



THE PUBLIC SECTOR

For public employers, free speech can often cost a lot

by Jeff Sloan and Elina Tilman
Renne Sloan Holtzman Sakai, LLP

A key protection that only public employees enjoy is the right to be free from discrimination based on their exercise of First Amendment rights. Recently, the U.S. Supreme Court expanded employees' rights by issuing a unanimous decision that public employees may neither be fired nor suffer adverse employment consequences for providing truthful subpoenaed testimony outside of their official duties.

Employee discovers corruption, testifies, and gets fired

While working for an Alabama community college, Edward Lane discovered evidence of a subordinate's misappropriation of government funds. In two resulting federal trials, Lane testified under subpoena, incriminating the subordinate employee.

After Lane was fired, he claimed his discharge was retaliatory and violated the First Amendment. The lower courts dismissed his suit, concluding that the First Amendment didn't protect his subpoenaed testimony. Lane appealed to the Supreme Court.

Balancing interests

A public employee's speech receives First Amendment protection only if:

- (1) The employee spoke as a citizen on a matter of public concern (i.e., of political or social concern) rather than as an employee about a matter of personal interest;
- (2) The speech isn't within the scope of the employee's duties; and
- (3) The government has no adequate business justification for treating the employee differently from the general public.

Reports or speech employees make in the course of their employment, such as an internal memo prepared by a prosecutor in the course of his ordinary job responsibilities, don't enjoy First Amendment protection.

Despite those restrictions, the Court's conservative and liberal justices ruled in Lane's favor. They

held that while he testified about information that arose from his employment, his ordinary job responsibilities didn't include testifying in court proceedings. The Court reasoned that testimony in judicial proceedings is a quintessential example of citizen speech. The Court further observed that public corruption is clearly a matter of public concern. Consequently, Lane's discharge violated First Amendment precepts. *Lane v. Franks* (2014) 134 S. Ct. 1871.

Bottom line

First, observe the close relationship between First Amendment and whistleblower protection. If the First Amendment doesn't protect an employee's report of possible violations of law, state whistleblower protections will often apply. Notably, Senate Bill 496 strengthened such protections by amending Labor Code Section 1102.5.

Second, public agencies should review their internal policies on reporting allegations of public wrongdoing by public employees. Policies requiring internal reporting of such allegations can ensure that employee concerns are funneled appropriately through the chain of command.

Third, virtually anything that arguably affects an employee's terms, conditions, or privileges of employment can be an "adverse action" that triggers a First Amendment lawsuit. Something as innocuous as a negative performance evaluation, changed job duties, or failure to follow up on an employee's complaint can precipitate a lawsuit.



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Fourth, beware—compensatory, special, and punitive damages as well as attorneys' fees, injunctive relief, and reinstatement are available remedies.

Last, special care needs to be taken regarding employees' Internet speech. Too often, public employers react too quickly and too severely to critical Internet posts from dissatisfied employees.

The authors can be reached at Renne Sloan Holtzman Sakai LLP in San Francisco, jsloan@rshslaw.com and etilman@rshslaw.com. ❖



Tilman