

REGULATING EMPLOYEE CONDUCT AWAY FROM THE WORKPLACE

Presented by:

Vanessa A. Gonzalez

Board Certified Labor & Employment

Bickerstaff Heath Delgado Acosta, LLP

3711 South Mopac Expressway

Building One, Suite 300

Austin, Texas 78746

512.472.8021 • 512.320.5638

vgonzalez@bickerstaff.com

WHEN AND HOW TO REGULATE?

- First Amendment protects rights to free speech but may be ok to restrict if disrupts government efficiency
- Conduct unbecoming an officer
- conflict of interest
- Public property for private gain
- Anti-fraternization policies
- Harassment



First Amendment



- That he suffered an adverse employment decision
- that he engaged in speech or associational activity involving a matter of public concern;
- under the balancing test, the interest in “commenting on matters of public concern ... outweigh the Defendant's interest in promoting efficiency”; and
- the speech or associational activity “motivated the adverse employment decision.”

Defense - If the Plaintiff establishes that the First Amendment activity was a motivating factor in the employment decision, the defendant can then establish the affirmative defense that it “would have come to the same conclusion in the absence of the protected conduct.”



PROTECTED FREE SPEECH

- Matter of Public Concern-

- content, form, and context of the expression.
- If it is on a matter of political, social, or other concern to the community, then it is regarded as “public” *Connick v. Myers*, 461 U.S. 138, 146 (1983)
- But if it is on a matter of purely personal interest, the First Amendment affords no protection.

- *Citizen not government employee* –

- If employees are engaged in speech as a government employee “pursuant to official job duties” at work, they are not speaking as “citizens” and no First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

- *Snyder v. Millersville University* – Snyder, student teacher, (analyzed as employee) posted on her Myspace page why would not apply for job (dislike of supervising teacher) and pirate pic with beer. No pass on student teaching requirement. Testified it was personal. Not protected First Amendment speech.



PROTECTED POLITICAL ASSOCIATION

- No requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance; instead, they must merely show that they were “discharged because they were not affiliated with or sponsored by” a particular party.

Branti v. Finkel, 445 U.S. 507 (1980)

- newly elected Democratic Sheriff of Cook County, Illinois, violated the constitutional rights of certain noncivil-service employees by discharging them “because they did not support and were not members of the Democratic Party.

Elrod v. Burns, 427 U.S. 347 (1976)



MATTERS PUBLIC CONCERN / GOVERNMENT EFFICIENCY

- Test – whether the speech is disruptive of workplace harmony or discipline, as well as its effect on employee loyalty, public confidence, and the operation of the workplace in general. (restraints higher for police and fire)
- *Spanierman v Ansonia Highschool* – Spanierman terminated after myspace page communicating with students with sexual overtones and pictures of naked men. Teaching contract not renewed. Some of speech was protected speech about War in Iraq but court determined the myspace page was disruptive to school activities and this outweighed the value in the myspace speech.



POLITICAL ASSOCIATION / GOVERNMENTAL EFFICIENCY

ISD terminated Ricci for violating Employee Handbook policy prohibiting an employee's participation in political activity from causing "pressure" to be placed on staff. On her lunch hour - Ricci, a payroll clerk, encouraged co-worker, Rush, to participate and vote for some particular candidates in the upcoming School Board election. *Ricci v. Cleveland Independent School Dist.* (S.D.Tex.,2012)

- Court found Ricci was speaking as a citizen, rather than pursuant to her official duties as a payroll clerk. Ricci's formal job duties, would not require Ricci to speak on matters such as the school board election.
- Even though it was private conversation between two people it was still a matter of public concern
- Court found the ISD failed to demonstrate how Ricci's private expression of her political preferences upset or impeded the proper functioning of Cleveland ISD or otherwise undermined the role and office of the Superintendent. Court is not persuaded that Defendants' interest in banning all political pressure on its campus outweighed Ricci's rights under the First Amendment.



CONDUCT UNBECOMING AN OFFICER

POLICY EXAMPLE

- "Conduct unbecoming is any conduct which adversely affects the morale, operations, or efficiency of the department or any conduct which has a tendency to adversely affect, lower, or destroy public respect and confidence in the department, or any officer or employee.
- Conduct unbecoming also includes any conduct which brings the department or any officer or employee into disrepute or brings discredit upon the department, or any officer or employee. Officers and employees shall conduct themselves at all times, both on and off duty, in such a manner so as to reflect most favorably upon the department."



CONDUCT UNBECOMING AND OFFICER NEXUS REQUIRED

- Rational basis needed for determination that the conduct of the employee impacted his or her fitness for public employment or how the conduct of the employee affected the operation, efficiency and/or morale of the agency.
- Idaho Court of Appeals upheld the firing of an Idaho Falls police officer who used excessive force at home in disciplining his step-children, affirming the excessive discipline negatively affected the officer's ability to perform as a law enforcement officer.



CONDUCT UNBECOMING POLICE OFFICER



- Austin police officer involved in a shooting put a picture of himself with an automatic weapon on his Facebook page after returning to work after leave with a caption saying, "back on the hunt." Sometime later, he got a DWI. He was terminated for pattern of poor judgment.
- A California Highway Patrol officer who was repeatedly seen at his front picture window unclothed or in his back yard sunbathing nude was terminated after being warned to be more discreet in his practice of nudity.



POLICE OFFICERS OFF DUTY DATING

- Constitutionally guaranteed rights of freedom of association and privacy.
 - Officers' "purely private" and *fully lawful* sexual behavior cannot be regulated by the agency.
 - To withstand constitutional scrutiny, an agency need only show a rational connection between the restrictive policy and the promotion of public safety.
- Two Phoenix Police Department officers maintained sexual relationships with two prostitutes, who also occasionally worked as paid informants for the department.
 - The relationships were known to some other prostitutes, and became known to the staff of the county attorneys office.
 - The officers were disciplined under a policy that generally prohibited "conduct unbecoming an officer and contrary to the general orders of the department."
 - Their discipline was sustained because the court found that the conduct was not "purely private" and was "potentially damaging" to the reputations and interests of the department.

POLICE OFFICER OFF DUTY WORK

- A potential conflict of interest between the officer's duties as a law enforcement officer and the duties to the officer's secondary employer:
- Where the officer's symbolic authority may be used improperly to serve the private employer
- Inherent problems of officers working in areas that are closely regulated (licensed), e.g.:
 - (1) Businesses that sell and/or dispense liquor
 - (2) Businesses that sell guns, lottery tickets, etc.
- The preclusion of work where the officer's authority would confer a special advantage to a private interest at the expense of the public interest
- Officer owned enterprises with inherent conflicts e.g. security and private investigative services
- An unacceptable risk of temporary or disabling injury that could limit the officer's return to regular duty, e.g. boxing and wrestling
- A threat to the status or dignity of law enforcement as a professional occupation



CONFLICT OF INTEREST

- City or county street maintenance worker
 - Business that sells asphalt or road cleaning equipment
 - Private road maintenance business
- City police / county deputy
 - Business that sells ammunition
 - Business that sells police uniforms
- County IT person
 - Software company bids for county RFP
 - Consulting work for software company that does county work



PUBLIC PROPERTY FOR PRIVATE GAIN

- City police officer or county deputy often take police vehicles home. Cannot use them to go private family event over the weekend while on personal time.
- County road maintenance worker can not use the county road repair equipment on his lunch break to fix the road on his ranch
- Selling Mary Kay cosmetics in the break room using county paper and county computer



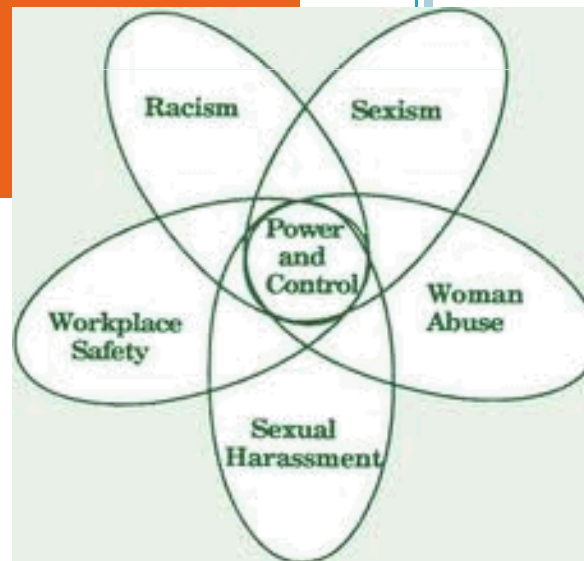
ANTI-FRATERNIZATION POLICIES

- Supervisor and subordinate
 - Dating
 - Romantic relationships
 - Sexual relationships
 - Marriage
- If so, what happens
 - Notice
 - Transfer
 - Termination



WORKPLACE HARASSMENT

- ❖ Quid Pro Quo
- ❖ Hostile Work Environment Claim
- ❖ Retaliation
- ❖ Outside Workplace



HARASSMENT MUST BE AGAINST SOMEONE WHO BELONGS IN A PROTECTED GROUP



- Sex (includes caregiver)
- Race
- Age
- Religion
- National origin
- Disability
- Pregnancy
- Genetic information
- Sexual orientation in some states
- Transgender in some states
- Marital status in some states



SUBJECTED TO UNWELCOME HARASSMENT



- What is unwelcome?
- The environment “must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”

Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)



SO SEVERE AND PERVASIVE SO AS TO ALTER THE TERMS AND CONDITIONS OF EMPLOYMENT

- An environment is sufficiently hostile or abusive by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive; and whether it unreasonably interferes with an employee's work performance.

Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)

- Incidental or occasional comments, discourtesy, rudeness, or isolated incidents (unless extremely serious) are not discriminatory changes in the terms and conditions of a worker's employment.

Faragher v. City of Boca Raton, 524 U.S. 788 (1998)



DID EMPLOYER KNOW ABOUT THE HARASSMENT?

If *not* a supervisor – Defendant knew or should have known of the harassment, yet failed to take prompt remedial action.



RETALIATION CLAIM

- Retaliation: engaged in protected activity, adverse action occurred and causal link

Burlington Northern – no longer just adverse employment action now it is “materially adverse.” *Burlington Northern v. Santa Fe Ry. Col.*, 548 U.S. 53 (2006).



REACH OF PROTECTION

- *Crawford v. City of Nashville*, 555 US 271 (2009) - Employee questioned during investigation who reported harassment is protected from retaliation.
- *Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2011) - Fiancé terminated after his fiancé filed a Charge of Discrimination with the EEOC was protected from retaliation



HARASSMENT

- Types of illegal conduct including verbal, physical, and visual.



- Off-site functions included as well as outside retaliation. The "workplace" can include interactions with vendors and customers, social and entertainment-oriented settings, trade shows, conventions, business



trips, and a host of other activities that occur away from the workplace.



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