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The Boundaries of Employee Free Speech

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I. INTRODUCTION

The laws affecting free speech in the workplace are complex and varied in their application. For example, employees in the private (non-governmental) sector have no general First Amendment right of free speech in the workplace, and political affiliation is not generally recognized as a protected category under the discrimination laws governing private sector employment (*e.g.*, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Texas Commission on Human Rights Act, etc.). However, private sector employees *are* protected from retaliation based on their speech if that speech is considered protected, concerted activity under the National Labor Relations Act, or the speech meets the definition of protected activity under the anti-retaliation provisions of Title VII, the ADEA, ADA, or other employment discrimination laws.

By contrast, employees of public sector (*i.e.*, government) employers are entitled to a significant level of First Amendment free speech protection – including some workplace speech. In addition, the right of freedom of association under the First Amendment protects most public sector employees from discrimination based on political or political party affiliation (subject to certain exceptions). But since the National Labor Relations Act doesn't apply to public sector employment, the concept of protected, concerted activity under that statute affords no protection to public sector employees in Texas.

This paper supplements the panel presentation on this topic at the 25the annual Labor and Employment Law Conference sponsored the University of Texas School of Law, and provides an overview of many of the legal standards, cases, and concepts the panel will reference during the presentation. The presenters have also included as an Appendix following the last page of this paper a table titled "Controversial Speech in the Workplace – Rights and Duties," which summarizes the key concepts discussed in this paper.

II. FIRST AMENDMENT CONSIDERATIONS IN THE PUBLIC SECTOR WORK-PLACE

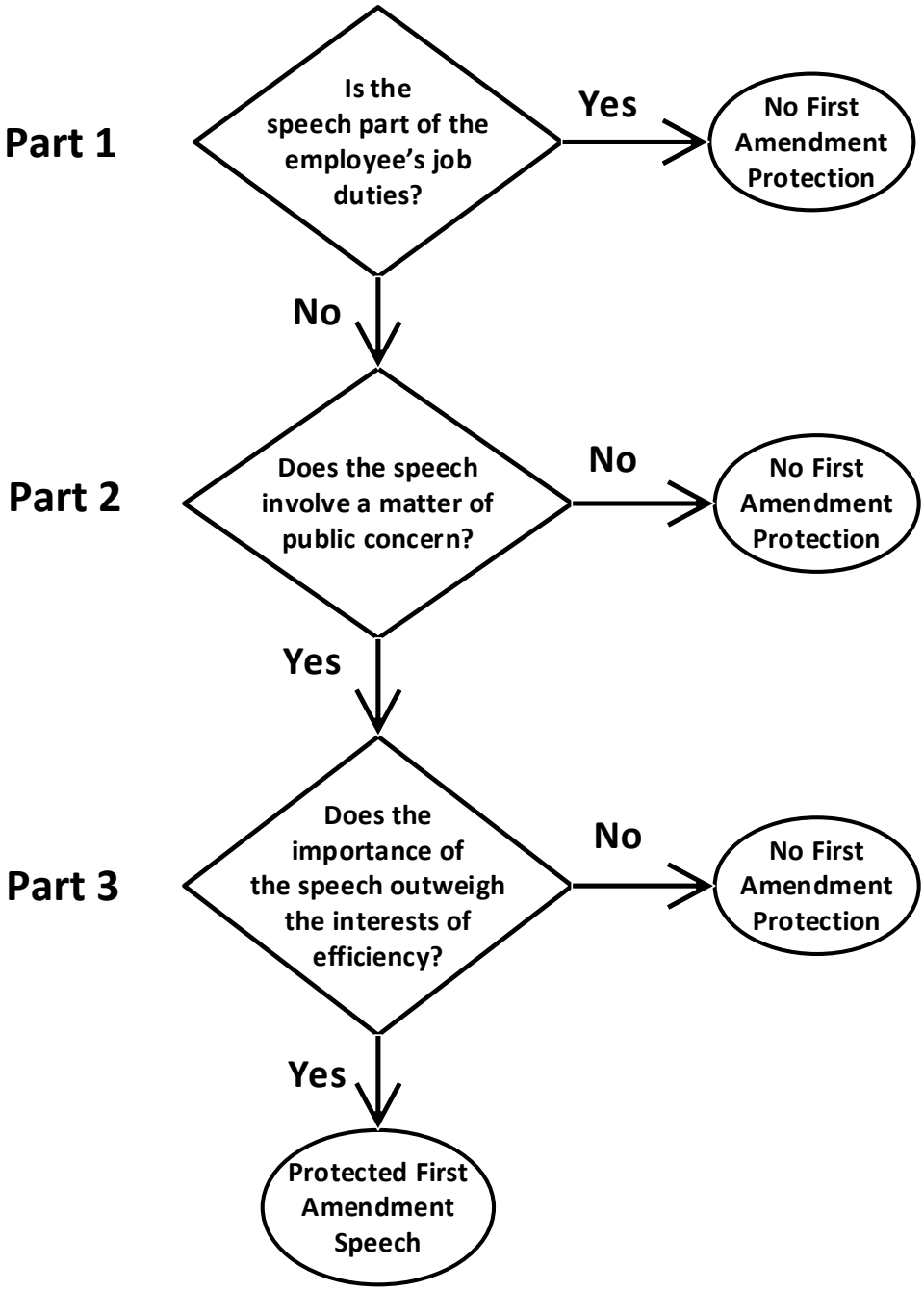
Since the Constitutional guarantees of the First Amendment apply to the government when it acts as an employer as well as when it acts as a regulator, public sector employees have significant protection for First Amendment activities in two areas that don't apply to their private sector counterparts. These two areas are: (1) protection of public employees from retaliation for the exercise of their First Amendment right of free speech; and (2) protection of public employees from retaliation based on their First Amendment right of free association based on political (or political party) affiliation. Both of these areas are subject to significant qualifications and conditions, discussed below.

A. Free Speech and First Amendment Retaliation Claims

The right of free speech under the First Amendment creates significant protections for public employees who speak out on matters of public concern. In many situations this means that

disciplining or discharging a public employee based on the employee's speech (or other form of First Amendment expression) is unlawful retaliation for exercising First Amendment rights and actionable under 42 U.S.C. §1983. However, not all speech by a public employee is protected. The parameters of a First Amendment retaliation claim based on employee speech includes a complex, 3-part test that has evolved over the past 50 years from a series of Supreme Court decisions. This 3-part test can be expressed graphically as follows:

The 3-Part Test for First Amendment Retaliation Claims



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