

Law Offices of Laurence E. Sweeney, Chelmsford, MA
www.laurencesweeney.com lsweeneyrph@comcast.net

WELCOME

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Welcome to the first edition of the **L.SWEENEYLAW - NEWS! Newsletter**.

This newsletter will be issued quarterly, or more frequently, and will contain current law topics related to various areas of this firm's law practice.

Content is not intended as legal advice and is for informational purposes only.

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We welcome your comments and your suggestions on topics you would like to see in future newsletters by sending Attorney Sweeney an email.

[To find a particular topic within this newsletter, refer to **Inside This Issue**, on page 1].

First Amendment Free Speech Rights and the Public Employee – When Discipline Violates the First Amendment

"If a cluttered desk is the sign of a cluttered mind, of what, then, is the sign of an empty desk?"

~ Albert Einstein

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ."

The First Amendment, however, is only applicable to the states through the Fourteenth Amendment. The 14th Amendment, in a nutshell, has a "privileges and immunity" clause and a "due process" clause. It is the interpretation of these clauses by the United States Supreme Court that resulted in the Bill of Rights (the first 10 Amendments to the Constitution) being applicable not only to the Federal Government (as it was prior to the 14th Amendment) but also applicable to the states and cities and towns.

The law is complex, but the First Amendment and the Fourteenth Amendment do not themselves provide any remedy for a violation. We need to look elsewhere for a remedial mechanism. That is, how do we enforce a free speech violation by a state or municipal government or government employee? The answer is in the Civil Rights Act of 1871. It is codified as 42 U.S. Code, Section 1983.

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Free Speech and the Public Employee (Cont'd)

*"There are times when
silence becomes an
accomplice to injustice."
~ Ayaan Hirsi Ali*

The Civil Rights Act of 1871 is also known as The Ku Klux Klan Act because one of its primary purposes was to provide a civil remedy against the abuses that were being committed in the southern states, especially by the Ku Klux Klan.

The key language in the act that provides the remedy for violations of a person's free speech rights is as follows: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, . . ." 42 U.S.C. §1983.

So the free speech RIGHT is derived from the First Amendment, but the REMEDY is provided through Section 1983. Section 1983 itself give no rights to a person. You can not violate someone's Section 1983 "rights." There are not "rights" under Section 1983. It is a remedial statute, so you have to first identify the "source" of the right that you are claiming is or has been violated - in this case, we are talking about the First Amendment Free Speech "right."

Now, to muddy the waters a little more, the violation of the free speech right has to be by way of some kind of "state action." That means it was some arm (employee) of the state (or state agency or even a municipality), or, as the courts have termed it - "Under Color of Law." That means that Section 1983 claims, in general, can only be brought against a "person" acting under "color of law," or put another way, under "authority of law," even if that state actor was violating the law. In other words, as long as the actor was acting with the "authority" of law, he or she can still be liable under Section 1983 if they were "abusing" that authority and acting outside the scope of their authority - such as a police officer unjustifiably beating up an arrestee, or a public employee supervisor disciplining or firing an employee because that employee was exercising his or her free speech.

So, for example, if a *private* employer, such as Target or Home Depot, fires an employee for speaking out about something of public importance, there is no Section 1983 claim because there is no "state action." That doesn't mean there might not be some other source of remedy based on the type of speech, such as a whistle blowing statute, or a state discrimination statute for complaining about sexual misconduct at the workplace, but there would be no Section 1983 claim.

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Free Speech and the Public Employee (cont'd)

Under current United States Supreme Court case law, for a public employee to have a Section 1983 claim for First Amendment free speech violations, the plaintiff/employee must meet the following:

1. Have spoken as a *citizen*;
2. On a *matter of public concern*.
3. The interest in the employee being able to speak out on the important public matter *outweighs* the employers interest in promoting the efficiency of the public service. [This is the *balancing part of the test*].
4. The exercise of the free speech was a *substantial factor or motivating factor* in the adverse employment action. [This goes to the issue of *causation*].
5. If it was a motivating factor, would the employer have discharged the employee *absent the speech*.

See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Parts 1, 2, and 3 have been declared by the Supreme Court to be questions of *law* for the court (judge) to decide, while parts 4 and 5 are *factual questions* for the jury or fact finder.

Part 1 is critical, because even if the employee is speaking about a matter of public concern, there is still no first amendment protection if the speech is done as part of the employees "*official duties*." If the answer to this yes (speaking as part of his official duties), then the inquiry stops and there is no protection.

This is not to say that there is no debate over what is or is not part of someone's "*official duties*" or what is or is not a "matter of public concern." These topics are hot, and are still being fine-tuned by decisions by federal courts of appeal and the United States Supreme Court.

In a recent case, a federal district court in Massachusetts allowed a case by a police officer against the Town of Ashland and various police officers to proceed where one of the claims, among others, was a Section 1983 claim for adverse employment action against the plaintiff/police officer because of his exercising his free speech, which included speaking out about sexual misconduct at the workplace.

See *Pomponio v. Town of Ashland*, District Court for the District of Massachusetts, Civil Action No. 15-cv-10253-IT, February 5, 2016.

The district court in Massachusetts explained: When "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not" protect their communications. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). However, "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) (concluding that fired employee's public testimony about information he learned through his employment was citizen speech). Instead, the "critical question" is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." Id. While this issue may be disputed, the allegations are sufficient to survive a motion to dismiss. [CONTINUED ON PAGE 4]



"When the people fear their government, there is tyranny, when the government fears the people, there is liberty."

Thomas Jefferson

Free Speech and the Public Employee (cont'd)



Know your rights! If you or someone you know is a public employee and has had some kind of adverse employment action taken against him or her, contact Attorney Sweeney for a free consultation to see if you may have a claim. There are different statutes of limitations for different claims and you may lose your rights if you do not assert them in a timely manner.

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