"Have Fun Storming the Castle!"[1] Wait, What Do You Mean There are Consequences?

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Introduction

In the wake of the United States Capitol building being stormed by acolytes of former President Trump, those same "patriots," conspiracy theorists, and others who believe without evidentiary support that the 2020 presidential election was stolen, are now facing repercussions for their actions. Even prior to the insurrection in Washington D.C., there were news articles and posts about individuals losing their jobs, sponsorships, or college acceptances because of their social media posts; and now, some face similar consequences for their participation in sedition at the Capitol on January 6, 2021. Some of these individuals argue that they have "a First Amendment right to say such and such" or similarly, "This is America and we have rights," or other things that sometimes are not PG rated. It seems like each time such news or articles appear, they should be accompanied by a scrolling chyron that reads: "The First Amendment only applies when the government is trying to curb speech and actions and, even then, there are limitations on rights to free speech and association."

Private corporations do not have similar constraints or obligations related to preserving employees' First Amendment rights. If Apple or Amazon wants to terminate an employee for a comment made on social media or for their participation in storming the Capitol, destroying property in the Capitol building, or committing violence against other persons, they can. There are other legal considerations that they must take into account, of course, such as harassment, discrimination, retaliation or concerted, protected activity under the National Labor Relations Act[2] (NLRA), but the First Amendment is not one of them.

This two-part article will examine the primary areas that may prove to be pitfalls for employers when disciplining or terminating employees for activities such as troublesome social media posts or engaging in light treason. These two areas are the First Amendment and concerted, protected activity under the NLRA. This article will focus on the First Amendment and the second in this series will turn to concerted, protected activity.

First Amendment Protections for Public Sector Employees

My favorite line from the movie *The American President* is when the fictional president Andrew Shepherd in defense of his girlfriend Sydney Ellen Wade's membership with the Americans for Civil Liberties Union (ACLU), says:

> You want free speech? Let's see you acknowledge a man whose words make your blood boil, who's standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours. And he goes on to talk about how defending free speech is hard work.[3]

The First Amendment states in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.[4]

All arms of the government - from the federal down to the local level - cannot restrain, interfere with, or censor speech because of its message, idea, subject matter, or content. However, there are some limits on free speech. The ubiquitous example of unprotected speech is that of a person who screams "Fire!" in a crowded movie theater, potentially causing a panic, when there is no fire.[5] Similarly, a speech that creates an immediate threat of harm or incites violence is unprotected.[6] People are not able to say anything they want to say free of government censorship, but regulations on speech are highly scrutinized to ensure that the any infringement is as limited as possible.

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[1] The Princess Bride (Act III Communications & Twentieth Century-Fox 1987).

[2] 29 U.S.C. § 151 et seq.

[3] The American President (Columbia Pictures 1995).

[4] U.S. Const. amend I.

[5] *Schenk v. United States*, 249 U.S. 47 (1919).

[6] *Brandenberg v. Ohio*, 349 U.S. 444 (1969).

Here, in the aftermath of the insurrectionist mob violence at the U.S. Capitol, many active participants in the violence, or the theft or destruction of property, as well as individuals who made threats or were photographed trespassing within the U.S. Capitol building, have been terminated or suspended from work, including those working for public employers. Although it is not currently known whether any of these public employees have filed suit against their employer, any such legal action might allege a First Amendment retaliation suit under Section 1983.[7]

Public Employer "Regulation" of Non-Violent Speech

As an initial matter, actual violence and criminal activity should be delineated from speech tending to incite violence; committing a crime is not protected speech. However, short of actual violence or criminal activity, the lawfulness of a public employer firing or taking other adverse action against such an employee turns on whether the speech is protected. In order to establish a *prima facie* case of retaliation under the First Amendment, an employee must demonstrate that (1) they engaged in *protected* speech; (2) they were subject to an adverse employment action; and (3) the protected speech was a "substantial or motivating" factor for the adverse employment action.[8] Even if the plaintiff can make this showing, the employer may still defeat the retaliation claim by demonstrating "an adequate justification for treating the employee differently from other members of the public," or that it would have taken the adverse employment action even in the absence of the employee's protected speech.[9]

In *Pickering v. Board of Education*,[10] the United States Supreme Court defined a balancing test for First Amendment retaliation cases involving public employees. The purpose of the test is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[11] In applying this test, subsequent courts have formulated the following five-step inquiry:

- Was the speech a matter of public concern?
- Did the employee speak as a private citizen or public employee?
- If the speech was protected, was it a substantial or motivating factor in the adverse employment action?
- Did the employer have adequate justification for treating the employee differently from other members of the public?
- Would the employer have taken the action even without the protected speech?[12]

Plaintiff bears the burden of demonstrating the first three factors and, if successful, the burden shifts to the employer to demonstrate one of the remaining two factors.[13]

Speech is protected when it 1) relates to a matter of public concern and 2) is spoken in the employee's capacity as a private citizen.[14]

The first prong is met here if the peaceful protesting centered on the legitimacy of the presidential elections, which is a matter of public concern. This may be disputed since there appears to be no legitimate basis to believe that the elections were fraudulent, but generally, "[s]peech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" However, speech that deals with "individual personnel disputes and grievances" that "would be of no relevance to the public's evaluation of the performance of governmental agencies" generally is not of public concern.[15] The test for "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[16]

With respect to the second prong, in the context of the U.S. Capitol riots, it appears that most of the individuals spoke in their capacity as private citizens. While some of the documented photographs show a handful of individuals wearing jackets or other garments bearing the name or logo of their employer, it did not appear

[7] 42 U.S.C. § 1983.

[8] *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003); *Eng v. Cooley*, 552 F.3d 1062, 1071-72 (9th Cir. 2009); *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1056 (9th Cir. 2013).

[9] See *Ellins,* 710 F.3d at 1056; *Gibson v. Office of the Attorney General*, 561 F.3d 920, 925 (9th Cir. 2009).

[10] 391 U.S. 563 (1968).

[11] 391 U.S. at 568; *see also Connick v. Myers*, 461 U.S. 138, 142 (1983).

[12] *Eng,* 552 F.3d at 1070; *Ellins,* 710 F.3d at 1056.

[13] *Ellins,* 710 F.3d at 1056.

[14] *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

[15] *Ellins,* 710 F.3d at 1057 (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)); *Turner v. City and County of San Francisco*, 788 F.3d 1206, 1211 (9th Cir. 2015) (plaintiff's complaints not protected, in part, because they "clearly arose out of an ongoing personnel dispute" with colleague and employer).

[16] *Connick v. Myers*, 461 U.S. 138, 147-48 (1963).

any were wearing public employer paraphernalia. For example, two Seattle police officers were identified as participants, but not because they wore their badges or their police gear. They were identified through social media posts presumably by friends or family.[17]

If the first two prongs of the test are satisfied, the plaintiff then needs to meet the third by showing that the protected speech was a substantial or motivating factor in the adverse employment action. We will assume *arguendo* that the plaintiff's presence in the mob in Washington D.C. on January 6, 2021 *was* the substantial motivating factor for the public employer's adverse action. In the case of non-violent protestors or those who were not photographed or witnessed being inside the U.S. Capitol building, the burden then shifts to the public employer to demonstrate the following:

- It had adequate justification for treating the employee differently from other members of the public; or
- It would have taken the adverse action even if the protected speech had not occurred.

A public employer can show adequate justification if it can establish that its "legitimate interests outweigh the employee's First Amendment rights."[18] Speech is not protected if a public employer's "legitimate administrative interests outweigh the employee's First Amendment rights."[19] In balancing these interests, public employers have "wide discretion and control over [their] personal and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation."[20] This is particularly so where an employee's speech interferes with the fulfillment of the employee's own and other employees' job duties.[21]

Turning to the example of the Seattle police officers - who were not suspended or terminated, but placed on administrative leave - the question being investigated by the Seattle Police Department is whether the officers' mere presence at the rally violates Departmental policies. For purposes of our analysis, let us assume the plaintiff here was terminated for violating Departmental policy by engaging in otherwise protected speech. In balancing the public employer's legitimate interests and the employee's First Amendment exercise, courts consider the context in which the speech was made, including the employee's specific role and the extent to which the speech impairs the efficiency of the workplace.[22] Relevant factors include whether the employee's speech:

- Impairs discipline or control by superiors;
- Disrupts co-worker relations;
- Erodes a close working relationship premised on personal loyalty and confidentiality;
- Interferes with the performance of the speaker's duties; or
- Obstructs the routine operation of the office.[23]

Significantly, "a public employee who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower-level employee."[24]

What Are an Employer's Legitimate Administrative Interests?

Public employers have "*wide discretion and control over [their] personal and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch*."[25] Again using the example of the Seattle police officers, let's first look at the employees and then the impact of the speech. The employees are police officers who are charged with upholding the law, including the Constitution. They interact daily with the public and are required to routinely engage the public in the performance of their duties. Their participation in the rally impacts the performance of their work because they were protesting the legitimacy of a presidential election on the basis of unsubstantiated claims of voter fraud. Such baseless claims have been successfully disputed in nearly every arena, including in the courts, where Trump's attorneys

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[17] Elise Takahama & Lewis Kamb, *Seattle Police Officers Who Were in D.C. During Riot at US Capitol Placed on Administrative Leave*, Seattle Times, Jan. 8, 2021, *available at* https://www.seattletimes.com/seattle-news/seattle-police-officers-who-were-in-dc-during-wednesday-riots-placed-on-administrative-leave/.

[18] *Shepherd v. McGee*, 986 F. Supp. 2d 1211, 1217 (D. Or. 2013) (citing *Eng,* 552 F.3d at 1071).

[19] *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2009); *Pickering*, 391 U.S. at 368.

[20] *Connick,* 461 U.S. at 151.

[21] See *Brewster v. Bd. of Educ.*, 149 F.3d 971, 981 (9th Cir. 2008); *Shepherd,* 986 F. Supp. 2d at 1217 (legitimate government interests include "promoting efficiency and integrity in the discharge of official duties and maintaining proper discipline in the public service").

[22] *Rankin v. McPherson*, 483 U.S. 378, 388-91 (1987).

[23] *Rendish v. City of Tacoma*, 123 F.3d 1216, 1224-25 (9th Cir. 1997) (citing *Hyland v. Wonder*, 972 F.2d 1129, 1140 (9th Cir. 1992).

[24] *McVey v. Stacy*, 157 F.3d 271, 277-78 (4th Cir. 1998); *see also Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994-95 (9th Cir. 1999).

[25] *Connick,* 461 U.S. at 151.

have lost nearly 60 cases in an attempt to throw out election results. These conspiracy theories, magnified by former President Trump and his supporters, signify to many that these individuals may hold deeper beliefs about society in general. For example, many believe that President Trump and his supporters do not believe in systematic racism and are very supportive of what they perceive as an anti-#BlackLivesMatter movement, BlueLivesMatter. For police officers who are known to be Trump supporters and who attended a rally that resulted in the attempted overthrow of the United States government, their subsequent (and former) work conduct and actions may be called into question. The public – or public defenders – may question the officers' motives in making arrests (e.g., racial profiling), their conduct during arrests, and even their behavior in their contacts with members of the public. If their political advocacy directly opposes the Seattle Police Department's goal of fostering community relations and enforcing the law in a fair and equitable manner, with an awareness of systemic racism, would that provide a sound basis for the Department to lawfully terminate the officers' employment?[26]

The City may argue that the officers' involvement in the rally could detract from the employer's overall mission and goals by undermining its credibility in the community. Additionally, widespread knowledge of the officers' activities could also hinder the efficiency of the workplace by negatively impacting relationships with co-workers, including officers who are regularly relied upon to "have each other's backs" during calls. Lastly, in a paramilitary organization such as the police, following the chain of command is paramount and, here, these officers were at a rally attempting to overthrow a legitimately elected Commander in Chief.

The officers may argue that the City did not have a legal basis to terminate their employment because they are officers who are not in positions of leadership and have no policy making authority. They could further argue that they were protesting as private citizens, and their right to protest did not interfere with their ability to be police officers. Assuming they have no prior disciplinary records, they may also assert that they are able to faithfully execute their job duties, and enforce and uphold the laws of the City and the U.S. Constitution. They might contend that they were peacefully exercising their First Amendment rights when others became violent, but that they never entered the U.S. Capitol building, and were not involved in any destruction of property, threats against Congressmembers, or other violence. They could further argue that their personal beliefs do not interfere with their work as public servants. Lastly, they might argue that they only attended a rally, which is their right, so they did not break any laws or violate their oath to uphold the Constitution.

For those who participated in the rally, but did not engage in violence, destruction of property, theft, or any other unlawful activities, the last question is whether the employer would have taken the adverse action even without the protected speech. Not knowing the Seattle Police Department's policy, but nearly every police department has a general policy where an employee's conduct cannot bring disrepute to the department. Again, this is difficult call because the conduct took place off duty, but the amount of publicity and notoriety of these officers for their mere presence at the rally in light of the events that occurred has brought the Seattle Police Department into disrepute in the community.

Conclusion

As more and more public employees are found to have either attended the rally and/or pushed past police barricades and stormed into the U.S. Capitol, public employers will be forced to engage more and more in this analysis in determining whether to take adverse employment actions against their employees. In many instances, it may be an easy decision, especially if there is evidence the employee has been charged with crimes. For those who were merely at the rally and did not participate in violence, the decision to discipline may be more difficult.[27]

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[26] *Biggs*, 189 F.3d at 991-92, 994-95.

[27] The second part of this article will focus on an employer's ability to regulate an employee's speech and conduct from a labor law perspective, as well as analyze an employer's ability to discipline an employee who engaged in protected, concerted activity.