FIRST AMENDMENT AS IT APPLIES TO PUBLIC EMPLOYEES

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> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."*

That is the entire text of the First Amendment of the Constitution of United States of America. Despite its brevity, there are plenty of misperceptions of what protections it actually offers. To be clear, it only protects against *government* limitations on a citizen's right to freedom of speech, freedom to assemble, etc. The First Amendment does not prohibit private companies, like Twitter, Facebook®, or private employers, from doing so. But, what if your employer is the government? Can a government employer limit its employees' free speech? The short answer is—yes—in some instances.

A. Freedom of Speech as it Relates to Public Employees

"Speech" is defined broadly to include spoken complaints, remarks made on social media, emails, etc. See e.g., Hagan v. Quinn, 867 F.3d 816, 823 (7th Cir. 2017) (conversations in the workplace, comments at a press conference, a Facebook® post or a tweet on Twitter may all be protected speech); Fox v. Hamptons at Metrowest Cond. Ass'n, Inc., 223 So. 3d 453, 457 (Fla DCA 2017) (online speech is equally protected under the First Amendment.).

The First Amendment also protects the right not to speak. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 645 (1943) (in invalidating a state law requiring students to salute the American Flag, the Court held that protected speech "includes both the right to speak freely and the right to refrain from speaking at all ….").

Moreover, symbolic, non-verbal, non-written forms of communications may also be protected speech. See e.g., Cohen v. California, 403 U.S. 15 (1971) (holding that wearing a jacket with the words "Fuck the Draft" in public constitutes protected speech); Texas v. Johnson, 491

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U.S. 397 (1989) (burning a flag at a political rally is protected speech); John Doe No. 1 v. Reed, 561 U.S. 186 (2010) (signing a petition is protected speech); Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013) ("liking" something on Facebook® is protected speech; Erickson v. City of Topeka, Kan., 209 F. Supp. 2d 1131 (D. Kan. 2002) (policy that effectively prohibited Confederate battle flag vanity plate violated First Amendment).

However, and as explained further below, there is an additional limitation on such speech in the context of public employment. Specifically, the government can limit such speech if the employee's interest in making the speech is outweighed by the disruptive effects on the employer.

In determining whether a government employer may limit the speech of its employees, courts consider a two-part test[3]:

1. The First Amendment only protects a public employee who speaks as a "private citizen" about matters of "public concern."

a. When is a Public Employee Speaking as a Private Citizen?

The first case to address whether an employee was speaking as a "private citizen" as opposed to part of his or her "official duties" was the landmark case of Garcetti v. Ceballos, 547 U.S. 410 (2006). In Garcetti, a deputy district attorney alleged that his public employer retaliated against him in violation of the First Amendment. Specifically, Garcetti alleged that his employer retaliated against him because he wrote a memorandum in support of dismissing charges against a defendant because the police affidavit used to obtain a search warrant was factually inaccurate. In rejecting Garcetti's case, the Supreme Court concluded that, because Garcetti wrote the memo as part of his official duties, he was not speaking as a citizen for First Amendment purposes. As such, the First Amendment did not insulate him from discipline.

In Lane v. Franks, 134 S. Ct. 2369 (2014), the Supreme Court made clear that a public employee only loses First Amendment protection if her speech is made in the performance of the "ordinary" tasks she was paid to perform. Garcetti, at 422; Lane, at 2379. "[T]he 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, at 2379. Thus, the critical question in determining whether an employee is speaking as a "private citizen" is "whether

[3] The Florida Constitution also provides a guarantee of freedom of speech. Article One, Section 4 of the Florida Constitution provides, in relevant part, that, "[n]o law shall be passed to restrain or abridge the liberty of speech or the press." Fla. Const. Art. I, § 4. Florida courts have consistently interpreted this provision as affording the same protection to freedom of speech as the First Amendment, and thus discussion of case law under both are cited interchangeably. See e.g., MacLean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1302–03 (M.D. Fla. 2002) (Because the scope of Florida's constitutional guarantee of freedom of speech is the same as the First Amendment's guarantee, and employee did not speak on matter of public concern, public employee's Florida constitutional claim fails for the same reasons his First Amendment retaliation claim fails). Although money damages are not available for free speech violations of the Florida Constitution, declaratory judgment, a permanent injunction, and other such equitable relief may be proper. See e.g., Fernez v. Calabrese, 760 So. 2d 1144 (Fla. 5th DCA 2000) (there is no support for the availability of an action for money damages for violations of Florida Constitution, including Section 4); Garcia v. Reyes, 697 So. 2d 549 (Fla. 4th DCA 1997) (no cause of action for money damages for violation of Florida Constitution); Abad v. City of Marathon, FL, 472 F. Supp. 2d 1374, 1382 (S.D. Fla. 2007) (although money damages may not be available, other equitable relief is available).

the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties...." Id., at 2373.[4]

b. When is a Public Employee Speaking on Matters of Public Concern?

In addition to speaking as a "private citizen," a public employee also has to be speaking about matters of "public concern" in order to get First Amendment protection. The U.S. Supreme Court established this principle in the landmark case, Pickering v. Board of Education, 391 U.S. 563 (1968). Pickering was a public-school teacher who wrote a letter critical of the school board to the editor of a local paper. Specifically, Pickering's letter complained about the board's handling of a bond issue and its allocation of financial resources between the schools' educational and athletic programs. Id., at 566. The Court concluded that Pickering's letter raised concerns about the "preferable manner of operating a school system" which is something "that clearly concerns an issue of general public interest." Moreover, his concerns regarding how the board allotted funds is a matter of "legitimate public concern" that is "vital to informed decision-making by the electorate." Id., at 571-72. As Pickering's employment only tangentially involved the subject matter of his speech, and because he spoke to matters of great public concern, the Court determined that the First Amendment protected his speech. Id., at 571-574.

Years after Pickering, the Supreme Court provided further instruction as to what speech constitutes a "matter of public concern." In Connick v. Myers, 461 U.S. 138 (1983), the Court held that to fall within the realm of a "public concern," an employee's speech must relate to a "matter of political, social, or other concern to the community." Id., at 146; see also, Snyder v. Phelps, 562 U.S. 443, 453 (2011) (speech that "is a subject of legitimate news interest …[or] a subject of general interest and of value and concern to the public" is speech involving matter of "public concern."). According to the Court, the inquiry turns on "the content, form, and context of given statement, as revealed by the whole record." Connick, at 147-48.

A review of the "whole record" is necessary because "an employee's speech will rarely be entirely private or entirely public." Akins v. Fulton Cty., 420 F.3d 1293, 1304 (11th Cir. 2005). Thus, in reviewing the whole record, courts make a determination whether the "main thrust" of the speech is on a matter of public concern or private concern. Vila v. Padron, 484 F.3d 1334, 1340 (11th Cir. 2007) (community college vice president's statements not made pursuant to official job duties, which raised concerns about the legality of the college's actions, were not protected where main thrust of statements involved matters of personal interest); Mitchell v. Hillsborough Cty., 468 F.3d 1276, 1285 n. 22 (11th Cir. 2006) (even if some portion of the employee's speech were personal in nature, "standing alone" that will not render the speech private where other portions contained matters of public interest).

While courts may consider whether an employee made an effort to communicate his or her concerns publicly, that issue is not dispositive. Nor is whether the public would be interested in the topic of the speech. Rather, the relevant inquiry is "whether the purpose of the speech was to

[4] However, as the Supreme Court observed in Garcetti, formal job descriptions "often bear little resemblance to the duties an employee actually is expected to perform." Id., at 424-25. As such, courts will look beyond an employee's job description and conduct a review of an employee's actual job duties.

raise issues of public concern." Maggio v. Sipple, 211 F.3d 1346, 1353 (11th Cir. 2000); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985) (noting that the relevant inquiry requires the court 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?").

c. Real World Examples.

The following examples may help provide some guidance:

- Heffernan v. City of Paterson, 136 S.Ct. 1412 (2016): Even if a public employer is mistaken, it cannot intend to retaliate against an employee for engaging in support of a political opponent. Heffernan, a New Jersey police officer, was demoted after transporting a yard sign supporting the mayor's political opponent. At the time, the mayor thought the sign was Heffernan's. In reversing dismissal of his First Amendment claim, the Supreme Court ruled that "the government's reasoning" for taking retaliatory action is what counts, "even if, as here, the employer makes a factual mistake about the employee's behavior." Id., at 1418.

- Lane v. Franks, 134 S. Ct. 2369 (2014): The First Amendment does protect public employees from retaliation for giving truthful sworn testimony. Lane testified in an FBI case against an elected official fired for engaging in fraudulent behavior. His public employer fired Lane following his testimony. The Supreme Court ruled that the First Amendment "protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities."

- Wagner v. Lee County, 678 Fed. Appx. 913 (11th Cir. 2017): The First Amendment does not protect public employee who works in economic development office for reporting fraudulent activity to auditors where making such reports was expressly within her job duties.

- Carollo v. Boria, 833 F.3d 1322 (11th Cir. 2016): City Manager who made reports to law enforcement about alleged violations of campaign finance laws by mayor and vice-mayor spoke as a citizen, and not to his ordinary job duties. Although the employer argued that City Manager Carollo's statements concerning finance laws was "squarely within" the scope of his duties, such duties were at best implied, and thus protected.

- Boyce v. Andrew, 510 F.3d 1333 (11th Cir. 2007): The First Amendment does not protect social service workers who complain that their caseloads were too high, as the complaints were "matters only of personal interest." Id., at 1345.

- Cook v. Gwinnett Cty. Sch. Dist., 414 F.3d 1313, 1319 (11th Cir. 2005): The First Amendment protects a bus driver's concerns about "the safety of children due to bus overcrowding" and "pre-trip bus inspections" as such concerns were not merely "internal bus driver employment issues."

- Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993): The First Amendment does not protect employee who spoke on behalf of co-worker who was allegedly being sexually harassed where primary thrust of complaint was to improve her own work environment.

- Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2015): The First Amendment does not protect police officer's statement on Facebook criticizing department's decision not to pay for gasoline to send officers to funeral of fellow officer because the criticism was not a matter of public concern, but instead involved a dispute over an intra-departmental decision.

- Jackson v. Bd. of Comm'nrs of Housing Auth. of Prichard, 2018 WL 3715730 (S.D. Ala. Aug. 2, 2018): The First Amendment does not protect public employees from retaliation for giving truthful testimony that is unsworn where it directly related to the job he was hired to perform. This case is pending on appeal before the Eleventh Circuit.

- Reed v. West Virginia State Police, 2016 WL 2970305 (W. Va. 2016): First Amendment did not protect a personal social media post made by a police officer that implied he might commit workplace violence because the thought expressed was a matter of private concern involving his frustration with the way the department put him on leave.

- Fernandez v. Sch. Bd. Of Miami-Dade County, 898 F.3d 1324 (11th Cir. 2018). Holding that the plaintiffs spoke as school officials with specific roles under Florida charter schools' statute and regulations, not as private citizens. Thus, no First Amendment protection. The Court listed "these considerations as relevant in determining whether a public employee spoke pursuant to his official duties: 1) speaking with the objective of advancing official duties; 2) harnessing workplace resources; 3) projecting official authority; 4) heeding official directives; and 5) observing formal workplace hierarchies."

- Cottrell v. Chickasaw City Schs. Bd. of Educ., 307 F. Supp. 3d 1264 (S.D. Ala. 2018). The court concluded that the plaintiffs had failed to demonstrate that the statements were made as a private citizen rather than as a teacher to a person in his chain of command. Plaintiffs also failed to prove that the reports were on a matter of public concern, because they were made privately without obvious expectation of bringing them to public light.

2. The First Amendment only protects employees if their interest in commenting outweighs the potential disruptive effect to the employer.

In Pickering, the Supreme Court recognized that the government employer has an interest in efficiently providing public services and maintaining good professional relationships within an office. According to the Court, the interest of the employer must be balanced against the interest of the public employee's right to freely comment on matters of public interest. Id., at 568.

Courts try to balance the government employer's interest against the employees' by considering a number of factors. For example, courts give the government a high degree of deference when "close working relationships" are essential to the fulfillment of public responsibilities, and where an employee's actions interfered with those working relationships. Connick v. Myers, 461 U.S. 138, 151, 152 (1983). However, the more substantially the employee's speech involved matters of public concern, the stronger showing is required from the government. Id.

The following examples may help provide some guidance:

- Moss v. City of Pembroke Pines, 782 F.3d 613 (11th Cir. 2015): The First Amendment does not protect assistant fire chief from criticizing city's handling of budget and pension issues; budget and pension issues were divisive topics among city employees, and many employees disagreed vehemently as to whether to take a pay cut or agree to pension concession. [Cited as good authority by the Court this year in Rabon v. Roberts, Sheriff of Jackson County, No. 18-11227, Docket No. 5:17-cv-00024-RH-GRJ, May 9, 2019 (Appeal from the North. Dist. of Fla.)]

- Morris v. Crow, 117 F.3d 449, 458 (11th Cir. 1997): Government's interest outweighed employee's right to free speech where the manner in which the employee expressed her message was disrespectful and rude.

- Belyeu v. Coosa Cnty. Bd. of Educ., 998 F.2d 925, 929-30 (11th Cir. 1993): Teacher's aide's speech at a PTA meeting about the school's failure to have a commemoration for Black History Month conducted in a polite manner did not disrupt racial harmony at the school. Therefore, the school's interest in reducing racial animosity did not outweigh the employee's right to free speech.

- Cowell v. Fuller, 362 So. 2d 124, 129 (Fla. 3d DCA 1978): Government interests in limiting speech outweigh employee's interest in making anti-Semitic remarks where such remarks disrupt the workplace.

B. Freedom of Speech as it Relates to Unions

Last year, the U.S. Supreme Court issued a landmark decision ruling that adversely affects union membership. In Janus v. American Federation of State, County, and Municipal Employees,

138 S. Ct. 2448 (2018), the Court considered an Illinois statute that authorized the state to charge "agency or fair share fees" to public employees who chose not to joint a union. The historical premise behind such fees was to cover the benefits that the union provides to all employees, such as grievance procedures. Janus argued that the statute violated his First Amendment rights because it compelled him to speak through the union. The Supreme Court agreed, and ruled that the public employers cannot deduct such fees from the wages of non-union members without their consent. In short, the Court ruled that requiring such fees without consent violated the free speech rights of non-members by compelling them to subsidize private speech on matters of public concern.

Since Janus, the Middle District of Florida has asked whether the Pickering balancing test applies to compelled speech. The matter remains undecided. Gwinnett v. Southwest Florida Regional Planning Council, Case 2:19-cv-00295-SPC-MRM (M.D. Fla. Aug. 21, 2019).

C. Freedom of Association as it Relates to Public Employees

In addition to freedom of speech, the First Amendment also protects public sector employees' right to be free from discrimination based on their political affiliations or associations. Ezell v. Wynn, 802 F.3d 1217, 1222 (11th Cir. 2015). As the Supreme Court instructed in NAACP v. Alabama, 357 U.S. 449, 460 (1958), "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

There is an exception, however, for those holding certain positions, such as politically oriented positions, for which party affiliation is integral to performance of the job. This is known as the Elrod-Branti exception. See Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980). In Branti, the Supreme Court clarified that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position [but whether] the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Id., at 518.

To determine whether the Elrod-Branti standard is met, the Eleventh Circuit uses a "categorical approach" to determine whether the employee has the same statutory powers and duties as the elected official. Id., at 1225. If the employee has the same duties and powers, she will be deemed the elected official's "alter ego," and thus is not protected by the First Amendment. Id.; see Underwood v. Harkins, 698 F.3d 1335, 1345 (11th Cir. 2012) (deputy superior court clerk was alter ego of Georgia superior clerk and thus not subject to First Amendment protections from running against her boss). If not the "alter-ego" of the elected official, courts will then make a determination whether, as a factual matter, the effectiveness of the employee's position requires political loyalty. Ezell, at 1224-25. Also, the seminal Eleventh Circuit case Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) is cited by the Court this year, and the panel included two famous South Florida judges: C. Clyde Atkins and Peter Fay.

The following examples may help provide some guidance:

- Jones v. Lamkin, 2019 WL 3183635, at *1 (11th Cir. 2019): First Amendment did not protect deputy marshals from retaliation for supporting elected marshal's opponent.

The court found that the deputy marshals were just alter egos of the marshal since they had the same job duties and responsibilities under the law.

- Epps v. Watson, 492 F.3d 1240 (11th Cir. 2007): A former employee contended that her employment was terminated because she supported a political opponent of her employer (the county tax collector) and allowed the opponent to display campaign signage on her personal property. Epps was fired the day after her supervisor was re-elected. The court ruled that, as an entry level tax clerk, Epps did not fall within the policymaking exception to freedom of association claims and allowed Epps to proceed on those claims.

- Bogart v. Vermilion Cty., 909 F.3d 210 (7th Cir. 2018): First Amendment did not protect financial resources director of county, as it was effectively a cabinet-level position, which required duties such as planning, organizing and directing accounting activities, establishing fiscal control procedures, etc.

- Lawson v. Union Cty. Clerk of Court, 828 F.3d 239, 250 (4th Cir. 2016): A deputy clerk whose work involved primarily administrative and ministerial tasks, such as record keeping, did not relate to partisan politics.

D. Freedom to Petition the Government as it Relates to Public Employees

In addition to freedom of speech and association, the First Amendment also protects an individual's right to petition the government to seek redress of grievances. In light of this protection, a public employee has an inherent right to file a grievance without fear of retribution. However, like freedom of speech, the First Amendment only protects an employee's petition if it relates to a matter of "public concern." Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379 (2011).

Guarnieri was employed as Chief of Police in a small town in Northern Pennsylvania. After he was fired, he filed a union grievance challenging his termination. His grievance proceeded to arbitration and he was ultimately reinstated. Following his reinstatement, Guarnieri alleged that he suffered a series of retaliatory acts. Guarnieri filed suit, alleging that his grievance was a "petition" protected by the First Amendment, and that the retaliatory acts he suffered violated the constitution. After he filed his lawsuit, Guarnieri contended he suffered further retaliation when he was denied overtime payment. Guarnieri amended his suit to allege that, like his grievance, his lawsuit was also a "petition" from which he suffered retaliation.

In considering Guarnieri's claim, the Supreme Court reasoned that the "public concern" test also applies to Petition Clause claims. Moreover, because petitions, like speech, can interfere with the efficient operation of the government, the balancing test between the petitioner's First Amendment rights must be balanced against the government employer's interest in operating effectively.

E. Proving a First Amendment Retaliation Claim in Public Sector Employment

1. Elements of a First Amendment Retaliation Claim

A public employee's First Amendment retaliation claim is governed by a four-stage analysis.[5] The first two prongs of the analysis are questions of law that are decided by the court:

a. The employee must show his speech was made as a citizen and involved a "a matter of public concern."

b. The employee's First Amendment interests outweigh the public employer's interest in regulating his speech to promote "the efficiency of the public services it performs through its employees."

If a court determines that the public employee's speech is so protected:

c. The employee must show that her speech was a substantial motivating factor in the adverse action taken against her.

If the employee is able to make this showing, the burden shifts to the employer:

d. Who must show that it would have taken the adverse action even in the absence of the employee's speech.

These final two issues, which address the causal link between the employee's speech and the adverse action, are questions of fact for a jury to resolve. See, Moss v. City of Pembroke Pines, 782 F.3d 613, 617–18 (11th Cir. 2015); Bd. of Regents of State v. Snyder, 826 So. 2d 382, 388–89 (Fla. 2d DCA 2002).

2. What is an "Adverse Action" for Purposes of a First Amendment Retaliation Claim?

In 2006, the Supreme Court decided Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006), which broadly redefined the definition of "adverse action" in the context of Title VII claims to include any action that "well might have dissuaded a reasonable worker" from engaging in protected activity. Id., at 68.

Several circuits and district courts have adopted the Burlington standard in First Amendment retaliation cases, or have been using similar standards. See. e.g., Couch v. Bd. of Trustees of Mem'l Hosp. of Carbon Cnty., 587 F.3d 1223, 1237-38 (10th Cir. 2009) (adopting Burlington standard); Matrisciano v. Randle, 569 F.3d 723, 730 (7th Cir. 2009) (employee must

[5] Claims for violation of the federal constitution are brought under 42 U.S.C. Section 1983. Bringing a claim pursuant to Section 1983 raises several complex issues, including arguments relating to Eleventh Amendment immunity, individual and supervisory liability, qualified immunity and municipal liability, and as such, is more suitably addressed in a separate outline.

establish that "he suffered a deprivation likely to deter free speech"), *abrogation on other grounds recognized in* Fairley v. Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009); Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 227 (2d Cir. 2006) (adopting Burlington standard); Nair v. Oakland County Cmty. Mental Health Auth., 443 F.3d 469, 478 (6th Cir. 2006) (adverse action means "an injury that would likely chill a person of ordinary firmness from continuing to engage in [the protected] activity"); Nash-Utterback v. Sch. Bd. of Palm Beach Cty., WL 12865852, at *15 (S.D. Fla. June 8, 2012) (adopting Burlington standard); Tatroe v. Cobb County, Ga., No. 04–CV–1074, 2008 WL 361010, at *6 (N.D. Ga. 2008) (same); Sharp v. City of Palatka, 529 F. Supp. 2d 1371, 1375–1376 (M.D. Fla. 2006) (same); But see Akins v. Fulton County, Ga., 420 F.3d 1293, 1300–01 & n. 2 (11th Cir. 2005) (action must tend to chill free speech and alter some important condition of employment to be adverse; but also observing that the First Amendment and Title VII standards are "consonant").

3. Timing to Bring a Claim

The time limit for federal employee claims of First Amendment retaliation depends on the administrative remedies available. If the employee has a right to appeal internally, for example, through the Merit System Protection Board (MSPB), then he does not have the right to sue in court. Typically, the time limit for MSPB appeals is thirty (30) days, but one should confirm specific time limits applicable to the specific employee.

The time limit for state and local employees' claims of First Amendment retaliation varies from state to state, depending on the time limit for personal injury claims where the court is located. In Florida, that time limit is four years. Ellison v. Lester, 275 F. App'x 900, 901–02 (11th Cir. 2008); Chappel v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003); Sherrod v. Palm Beach Cty. Sch. Bd., 620 F. Supp. 1275 (S.D. Fla. 1985).

4. Remedies Available

Because state entities have Eleventh Amendment immunity, only prospective relief is available against state entities or persons sued in their official capacity. Ex Parte Young, 209 U.S. 123 (1908).

However, a broad range of damages, including back pay, front pay, and compensatory damages, are available against other government entities. See e.g., Batista v. Weir, 340 F.2d 74, 86 (3rd Cir. 1965) (damages in a Section 1983 action are based on federal common law); Carey v. Piphus, 435 U.S. 247 (1978) (federal common law provides for a broad range of damages, including emotional distress).

Employees may also sue state or other public officials in their individual capacities, and recover compensatory and punitive damages. City of Newport v. Fact Concerts, 101 U.S. 2478 (1981) (government organizations are typically immune from punitive damages).

Attorney fees are also recoverable. 42 U.S.C. §1988; Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598, 601 (2001).

F. Florida Public Employees Relations Commission ("PERC") Weighs in on Free Speech Claims

Part of the jurisdictional envelope of the PERC is the adjudication of Career Service (state employee) discipline appeals. Barry Dunn, Clerk of PERC, has provided three examples of PERC's application of federal court decisions to the question regarding state employees' right to speak freely.

- Church v. Dept. of Corrections, 14 FCSR 282, Florida PERC Case No. CS-98-622 (April 29, 1999). Herein the "speech" in question was a series of comic strips posted on the Internet. PERC quotes the Supreme Court that, "[w]e have previously recognized as pertinent considerations whether the [employee's] statement impairs discipline by superiors or harmony by coworkers, and has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Rankin v. McPherson, 483 U.S. 378, 388 (1987). Following that, the decision cites the U.S. Circuit Court of Appeals for the Eleventh Circuit in Morris v. Crow, 117 F.3d 449, 458 (1997): "The First Amendment does not require a public employer to tolerate an embarrassing, vulgar, vituperative, ad hominem attack [of a personal nature upon a supervisor], simply because the employee [has also engaged in other protected free speech]." PERC determined that Church's conduct was personal as opposed to in the public interest.

- Rollins v. Fla. Dept. of Law Enforcement, 16 FCSR 166, Florida PERC Case No. CS-00-501 (April 3, 2001). Herein the "speech" in question was the wearing of a T-shirt which read on the back, "FDLE has punished me illegally" and on the front, "Who is next?". PERC, relying on Connick v. Myers, 461 U.S. 138, 146 (1983), found that the message on the clothing was not protected speech.

- Bryant v. Florida School for the Deaf and the Blind, 26 FCSR 206, Florida PERC Case No. CS-11-096 (Fla. 1st DCA Case No. 1D10-853 June 27, 2011). Herein the employee sent three private Facebook® messages over the Internet to fellow employees alleging that there were "fat disgusting pigs" and asking "are you still a drunk?" Applying the "Connick test", the Commission found that personal disputes among public employees are not protected by the First Amendment unless they address a matter of public concern.

G. Additional Limitations on Federal Employees via the Hatch Act

Recently, the Hatch Act made numerous headlines when the Office of Special Counsel recommended in June 2019 that President Trump terminate Kellyanne Conway for her repeated violations of the Act. The Hatch Act (or the "Act to Prevent Pernicious Political Activities") prohibits federal employees from endorsing political candidates or otherwise affecting the result of an election. 5 U.S.C. §7323(a)(1). For example, federal employees cannot, while on duty, display partisan buttons or other items that show support for or opposition to a political party. Challenges to the law on the basis that it violates the First Amendment rights of public employees

have been rejected by the Supreme Court. United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

Although the Act expressly applies to federal employees, state employees may also be bound by the Act if they work in connection with the federal government.

H. Other Protections

Most public employees have other protections available to them beyond the First Amendment. For example, employees belonging to a union are typically protected from termination without a showing of "just cause." Indeed, for public employees, Article 1, Section 62 of the Florida Constitution embodies the fundamental constitutional right for such employees to unionize and bargain collectively. Dade County Classroom Teachers Association v. Ryan, 225 So. 2d 903, 905 (Fla. 1969) ("with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees."). Likewise, most state and local governments have civil services laws that grant employees a hearing on whether termination or other discipline is appropriate. Finally, there are several whistleblower laws at the state and federal level that public employees may avail themselves to, such as Florida's Public Whistle-blower's Act, Section 112.3187, Florida Statutes, *et seq*.

I. The Era of Public Employees and Electronic Speech on the World-Wide Web

For an in-depth look at this evolving topic, check out *Managing Public Employee Speech in the Age of Social Media – Instituting Policies Regulating Public Employee Conduct While Balancing Access to the 'Democratic Forums of the Internet'* by Roxana M. Underwood, Illinois Public Employee Relations Report, Vol. 35, No. 4, at https://scholarship.kentlaw.iit.edu/iperr/107/.

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If you have an employment law question,
we urge you to seek legal counsel.

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