2020 Update – Public Employee Issues

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I. FREE SPEECH IN THE WORKPLACE

- Long established – public employees do not wholly relinquish First Amendment rights by accepting public employment
- But their rights can be limited more than those of the public generally
- Courts engage in *Pickering* balancing test, where employee rights are measured against governmental employer's needs
- *Pickering v. Bd. of Educ. (Sup Ct – 1968)*

Elements – public employee Free Speech Claims

- Test for public employee free speech claims:

1. Did employee suffer adverse employment action?
2. Did employee speak on matter of public concern?
3. Did employee interest in speech outweigh employer's interest in governmental efficiency?
4. Was the adverse action substantially motivated by the employee's speech?

Added Element – did employee speak pursuant to official job duties?

- Seminal case – *Garcetti v. Ceballos,* 547 U.S. 410 (2006)
- New clarification – *Lane v. Franks*, 573 U.S. 13 (2014)
- Critical distinction – speech connected to job can still be protected if it is not speech required by job (but courts blur this line *often – especially in cases involving law enforcement employees*)

Undecided Issue (5th Cir.): What constitutes an adverse employment action?

- Old law – must have concrete action like discharge, demotion that involves loss of pay
- Transfer in some cases constitutes adverse employment action, even w/out pay loss, if it is in effect a demotion.

Does Burlington Northern supplant Adv Emp Act standard?

- Burlington Northern – *any* action considered materially adverse, if it would dissuade an employee from making a report.
- BN has been applied in First Amendment context by some district courts in the 5th circuit – e.g., *Rodriguez v. Laredo*, 2007 WL 2329860
- But 5th Circuit has not decided question – *Dumas v. St. Tammany*, 2018 WL 2117240 (W.D.La.)

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