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THE PUBLIC SECTOR

Are public employee complaints protected by the First Amendment?

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Unlike their counterparts in the private sector, public-sector employees' work-related speech may be protected by the First Amendment to the U.S. Constitution. The rules on when those protections apply are unclear, adding to the challenge and risk for public-sector management. Recently, however, the U.S. 9th Circuit Court of Appeals (whose rulings apply to all California employers) gave public employers an unusual win, holding that the First Amendment doesn't protect self-interested speech motivated by an individual employee's own personnel disputes.

Employee questions alleged 'unlawful practice'

Peter Turner worked as a survey assistant for the city and county of San Francisco. Although the job was advertised as a permanent civil service position, he was designated a temporary exempt employee. Turner made statements at staff meetings, at union meetings, and to his superiors about the city's practice of misclassifying employees as "temporary exempt" in violation of the city charter and its practice of regularly assigning work to temporary exempt employees that was arguably outside their classification. When Turner's supervisor allegedly blocked his promotion and interfered with a permanent surveying job offer, Turner wrote to HR, threatening to expose the city's hiring practices. He was terminated shortly thereafter.

Turner filed a federal court lawsuit claiming retaliation under the First Amendment, but the claim was denied because his communication focused on—and was motivated by—a private grievance about *his* employment situation. Accordingly, he was not speaking as a citizen on a matter of public concern. The 9th Circuit affirmed the ruling.

Mere personnel disputes don't invoke 'public concern'

A public employee's speech receives First Amendment protection if (1) he engaged in "protected" speech, (2) the employer took an adverse employment action, and (3) his speech was a substantial or motivating factor for the adverse employment action. Speech is protected if the employee speaks as a citizen on matters of "public concern" (i.e., social, cultural, or political matters). Whether speech involves public concern depends on the content, form, and context of the statement as well as the employee's motivation—does the speech disclose actual or potential wrongdoing, or is it prompted by dissatisfaction with one's own employment situation?

In this case, the 9th Circuit quickly concluded that Turner's personal complaints about the city's alleged unlawful hiring practices were merely disguised as public concern. In reality, the complaints were driven by Turner's internal grievance—his concern over his own professional development and his dissatisfaction with his status as a temporary employee.

The court placed particular emphasis on the form and context of Turner's speech. Specifically, his complaints were tied only to an ongoing personnel dispute and were aired only *internally*—to his supervisor, to HR, and at union meetings—rather than to the board of supervisors, the press, or another public forum. The court also emphasized that Turner didn't speak as a union representative, nor did he seek broad-based union relief on behalf of similarly situated employees; he was solely concerned about his position. Therefore, his speech was unprotected. *Turner v. City & Cnty. of San Francisco,* Case No. 13-15099 (9th Cir., June 11, 2015).

Bottom line

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First Amendment retaliation claims *are* actionable regardless of whether the employee's speech is directed internally to a supervisor or to the general public through broadcasting so long as the employee speaks as a "citizen" on a matter of "public concern." However, to whom the statements are made can be important in determining whether the speech involves a matter of "public concern."

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