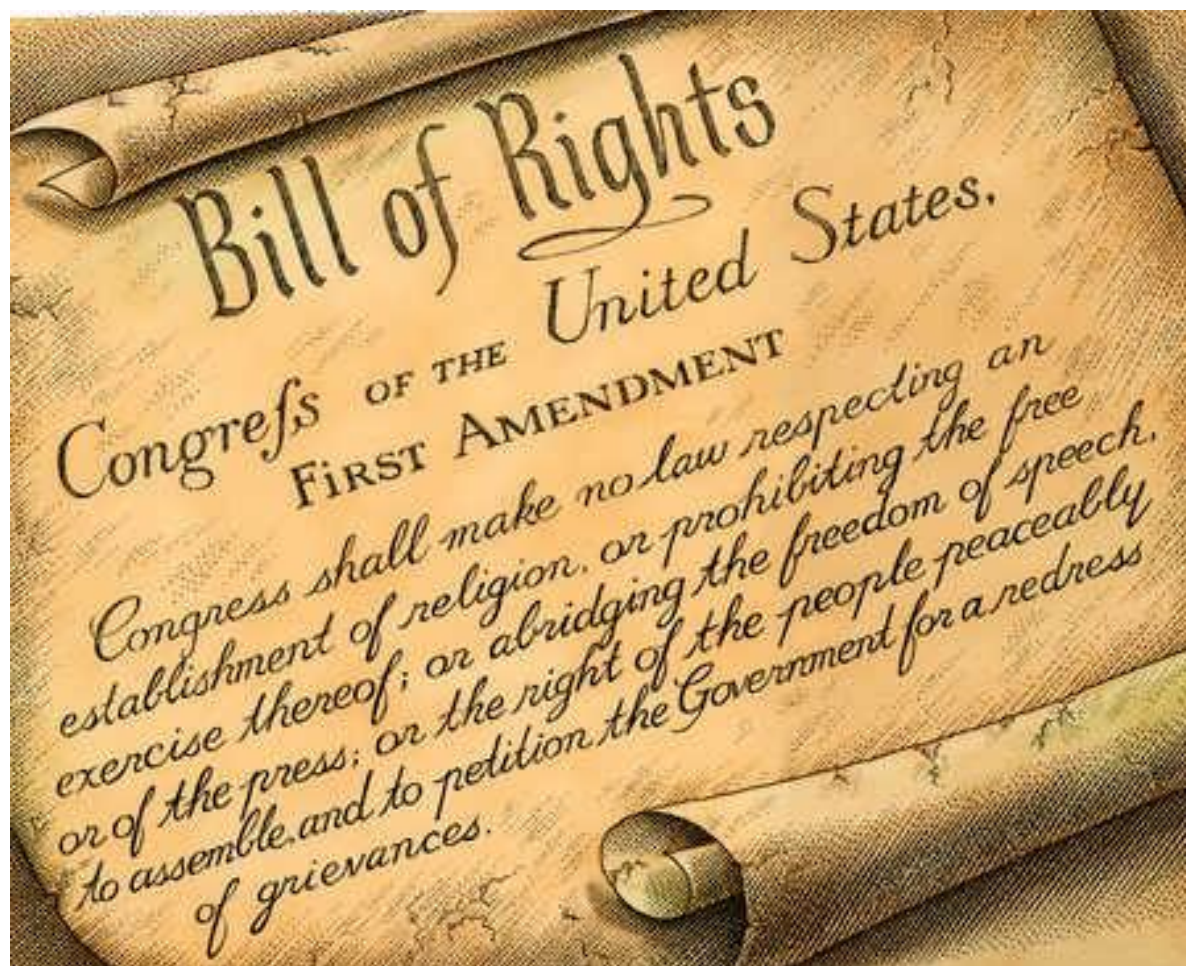
No Individual Liability Under Title VII

Qualified Immunity

- Court Created
 - Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known
- To protect public employees/officials from litigation and liability
 - Did the official's conduct violate a clearly established constitutional right of which a reasonable person would have known?
 - Objectively reasonable action under the circumstances?

Absolute/Legislative Immunity

- More limited application than qualified immunity
- Legislative bodies, Judges, Prosecutors
 - Must be engaged in the performance of acts that are legislative, judicial or prosecutorial in nature
- No personal liability if sued in connection with official duties



Federal Causes of Action That May Trigger Personal Liability

- 1st Amendment
 - Municipalities and their law enforcement officials often face First Amendment retaliation claims
- 4th Amendment
- 14th Amendment
- Section 1981

Private Employment

**I'm exercising my
First
Amendment
rights!!**



YOU'RE FIRED!

In public employment, however, political discrimination and firing claims can lead to a municipal employee's individual liability.

Public Employment First Amendment Lawsuits

- No administrative prerequisites to sue
- Fact intensive – Issue for jury



Political Discrimination – Firing Claims Under First Amendment

- Plaintiff has initial burden of showing political activities was a substantial or motivating factor behind adverse employment action.
- Burden shifts to Defendant to show that same employment decision would have occurred in absence of political activity.
- Once the Defendant proffers a nondiscriminatory reason for the adverse employment action, Plaintiff has a chance to discredit the given reason by producing evidence that discrimination was more likely than not a motivating factor.

First Amendment – Free Speech

- Personal liability for retaliation against citizen's Free Speech rights
 - Defendant acting under color of state law
 - Plaintiff's speech activities protected under First Amendment
 - Plaintiff's exercise of right a substantial or motivating factor in Defendant's action

First Amendment Speech Balancing Test

- Public Concern v. Public Efficiency
- No protection for purely private concerns
- Less First Amendment protection for public employees
- *Garcetti*
 - No protection for speech made pursuant to official duties

Borough of Duryea v. Guarnieri (2011)

- Public employees cannot assert retaliation claims based on the First Amendment right to petition unless their “petitioning” in question involves a matter of public concern.
- A petition which involves “nothing more than a complaint about a change in the employee’s own duties” does not relate to a matter of public concern.



Public v. Private Concern

- YES:**
- Revealing official corruption or misconduct
 - Matters of public safety
 - Testimony before fact-finding body
- NO:**
- Personal concern for working conditions, pay, job security



Garcetti v. Ceballos (2006)

“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”



San Diego v. Roe (2004)

- Police officer fired for selling sexually explicit videos of himself in police uniform
- Lower court held it fell under category of “public concern” because it did not involve a workplace grievance and involved off-duty activity
- Supreme Court affirmed termination on grounds video not a matter of public concern under any test and implicated legitimate concerns of the police department.



Fourteenth Amendment

- Property interest in public employment
- Liberty interest in public employment

Fourteenth Amendment – Sex Discrimination/ Harassment

- Intentional sex discrimination under color of state law violates Fourteenth Amendment
- Individuals can be sued under Section 1983
- Plaintiffs can “bundle” Title VII and Section 1983 claims

Race Discrimination/Retaliation Under Section 1981

- Cause of Action essentially the same as Title VII
- Individual liability and no administrative requirements
- No caps on damages

Tortious Interference

- Acts were intentional and willful
- Done with unlawful purpose of causing damage to Plaintiff
- Without right or justifiable cause on part of Defendant
- Actual damage resulted

Other State Law Claims Carrying Individual Liability

- Intentional infliction of emotional distress
- Assault and battery claims for sexual harassment

Social Media



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