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Employment

Legal Maze

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Many lawyers remember constitutional law from college, law school and the Bar Exam. If they are civil lawyers, they probably work closely on constitutional issues fewer than a dozen times in the span of a career. In general, the U.S. and state constitutions regulate governments, not the private individuals and businesses whom civil lawyers typically represent. The same is true of private-sector labor and employment, which is governed primarily by contract and statutory law.

In the public sector, however, the fact that the employer itself is a governmental entity means that federal and state constitutional provisions dictate how the employer can treat its employees. Public-sector employment law concerns such entities as cities, counties, school districts and certain special districts and determines the rights of such diverse types of employees as police officers and firefighters, paramedics, teachers, hospital physicians and staff, assistant district attorneys, agency clerical and support staff and others. Because public employment consistently generates litigation and reported cases, constitutional law develops steadily and quickly in this area.

The public-sector employment context involves three primary areas of constitutional litigation. Each involves complex issues that can pose significant challenges to employers and their counsel.

Free Speech

The U.S. Constitution's First Amendment (applied to the states by the 14th Amendment) prevents the government from "abridging the freedom of speech." U.S. Constitution, Amendment I. As a gen-

eral rule, a public entity cannot "condition employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138 (1983). Among other things, employers cannot take adverse action against employees for engaging in speech that qualifies for constitutional protection. The Supreme Court has approached these cases using a two-step process, considering, first, whether the employee spoke as a citizen on a matter of "public concern" and, second, whether the employer nevertheless had adequate business justification for its action. Courts have had to consider whether free-speech principles precluded discipline of a police officer/union president for his anti-management article in the association newspaper, *Chico Public Officers Association v. Chico*, 232 Cal.App.3d 635 (1991), whether they precluded discipline of a police captain, himself a former member of management, from publicly criticizing new management established by his political rivals, *Gray v. Tulare*, 32 Cal.App.4th 1079 (1995), and whether the principles protected a court administrator's refusal to obey her supervisor's directive to provide training only to those who had worked for her supervisor's election campaign. *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999).

The United States Supreme Court in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), recently modified the applicable test for free-speech protection in the employment context by holding that, even if an employee speaks on matters of "public concern," no protection exists if the employee makes the statements as part of his or her official duties. Thus, in *Garcetti*, although the plaintiff, a deputy district attorney, had made statements arguably concerning a matter of public concern (he claimed

that a police officer made inaccurate statements in an affidavit supporting a requested search warrant), no free-speech protection applied, because the plaintiff made the statements as part of his job for the district attorney's office. The court reasoned that the employee did not speak as a "citizen" but as a public servant.

Establishment and Free Exercise

Public employers also must contend with constitutional doctrines regulating religious speech and conduct. The First Amendment not only guarantees free speech but also guarantees that the government will not prohibit the "free exercise" of religion and that it will "make no law respecting an establishment of religion." U.S. Constitution, Amendment I. Thus, on one hand, public employers may not infringe the First Amendment by unlawfully restricting employees' free exercise of religion. On the other, employers may not appear to sponsor religious views and thereby violate the Establishment Clause.

As to free exercise, the 9th U.S. Circuit Court of Appeals case law provides that employees have the right to engage in certain types of religious expression in connection with their work. In *Tucker v. State of California Department of Education*, 97 F.3d 1204 (9th Cir. 1996), the court held that an employee could place religious messages on his own work product that was internal to the department. In applying the Establishment Clause, by contrast, the 9th Circuit held that, when an employee's religious expressions reach the public, the employer may curtail them because they appear to give the government's work the imprimatur of religious expression. Specifically, in *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006), the court held that an employer properly prevented an employee from having religious items and messages at his cubicle, where he met members of the public to discuss government benefits, and approved the employer's policy that, although the employee

could share his religious beliefs with co-workers, he could not share them with clients — that is, members of the public.

Due Process

The U.S. Constitution's 14th Amendment provides that no state shall "deprive any person of ... property, without due process of law." U.S. Constitution, Amendment XIV. Public employers cannot deprive "property interest" employees of employment rights without satisfying this requirement of due process. See *Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975). Indeed, this application of due process is a core feature of public-sector employment law. "Property interest" employees for the most part are those who have worked beyond their probationary period, who are not temporary or substitute employees and who do not have "at will" employment arrangements. Once employees have a "property interest" in employment, the employer cannot deprive them of it without due process. Actions short of termination can constitute a "deprivation," including reduction in pay, forced retirement or suspension without pay.

Courts have held that, to satisfy due process, an employer must provide notice of the proposed action against the employee,

including a description of the reasons for the action; a pre-disciplinary conference with the employer at which the employee can be heard; and a post-disciplinary administrative hearing before a representative of the public entity, at which the employee can cross-examine witnesses and present evidence in an effort to have the employer change its decision. As a result of this framework, many public-sector attorneys spend a significant amount of time handling administrative hearings, arbitrations and judicial writs of mandate.

Even though the seminal *Skelly* case dates from 1975, courts are still establishing the precise contours of what procedures pre-disciplinary due process requires. For example, in *Flippin v. Los Angeles City Board of Civil Service Commissioners*, 55 Cal.Rptr.3d 458 (2007), the 2nd District Court of Appeal recently decided under what circumstances an employee waives the right to make due-process challenges to steps in the discipline procedure and whether the same official of the employer who issued the disciplinary notice could also, consistent with due process, preside at the employee's pre-disciplinary conference. In *California School Employees' Association v. Livingston Union School Dis-*

trict, 149 Cal.App.4th 391 (2007), the court considered what constitutes "clear and understandable" pre-disciplinary notice of charges so as to satisfy due process.

Finally, due process requires an adequate substantive justification for terminating or disciplining an employee. Courts reviewing a public entity's decision to discipline or terminate (after the post-disciplinary administrative procedure) will not defer to the employer to the extent they will in the "at will" context in private employment. Rather, the court will consider the accuracy of charges and the appropriateness of the employer's action.

The foregoing are primary constitutional doctrines in the public-employment context. Others include constitutional privacy protections and protections for free association. The result is an area that involves greater protection for employees, that has increased complexity and demand for legal practitioners and that likely will bring additional substantial developments in constitutional doctrines.

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