FIRST AMENDMENT ISSUES FOR FIRE AND RESCUE PERSONNEL

FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES

Among our most cherished rights are the right to speak freely on matters of public concern, and the right to associate with whom we choose. These rights to freedom of speech and freedom of association are protected by the First Amendment to the U.S. Constitution. Although there is no "right" or "entitlement" to government employment, public employers cannot fire, refuse to hire or otherwise discriminate against an individual based on his or her exercise of First Amendment rights.

The First Amendment provides an important check on the ability of public employers to discipline or otherwise discriminate against a public employee.

FREEDOM OF SPEECH

Under the First Amendment, individuals have the right to speak out on matters of public concern without having government employers retaliate against them for the exercise of free speech. In the employment context, to be protected, there are two basic requirements:

1) an employee's speech or comments must involve a matter of "public concern"; and
2) the employee's interest in speaking on the matter of public concern must not be outweighed by the employer's interest "in promoting the efficiency of public services."

In addition, the employee must prove that the protected speech was a "substantial" or "motivating" factor in the adverse employment decision. Another way to say this is that the employee's protected speech must have been a reason that moved the public employer towards its decision. Further, the employer can escape liability if it can prove that it would have made the same decision even in the absence of the employee's protected speech activities.

In 2006, the United States Supreme Court issued a decision in the case Garcetti v. Ceballos, 547 U.S. 410 (2006), in which the Court placed an additional limitation, beyond the two just discussed, on what constitutes protected speech under the First Amendment. In Garcetti, the Court held that when public employees make statements "pursuant to their official duties," their speech is not protected under the First Amendment, so they can be disciplined for their statements.

This means that a public employee's statements are not protected when they are made in the process of completing a work duty. For example, a paramedic who is required to complete a written report after transporting a patient to a hospital is not protected under the First Amendment from discipline for statements made on the report. Similarly, a public employee who is responsible for making comments to the press and public as spokesperson for a fire department is not protected under the First Amendment from discipline for statements made while performing those duties.

Matters of Public Concern

Matters of public concern are issues that concern the public at large versus issues that only affect an individual employee. Speech on matters of "public concern" is speech that can be "fairly considered as relating to any matter of political, social or other concern to the community." Courts have routinely found that issues regarding public safety (including staffing, response time, and equipment for emergency services), discrimination, public budgets, taxation, and fraud are matters of public concern. Conversely, courts have found that issues are not matters of public concern if they only concern such things as whether an individual employee was properly disciplined for non-speech reasons, personality disputes among employees, or other complaints regarding working conditions that only affect the complaining employee.

Weighing the Harm

Once it is determined that the employee's speech is on a matter of "public concern," the employee's interest, as a citizen, in making the speech must be weighed against the harm, if any, to the employer's efficient and effective operations. Where the employee's interest is strong, such as political speech or speech raising a serious issue of public safety, it will be very difficult for the employer to "win" this balancing test. As one court said with respect to speech concerning cuts to emergency services, "*it is hard to imagine any combination of government interests sufficient to outweigh [the employee's] interest in informing the public about policies he believed were dangerous to the City's citizens*." In this regard, the courts often look to whether the an injury or disruption of the workplace affecting the public employer's ability to provide its services occurred, or is *likely* to occur. Moreover, employers may not single out a particular employee or particular type of speech for punishment. If an employee or particular type of speech is being singled out, the courts usually strike down the speech based restrictions as unconstitutional.

EXAMPLES OF FREEDOM OF SPEECH CASES

Set forth below are a few examples of First Amendment freedom of speech cases that employees have successfully pursued:

- In Texas, a fire fighter was discharged for speaking to the media following a routine fire in which a fire fighter died of a heart attack, and another fell from a ladder, sustaining serious injury. The fire fighter, who was president of the local fire fighters union, informed the press that recent budget cuts and staffing reductions may have played a part in the incidents. The court found the fire fighter's statements to the media constituted speech on a matter of public concern, protected under the First Amendment. The fire fighter was reinstated with back pay, benefits, and payment of his attorneys' fees and costs.

- In Missouri, a fire fighter was discharged after publicly announcing the local union's endorsement of a local fire district board candidate at a political meeting. The union-endorsed candidate was running against a long time incumbent, who had the support of the fire chief and his fellow fire board members. Although the fire department claimed

the fire fighter was fired due to abuse of sick leave, the jury concluded that this was a false reason given by the fire department to disguise its true motive of punishing the employee for engaging in protected political speech. The jury awarded the fire fighter substantial damages, including back pay, compensatory damages for pain and suffering, and attorneys' fees and costs. In addition, the fire district was ordered by the court to reinstate the fire fighter.

- In a case involving a state highway patrol, a state trooper was disciplined for allegedly withholding information regarding missing property. At trial, the court found that the true reason for the trooper's discipline was that the trooper had endorsed a candidate for patrol superintendent who was opposed by the trooper's superior. In balancing the employee's interest in free speech against the employer's interest in the efficiency of the service, the court ruled *in favor* of the trooper because the highway patrol could not show that an injury or disruption of the workplace was or would be the result of such protected speech.

- In a Tennessee case, a fire department prohibited any literature at the workplace that mentioned "unions" or "labor organizations." The department did allow fire fighters to read other magazines and books to the workplace, including adult magazines such as Playboy. The prohibition solely related to union material. The court struck down this rule finding that it was an invalid content based restriction on speech that was unnecessary to promote the efficiency of the department's service to citizens. This case also demonstrates that a public employer may not discriminate against certain types of speech based on the employer's opposition to, or disagreement with, the content of the speech.

- In a South Carolina case, several fire fighters were not hired after their department was merged into another city's fire department. The fire fighters had been active in the union and had publicly commented on city related issues in the past. The fire fighters won a jury trial in which the court found that the city had violated the fire fighters' First Amendment rights.

FREEDOM OF ASSOCIATION

Public sector employers (state, local and federal government employees) may not take adverse actions against employees based on the groups with which the employees associate, such as labor associations, political organizations, and civic groups. This right is not absolute, however. For example, a police detective may not be able to associate with known organized crime figures, or associate with a motorcycle gang that the city is investigating. In evaluating 'free association' claims, courts must balance the employee's First Amendment interest in belonging or associating with a group against the employer's interest "in promoting the efficiency of public services." It is rare for an employer to be able to justify restrictions based on an employee's right of association.

In addition, the employee must prove that the protected associational activity or membership was a "substantial" or "motivating" factor in the adverse employment decision. Another way to say this is that the employee's protected association must have been a reason that moved the public employer towards its decision. Further, the employer can escape liability if it can prove that it would have made the same decision even in the absence of the employee's protected activities.

In attempting to justify a restriction on speech or freedom of association, the employer must offer more than mere speculation or conjecture; rather the courts will look to whether an injury or disruption of the workplace affecting the public employer's ability to provide its services occurred, or is *likely* to occur.

EXAMPLES OF FREEDOM OF ASSOCIATION CASES

Set forth below are a few examples of First Amendment freedom of association cases that employees have successfully pursued:

- In a fire department there were two IAFF local unions—one for the officers and one for the rank and file. The city ordered the employees in the officers local to withdraw their affiliation with the International union, claiming that it created a conflict of interest for the officers to affiliate with the same union in which their subordinates were members. A federal court struck down this restriction finding that there was no rational basis for the city's fears.

- In a case involving the District of Columbia's attempt to restrict the association rights of police officers who were trying to organize a union, the court held that a D.C. Code provision, which forbade membership by D.C. police officers in a union that was *affiliated* with any union that asserted the right to strike, was unconstitutional. The District argued that the restrictions against affiliations were necessary "to insure a smoothly running, fair and impartial police force." The District suggested that a police officer's union sympathies would interfere with his ability to respond to labor disputes. The court rejected the District's arguments and struck down the ordinance as an impermissible restriction of freedom of association.

- In a case involving fire fighters' attempts to become affiliated with an international union, the court declared a North Carolina statute that prohibited fire fighters from becoming members of a labor organization that is affiliated with a national or international labor organization, to be unconstitutionally overbroad. The court held that:

  > It matters not . . . whether the firemen of the City of Charlotte meet under the auspices of the intervenor, a national labor union, but whether their proposed concerted action, if any, endangers valid state interests. We think there is no valid state interest in denying firemen the right to organize a labor union -- whether local or national in scope.

- In a similar case involving police officers, a court struck down a regulation that prohibited police officers from joining or maintaining membership in any labor organization whose membership was not exclusively limited to full-time law enforcement officers. The city attempted to justify the regulation on the grounds that a police officer must appear to be impartial and neutral in the handling of labor disputes. The court concluded that the city's asserted interest did not outweigh the First Amendment rights of the police officers to join a labor organization of their own choosing.

REMEDIES

Employees who successfully pursue First Amendment cases are eligible to recover the following types of remedies:

- Declaratory relief such as a court's ruling that a statute or ordinance is unconstitutional;
- Injunctive relief such as an order that the employee be returned to work;
- Actual damages such as lost wages and benefits;
- Compensatory damages, such as pain and suffering caused by the employer's misconduct;
- In extreme cases, punitive damages to punish the public officials who violated the employee's rights; and
- Attorneys' fees and costs incurred in pursuing the case.