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TEACHER FIRST AMENDMENT SPEECH 2006: POLICY IMPLICATIONS

Overview

In 2006, are public school employees, especially classroom teachers, reluctant to speak out in public on matters that involve the school system where they are employed? Are school system employees fearful that their jobs may be placed in jeopardy by speaking out in a public forum on controversial issues, especially issues that have a direct connection to their employer (e.g., the school system's budget, local school board elections, elections of local political leaders, local school board curricular priorities)? The bottom line question is: Do public school employees, especially classroom teachers, forego their First Amendment rights and protections solely because of their employment status?

Recently, a writer made the following observation: "Public employers are seeing First Amendment retaliation claims with greater frequency. Employees routinely claim that workplace comments that happen to touch on matters of public interest are protected and that the public employer can take no action against them for the speech." Gesina (2005) The purpose of this commentary is to briefly discuss the rights of public school system employees to comment on matters directly related to their employment. The free speech rights of public school classroom teachers will serve as the primary focus of the commentary's issue analysis and the ensuing discussion of legal and policy implications.

The First Amendment and Free Expression

The First Amendment to the United States Constitution states, in relevant part, "Congress shall make no law ...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (Ratification of first ten amendments completed December 15, 1791) It is important to note that nowhere in the above statement, or in the body of the Constitution, is the word "expression" used. Vacca and Bosher (2003)

In his comprehensive treatise on the law, Fried makes the following observation: "The constitutional doctrine of free expression comes as close to the libertarian ideal as it is sensible to wish. The mind is free. It does not belong to the state, the government, the community—whatever your preferred location—but is solely the property of the individual to use as she wishes." Fried (2004)

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Expression: What is it? The term *expression* is broad in scope. To express, states Black's Law Dictionary, is to make something known (in words) distinctly and explicitly so as not to be left to inference or implication. Black's (1999). The Random House Dictionary tells us that expression involves the act of communicating ideas, opinions, and feelings. Random House (1966)

Individuals express themselves in a variety of ways. They express themselves in what they write, in pictures they create, through physical gestures, in the clothing and jewelry they wear, and verbally (i.e., the “spoken word”). “Given a particular situation, one or a combination of these forms might prove more effective than the others in making an individual’s feelings, beliefs, or wishes known to others.” Vacca and Bosher (2003)

Employee Expression in the Workplace: The Disruption Standard. More than three decades ago, the United States Supreme Court made it clear that students and teachers do not shed their First Amendment rights to free speech and expression at the schoolhouse gate. Tinker v Des Moines (1969). Courts have consistently applied a “disruption standard” to establish that public employee free expression is subject to reasonable limitations, restraints, and boundaries set by employers. City of San Diego v Roe (2004)

Judicial Standard of Analysis. The traditional judicial standard used in deciding acceptable bounds and the extent of public school system employee free speech in the workplace is applied on a case-by-case basis. The issue analysis focuses on the following elements: (1) the content of the employee’s speech, (2) the forum in which the speech occurs, and (3) the relationship to and resulting effect on the employee’s work environment.

Expression in the Workplace

Teacher speech and other expressive activities, no matter how well intended, that disrupt the workplace are not acceptable. As one legal scholar succinctly summarized post-Tinker, “The cases on freedom of expression in public schools voice a consistent underlying theme, namely, that no teacher or student may press constitutional rights to the point of disrupting the operation of schools. Short of actual or *serious threat* of a material disruption of a substantial educational interest, teacher rights are protected; but beyond that point, they do not exist.” Valente (1987)

Personal Interests v Public Interests. The United States Supreme Court has drawn an important distinction between speech that represents an employee’s *personal interests* (not protected) and speech that involves matters of *public concern* (protected). Connick v Myers (1983) Legal experts agree that the “courts have consistently ruled that teachers have a constitutional right to speak out on matters of public concern.” Wood, et al. (2000) In Connick, while the high court made it clear that “a federal court is not the appropriate forum in which to review the wisdom of a personnel decision...” Connick (1983), it was convinced that Myers’ personally motivated actions “ would disrupt the office, undermine authority, and destroy the close working relationships within the office...” Alexander and Alexander (1995)

Using a Connick-type analysis it can be argued that a teacher who publicly expresses his/her opposition to the local school board’s budget as it effects his/her particular salary (a matter of personal interest) is different from a teacher publicly speaking out in opposition to the board’s budget as it impacts on the overall pay scale of all teachers (a matter of public concern). The potential impact on faculty morale and the efficient operation of the school system likely would be a major concern of the employer.

Pickering (1968) and Mt. Healthy (1977). In 1968, the United States Supreme Court decided a case involving a public school teacher who, in a letter to a newspaper, criticized his employer (local board of education). In his

letter he cited failed bond issues, board elections, and board budgetary priorities. He also criticized the superintendent of schools for allegedly influencing teachers not to vote in the bond election. The school board claimed that because his letter contained false statements, impugned the motives of the school administration, and damaged the school system, his dismissal from employment was justified. In ruling for the teacher, the court concluded that: (1) subjects contained in the teacher's letter were matters of public concern, (2) errors contained in the letter were minor; and (3) no malice could be attached to the teacher's motives. Pickering v Board of Education (1968)

The United States Supreme Court established a judicial standard that has served to balance the personnel prerogatives of school officials with the rights and protections of school system employees to publicly speak out, when it decided a case out of the Southern District of Ohio. In Mt. Healthy City School District Board v Doyle (1977), a non-tenured teacher (he worked in the school system under one year contracts for three years) sued school officials claiming that his First and Fourteenth Amendment rights were violated when the board of education decided to non-renew his employment contract. Even though several incidents led up to the board's non-renewal decision, the teacher's telephone call to a local radio station in which he openly and critically discussed the contents of a memorandum sent to all teachers by the school principal prompted the board to act. It was this exercise of speech (on matters of public concern) that the teacher cited as the unconstitutional reason for the board's non-renewal decision.

In vacating the decision and remanding the matter back to the Sixth Circuit, the Supreme Court created a three-pronged standard of causation to apply in this type of case. The questions are: (1) Is there present in this situation some element or exercise of constitutionally or legally protected conduct? (2) Did the element or exercise play a "substantial or motivating part" in the board's decision? (3) Absent that element or exercise, would the same decision have been made regarding this employee? This standard, said Justice Rehnquist, strikes a "balance between the interests of the teacher, as a citizen..., and the interests of the State, as an employer...." Mt Healthy v Doyle (1977)

Related Case Law

In this nation's body of constitutional law, *liberty* is a bedrock concept upon which other, basic individual freedoms rest. The Fourteenth Amendment to the United States Constitution states, "nor shall any State deprive any person of life, liberty, or property, without due process...." (Declared ratified July 28, 1868)

Cambron-McCabe and her colleagues remind us "...liberty interests encompass fundamental constitutional guarantees such as freedom of expression and privacy rights. If governmental action in the nonrenewal of employment threatens the exercise of these fundamental liberties, procedural due process must be afforded." However, state these experts, "...[m]ost nonrenewals do not overtly implicate fundamental rights, and thus, the burden is on the aggrieved employee to prove that the proffered reason is pretextual to mask the impermissible grounds." Cambron-McCabe, *et al.* (2004) On the other hand, the more obvious the presence of an unlawful intent on the part of school officials, or the more arbitrary the board's decision seems, the more likely that school officials may be required to produce substantive evidence necessary to support their employment decision. Vacca and Boshier (2003)

Case Law Examples. A review of past court decisions reveals cases in which plaintiff employees claimed, among other things, that they were retaliated against by their employer for complaining about matters related to their workplace. In other words these employees claimed that they still would be employed *but for* their exercise of protected (*liberty*) conduct. Some examples of court decisions follow.

In Renfro v Kirkpatrick (1982), a non-tenured teacher claimed in federal court that she was not offered a full-time teaching position because she had filed a grievance against school officials. In her grievance she complained about her employment situation in the school system. In this case the plaintiff employee could not show that her First Amendment exercise was a “motivating factor in the Board’s decision not to rehire her.”

A 1996 federal district court decision upheld the right of public school teachers to participate in a school board election. In the court’s view employees openly making their views known on candidates for a school board election involves speaking out on matters of “public concern.” Castle v Colonial School District (1996)

The United States Court of Appeals for the Eighth Circuit has held that an employee cannot be fired solely because she has spoken out on a matter of public concern. In this case school officials were able to demonstrate that the employee’s (school principal’s) other work-related behaviors warranted their actions. Howard v Columbia Public School District (2004)

In 2005, the United States Court of Appeals for the Tenth Circuit decided a case in which a computer specialist unsuccessfully claimed, in addition to an allegation of age discrimination, that she was not promoted to a new administrative position because of statements that she had made criticizing decision-making. She also had circulated a memorandum to office staff urging them to report their concerns to the school system’s finance officer. In this case the appellate court held, among other things, that the subject of the employee’s vocal and written communications was a personal matter not a matter of public concern, and that school officials had hired a more qualified candidate to fill the new position. Mella v Mapleton Public Schools (10th Cir. 2005)

Last term, the United States Supreme Court decided Jackson v Birmingham Board of Education (2005). In this case a teacher who also coached the girl’s basketball team complained to school officials that funding, equipment, and access to school facilities for female teams were not equal to male athletic teams. Subsequently he began to receive negative work evaluations. Relying on *Title IX* (Education Amendments of 1972), he sued in a federal district court claiming that ultimately he lost his job in retaliation for his complaints about male and female athletics. He was unsuccessful at both the trial and appellate courts. However, the United States Supreme Court held, by a vote of 5 to 4, the coach had a private right of action under *Title IX*, and that retaliation against an employee who complains about acts of discrimination on the basis of sex is covered under *Title IX*.

Policy Implications

As the case law cited above shows, teachers and other public school employees do not surrender their First Amendment speech and expression rights and protections when they sign their employment contract. However, it is equally clear, as a matter of law, that employee First Amendment rights in the workplace are not so broad as they are out in the community, and that local public school boards can and do set limits on employee speech and expression. The key to avoiding costly litigation lies in crafting a balance between employee rights and employer prerogatives. This critical balance can be achieved by drafting clearly stated and fairly implemented personnel policies.

What follow are some suggestions to consider as existing policies are revisited and new ones are drafted. Local school officials must clearly state that:

- The board of education (the Board) retains exclusive and final authority over all personnel matters.

- The Board exercises wide discretion in deciding whether or not to continue the employment of personnel in the school system.
- The Board makes all employment contract and retention decisions based on: (1) the facts in each case, and (2) substantive documentation.
- The Board respects the constitutional and legal rights of all employees, including but not limited to their rights as citizens to speak out on matters of public concern.
- The Board will take immediate and appropriate disciplinary action in situations where employee acts of speech and expression: (1) present imminent danger and/or threaten harm to students or other employees, or (2) disrupt the learning environment, or (3) impede access of students to educational opportunities, or (4) have a harmful effect on employee morale, or (5) damage the school system's reputation and credibility in the community (especially among parents).

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