



LEGAL ISSUES

RELATING TO COUNTY GOVERNMENT

The Delicate Balance Between County Authority and Employee First Amendment Rights

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In a time marked by increased polarization, the delicate balance between county authority and the protection of employee First Amendment rights has emerged as a crucial and contentious issue. The boundaries of free speech for county employees, and a county's authority to regulate such speech, require careful examination and analysis using the framework described in this article.

The Free Speech Clause of the First Amendment prohibits a county employer from "abridging the freedom of speech" of a public employee.¹ Speech may be verbal, written, or actions intended to convey a message, and a county employer is prohibited from retaliating against an employee for engaging in protected speech.²

While this general prohibition may appear rather straightforward, the requisite analysis for determining whether speech is protected is fraught with complicated considerations. By examining key U.S. Supreme Court and Seventh Circuit rulings and legal principles, this article aims to shed light on considerations that shape the boundaries of free speech for county employees and the delicate balance between individual expression and the efficient functioning of public services.

First, a county must determine whether the county employee is speaking as an employee or as a citizen. In most cases, if it is determined that the county employee is speaking as an employee, the county has the authority to regulate the speech at issue. However, if the county employee is speaking as a citizen, the county must then determine whether the speech was on a matter of public or private concern. If it is determined that the speech was on a matter of private concern, the speech is unprotected.

However, if the speech is on a matter of public concern, a county must engage in a balancing test where the interests of the employee and the public are weighed against the interests of the county. Each of these steps is laid out in more detail below.

▶ **Step 1: Is the county employee speaking as an employee or as a citizen?**

The initial inquiry revolves around determining whether the county employee is expressing themselves in their capacity as an employee or as a citizen. If the county employee is speaking as an employee, the speech is unprotected. However, if the county employee is speaking as a citizen, a more in-depth examination is necessary in the subsequent step of the analysis.

A county employee is speaking as an employee when they "make statements pursuant to their official duties."³ In such instances, "the Constitution does not insulate their communications from employer discipline."⁴ Speech will be found to be pursuant to an employer's official duties, for example, when it is part of the employee's "daily professional activities."⁵

When conducting this analysis, a county should refer to the employee's daily professional activities and job descriptions for insight into whether the individual was speaking as a county employee or a citizen. For example, in *Garcetti v. Ceballos*, a deputy district attorney faced adverse employment actions for providing his supervisor with a memorandum detailing his concerns about an affidavit used to obtain a search warrant that contained misrepresentations.⁶ The U.S. Supreme Court found that the employee was speaking as an employee when he

drafted the memorandum because he routinely supervised other attorneys, investigated charges and prepared filings as part of his professional duties.⁷ Thus, the employee's speech did not enjoy First Amendment protection.

However, in *Lane v. Franks*, the Supreme Court found that an employee was speaking as a citizen when, pursuant to a subpoena, he testified under oath about his public employment and information learned in the course of employment.⁸ In reaching this holding, the court explained that "[t]he critical question in *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."⁹ Therefore, counties should carefully consider the daily professional activities of an employee when determining whether an employee is speaking as an employee or as a citizen.

► **Step 2: If the county employee is speaking as a citizen, is the speech on a matter of public concern or private concern?**

If the county employee is speaking as a citizen, the second step in the analysis involves determining whether the speech at issue pertains to a matter of public concern or private concern. If the speech is considered to be on a matter of public concern, a county employer must then conduct the analysis under step three because the First Amendment will be implicated. Conversely, if the speech is considered to be on a matter of private concern, the speech is unprotected.

This distinction is crucial because courts prioritize safeguarding speech with significant social value because the public has a greater interest in hearing such speech.¹⁰ Speech qualifies as a matter of public concern when it can "be fairly considered as relating to any matter of political, social or other concern to the community."¹¹ While this standard is broad and relatively ambiguous, speech will be considered a matter of public concern where it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time."¹²

That said, the question of whether speech involves a matter of public concern requires an examination of the content, form and context of the speech and even "speaking

up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern[.]"¹³ Rather, "it is necessary to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"¹⁴ Thus, even if an employee's speech might be potentially of interest to the public, it may not be protected if the employee's motivation for the speech was purely personal. Thus, for example, an internal grievance has been held not protected, even when it touched on subjects of potential interest to the public, when it was made for the purpose of advancing the private interests of the employee, such as by securing medical treatment for the employee or ensuring the employee had a safe working environment.¹⁵

► **Step 3: If the speech is on a matter of public concern, does the county employee's interest in commenting on matters of public concern outweigh the county's interest in promoting efficiency of its public services?**

Even where a public employee speaks as a citizen on a matter of public concern, the First Amendment analysis does not end there. In such instances, the county will employ the balancing test that arose out of the *Pickering v. Board of Education* case. In that test, the interests of the employee, as a citizen, are weighed against the interests of the county, as an employer, "in promoting the efficiency of the public services it performs through its employees."¹⁶

For example, in *Pickering*, a teacher criticized the allocation of public school funds. The court found that the teacher's interest in speaking out on a matter of public concern (and the public's interest in hearing it) outweighed the interest of the school district in maintaining workplace harmony because the teacher's "statements [we]re in no way directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work as a teacher."¹⁷ Compare this to the situation in *Connick v. Myers*, where the speech was not constitutionally protected because it could have resulted

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in the potential for undermining office relations or the destruction of “close working relationships.”¹⁸

Application of the Pickering balancing test is generally a fact-intensive inquiry that will turn on the specifics of each individual case. That said, in conducting the inquiry, courts will consider several factors: “(1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee’s ability to perform their responsibilities; (4) the time, place, and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.”¹⁹ Thus, even if

an employee is otherwise speaking as a citizen on a matter of public concern, a county employer should consider these various factors when determining whether the employee’s speech is actually protected by the First Amendment.

► Conclusion

The intersection between county authority and employee First Amendment rights requires that counties conduct a careful examination and analysis when issues arise with an employee’s speech. The framework outlined in this article provides some insight for navigating this challenging intersection. Central to this approach is the distinction between speech made by a county employee as an employee or a private citizen and whether such speech was on a matter of public or private concern. Further, even if speech is on a matter of public concern, a county should engage in a balancing test, evaluating the interests of the employee, the public and the county. Given the significant and, at times, complex legal analysis, counties are strongly encouraged to speak with corporation counsel when issues arise involving employee rights to freedom of speech. ■

Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.

1. U.S. Const. amends. I. and XIV (note that the prohibition is extended to local governments through the 14th Amendment).
2. *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006).
3. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
4. *Id.*
5. *Id.* at 422.
6. *Id.* at 414-15.
7. *Id.* at 422.
8. 573 U.S. 228, 238 (2014).
9. *Id.* at 240.
10. See *Connick v. Myers*, 461 U.S. 138, 152 (1983).
11. *Id.* at 146-47.
12. *San Diego v. Roe*, 543 U.S. 77, 83-84 (2006) (per curiam).
13. *Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999).
14. *Id.* (internal quotation marks and citations omitted).
15. *Bivens v. Trent*, 591 F.3d 555 (7th Cir. 2010).
16. 391 U.S. at 572.
17. 391 U.S. at 569-70.
18. 416 U.S. at 154.
19. *Lalowski v. City of Des Plaines*, 789 F.3d 784, 791 (7th Cir. 2015).

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