Birds, Knees and Tweets: Understanding the Limitations of Public Employee Free Speech Rights in Turbulent Times

Florida Association of County Attorneys
2022 Mid-Year CLE Seminar

Gregory A. Hearing
Shareholder
GrayRobinson, P.A.
813-273-5000
gregory.hearing@gray-robinson.com

Agenda

- Birds, Knees and Tweets
- In the News
- Scope of the First Amendment
- Employee Misconceptions
- Public Sector Employers
- Whistleblower Statutes
- Statutes Prohibiting Retaliation
- Public v. Private Employers
- NLRA/Public Employees Relations Act
- Conclusion

BIRDS

Briskman v. Akima LLC

Briskman v. Akima LLC

- Facts
  - Juli Briskman made national news in October 2017 when a picture of her riding a bicycle and holding up her middle finger as President Trump's motorcade passed went viral
  - When Ms. Briskman returned to work the following week, Akima LLC, her employer and a government contractor, terminated Ms. Briskman's employment
    - Akima cited its social media policy on obscenity as Ms. Briskman shared the image on Facebook and Twitter
    - Additionally, Akima feared blowback from the Trump administration
  - On April 4, 2018, Ms. Briskman filed suit in Fairfax County Circuit Court, in Virginia

Briskman v. Akima LLC

- Briskman's complaint alleged a claim for wrongful termination, arguing that Akima terminated Briskman's employment because it feared repercussions from the Trump administration
- Akima argued in its motion to dismiss and at the hearing on the motion that, as a private employer, Akima could not violate Briskman's First Amendment rights
  - Moreover, Akima argued that politics were not a factor in its decision and Akima would have terminated Briskman for the same behavior toward President Obama
  - Furthermore, they argued that the termination did not violate the public policy exception to Virginia's at-will employment statute, even though Akima is a federal contractor, as there are no facts to support that the government coerced Akima to do anything
    - Briskman did not plead any facts to support government action

Siding with Akima, the Judge dismissed the wrongful termination claim

KNEES

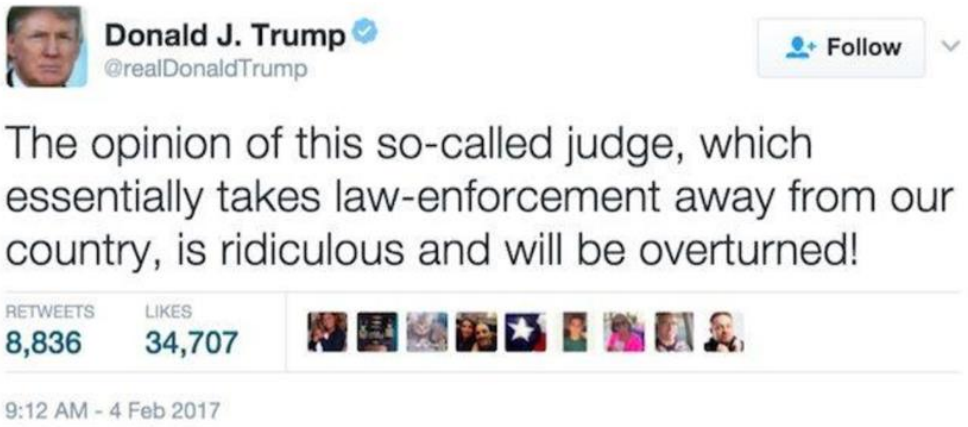
Recent NFL National Anthem Protests

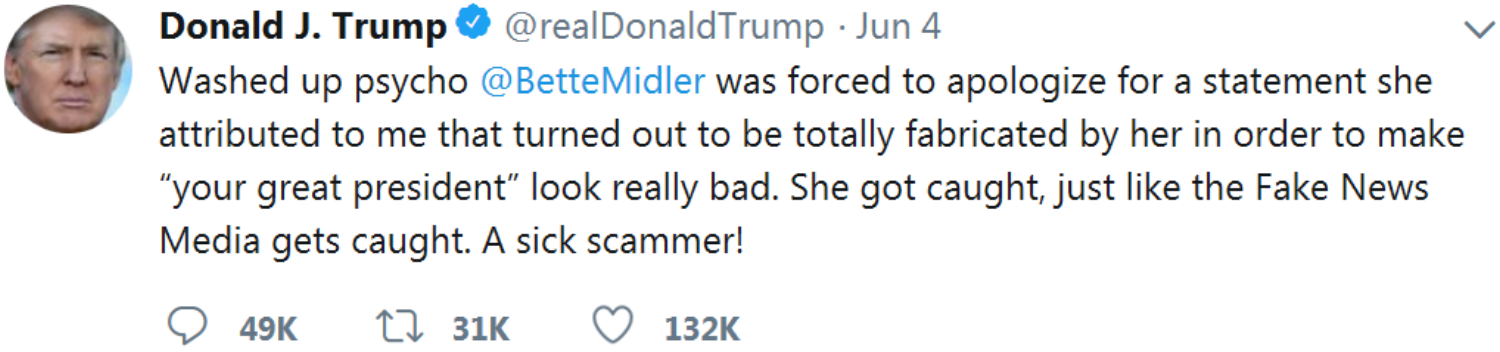
Recent NFL National Anthem Protests

- For teams such as the Dallas Cowboys, the negative fan response required action in order to prevent further economic loss
- At the start of the 2017 season, the Dallas Cowboys' owner, Jerry Jones, told players that they may no longer take a knee during the national anthem and threatened to bench any player who did so
- Mr. Jones' actions prompted Local 100 of the United Labor Unions to file an unfair labor practice charge against the Cowboys with the National Labor Relations Board
- The union claimed the threat to bench players chilled protected concerted activity
- Local 100 eventually withdrew the charge
    - Success for the union would have required a showing that the players were protesting the terms and conditions of employment
        - Not ongoing political and social issues

TWEETS


Donald J. Trump
@realDonaldTrump
Follow
Meryl Streep, one of the most over-rated actresses in Hollywood, doesn't know me but attacked last night at the Golden Globes. She is a.....
RETWEETS
37,861
LIKES
124,285
3:27 AM - 9 Jan 2017


Donald J. Trump
@realDonaldTrump
Follow
The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!
RETWEETS
8,836
LIKES
34,707
9:12 AM - 4 Feb 2017


Donald J. Trump @realDonaldTrump · Jun 4
Washed up psycho @BetteMidler was forced to apologize for a statement she attributed to me that turned out to be totally fabricated by her in order to make "your great president" look really bad. She got caught, just like the Fake News Media gets caught. A sick scammer!
49K
31K
132K

Donald J. Trump @realDonaldTrump · Jun 3

....Kahn reminds me very much of our very dumb and incompetent Mayor of NYC, de Blasio, who has also done a terrible job - only half his height. In any event, I look forward to being a great friend to the United Kingdom, and am looking very much forward to my visit. Landing now!

25K 31K 151K

Show this thread

Donald J. Trump
@realDonaldTrump

North Korean Leader Kim Jong Un just stated that the "Nuclear Button is on his desk at all times." Will someone from his depleted and food starved regime please inform him that I too have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works!

12:49 AM - Jan 3, 2018

74,411 74,116 177,875

Knight First Amendment Institute at Columbia University v. Trump

- Issue was whether President Trump's Twitter account was a public forum and, if so, whether blocking users from his account based on their expressed political views violated their First Amendment right to free speech
- The United States District Court for the Southern District of New York granted Plaintiff's motion for summary judgment finding that the Twitter account was a public forum and blocking users based on their political views amounted to unconstitutional viewpoint discrimination under the First Amendment and violated the organization's right to read replies of blocked users
  - In particular, the Court held that President Trump could not silence Twitter users who commented on his Tweets simply because he disagreed with their viewpoints
- President Trump appealed the trial court's order to the 2nd Circuit which affirmed the lower court decision
- President Trump appealed but the appeal was later dismissed as moot

Current Climate of Extreme Political Polarization and Impassioned Social Movements

- Speech issues have permeated our news over the past two years due to the current political and social climate in the U.S.
- Individuals often express their speech through extreme or conventional methods
- The extreme, and often times illegal, methods of expression are the most news worthy
  - 2020 summer riots
  - January 6, 2021, Capitol riot

- Some employees now feel emboldened to express political and social speech when they may have otherwise not done so in the past
- The presence of masks in public and work environments due to COVID-19 allows for a novel method of expression
- Sometimes public employers permit political and social content on masks, sometimes they do not

- The anonymity which masks provide allows individuals to feel more comfortable expressing their opinions even in the workplace where they are recognized by co-workers

Recent Instance of Public Employers Limiting Expression

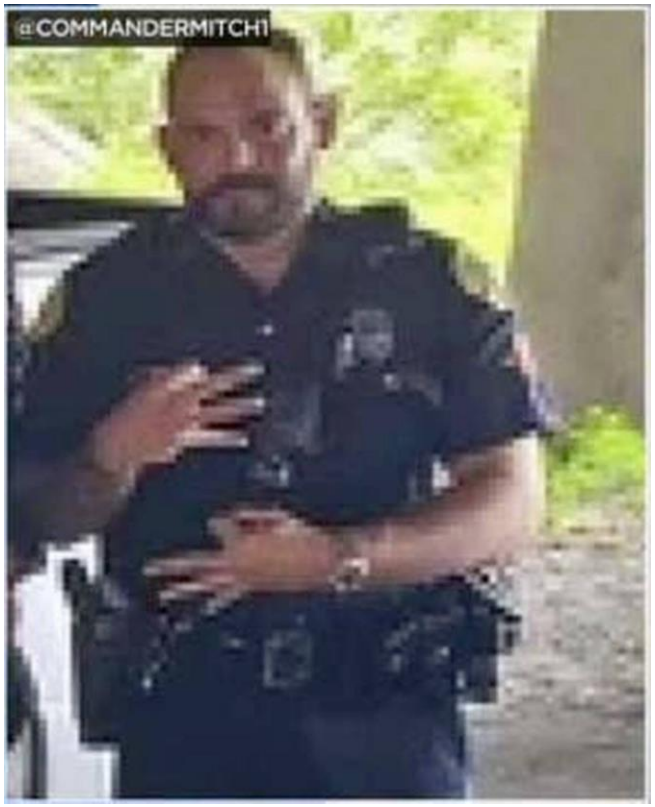
- A New Jersey town recently fired a police officer for posting on Facebook that Black Lives Matter protesters are "terrorists"
  - The town suspended another police officer who responded to the Facebook post
- The Kissimmee Police Department, which serves Kissimmee, Florida, terminated a police officer for Facebook posts regarding the January 6, 2021, Capitol riot and the BLM movement
  - The officer posted the following:
    - "The silent majority will rise!! Day one of the Revolutionary War!! Hang on, it's only just begun."
    - "I'm selling my white privilege card ... it hasn't done a damn thing for me. No inheritance, no free college, no free food, no free housing ect. [sic] I may even be willing to do an even trade for a race card. Those seem way more useful and way more widely accepted."

Recent Instance of Public Employers Limiting Expression

- A Miami police officer violated Department policy when he wore a Trump 2020 face mask
- The mask read "TRUMP 2020 NO MORE BULLSHIT"
- Conduct exacerbated by fact that the officer wore the mask at a polling place during early voting for the 2020 presidential election
- The Department disciplined the officer with a written reprimand
- It does not appear that the officer filed a grievance or lawsuit in response to the discipline

Recent Instance of Public Employers Limiting Expression

- In August 2021, this same officer was photographed displaying what appeared to be a hand signal used by white nationalists
- The photo was posted on Twitter and then subsequently removed when someone noticed the hand signal
- The Department removed the officer from duty pending an internal investigation



- Public employers who allow some political or social expression should be prepared to allow the expression of opposing viewpoints
  - For instance, a public employer who allows employees to wear masks supporting a particular social or political viewpoint should also allow employees to express opposing viewpoints
- Recently, a federal court found that a port authority's rule against BLM masks violated the port authority employees' First Amendment free speech rights
  - The court considered the fact that the port authority had a history of allowing its employees to wear various political and social buttons
  - Also, the court found that subsequent blanket prohibition of masks containing any form of messages was intended to prohibit BLM masks and actually infringed on employees' speech rights further than original ban of only BLM masks

- Other recent public employer disciplinary actions are not close calls when the employee's behavior is illegal
  - For instance, two police officers with the Rocky Mountain Police Department in Virginia were terminated after their arrest for participating in the January 6, 2021, riot at the U.S. Capitol
    - They are not alone
    - Law enforcement officers and other government employees from across the country have been arrested for their involvement in the Capitol riot
    - Repercussions from their employers have followed, some opting to resign instead of facing termination
    - On September 20, 2021, a former police officer in Houston, Texas pleaded guilty for his role in the Capitol riot
      - The officer previously resigned from the Houston Police Department once the Department commenced its investigation into a tip that he was at the Capitol on January 6, 2021

The First Amendment

"**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."

Government Action

- The First Amendment protects against infringing government action
- If a private entity or person prohibits protected speech, without a nexus to government action, there is no violation of the First Amendment
- Must have either direct government action or close nexus to government action
  - Example: a private security firm contracted with the government to provide security at a federal park
    - A security guard asking a visitor to leave because the visitor is wearing a political candidate's shirt is a violation of the First Amendment because the guard is acting on behalf of the government

Types of Speech NEVER Protected

- True threats
- Fighting words
- Calls to illegal action
- Obscenity
- Child pornography
- Defamation
- Perjury
- Plagiarism
- Solicitation to commit a crime
- Blackmail

Common Employee Misconceptions About Free Speech

- Many employees, and Americans in general, mistakenly believe that the First Amendment affords limitless free speech protection
- In fact, when most people are told they are prohibited from saying something, the immediate response is a reference to the First Amendment right to free speech
- However, the First Amendment does not:
  - Protect all forms of speech
  - Prohibit action by private entities or individuals
  - Prohibit action by private sector employers

Public Sector Employers

- Public sector employees' speech is protected by the First Amendment
- However, this does not mean that such employees are free to say whatever they want whenever they want
- In determining whether a public employee's speech is entitled to constitutional protection, the court must first determine "**whether the employee spoke as a citizen on a matter of public concern**. If the answer is **no**, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006).

Public Sector Employers

- In Garcetti, the U.S. Supreme Court further explained that "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 insulate their communications from employer discipline."
- Public sector employers may limit speech as citizens on matters of public concern when there is an "adequate justification" for treating an employee differently than other citizens

Case in Point:

Austin v. UF Bd. of Trustees, Case No. 1:21CV184-MW/GRJ (N.D. Fla. January 21, 2022)

- Facts
  - The plaintiffs, professors at the University of Florida, sought to provide expert witness testimony in litigation against the State of Florida.
  - The University denied the plaintiffs' request citing the University's conflicts-of-interest policy and the plaintiffs filed a lawsuit in the U.S. District Court for the Northern District of Florida alleging that the University violated their First Amendment free speech rights.
    - Initially, the University's conflicts-of-interest policy prohibited professors from engaging as expert witnesses or providing legal consultation in litigation involving the State of Florida. The University then revised its policy to permit professors to testify as expert witnesses in their capacity as private citizens in litigation in which the State of Florida is a party so long as there is not clear and convincing evidence that such testimony will conflict with "an important and particularized interest of the university."

In the lawsuit, the plaintiffs sought a preliminary injunction enjoining the University from enforcing its conflicts-of-interest policy.

Case in Point:
Austin v. UF Bd. of Trustees, Case No. 1:21CV184-MW/GRJ (N.D. Fla. January 21, 2022)

- Ruling
  - After considering arguments from the parties, the trial court granted the preliminary junction in part, enjoining the University from enforcing "its conflicts-of-interests policy with respect to faculty and staff requests to engage as expert witnesses or provide legal consulting in litigation involving the State of Florida until otherwise ordered."
  - In its 74 page decision, the trial court found that the plaintiffs' testimony as expert witnesses constitutes speech as private citizens, not speech pursuant to their official duties.

Case in Point:
Austin v. UF Bd. of Trustees, Case No. 1:21CV184-MW/GRJ (N.D. Fla. January 21, 2022)

- Ruling
  - The trial court reached this conclusion, in part, by relying on an excerpt from the U.S. Supreme Court's decision in *Lane v. Franks* in which the Supreme Court stated the following:
    - "[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. The critical question under *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." 573 U.S. 228, 240 (2014).
  - In relying on *Lane*, Judge Walker did not address the many official duties of a professor which extend outside of the classroom (i.e., research, speaking engagements, published works, etc.), many of which integrate into a professor's ability to provide expert testimony, testimony which surely perpetuates a professor's expertise in his/her field, as well as the professor's duties.
    - The University subsequently appealed the injunction and the Eleventh Circuit may clarify *Garcetti's* application to college professors, providing the clarity which is currently lacking in the case law.

Case in Point:
Austin v. UF Bd. of Trustees, Case No. 1:21CV184-MW/GRJ (N.D. Fla. January 21, 2022)

- Ruling
  - Specifically, the Supreme Court recognized in *Garcetti* that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."
  - Accordingly, the Supreme Court's dicta has left the applicable case law in this case unclear and the Eleventh Circuit may be asked to determine whether *Garcetti* left the door open for an exception when considering free speech issues with respect to professors in higher education.

Case in Point:
Snipes v. Volusia County, 704 F. App'x 848 (11th Cir. 2017)

- Facts
  - The plaintiff, a police officer with the Beach Patrol in Volusia County, Florida, posted an insensitive comment regarding Trayvon Martin on social media
  - Additionally, Snipes sent racial and vulgar text messages to fellow officers the day after the Zimmerman verdict
  - Snipes' actions occurred while on-duty
  - Due to the racially charged nature of the speech, the proximity in time to the Zimmerman verdict, and the potential for rioting, Volusia County terminated Snipes' employment
  - Snipes filed suit in federal court claiming Volusia County violated his First Amendment right to free speech

The district court granted summary judgment in favor of Volusia County and Snipes appealed

Snipes v. Volusia County

- 11th Circuit
  - The 11th Circuit held that Volusia County had a legitimate interest in avoiding riots and protests
  - Volusia County's legitimate interest trumped Snipes' First Amendment rights
  - Therefore, Volusia County did not violate Snipes' First Amendment right to free speech when it terminated his employment

Alternative Case in Point: *Rankin v. McPherson*, 483 U.S. 378 (1987)

- Facts
  - Upon learning of the assassination attempt on President Ronald Reagan, an administrative employee at the county Constable's office made the comment that "if they go for him again, I hope they get him"
  - The employee was not a sworn peace officer and the comment was made in a room not readily accessible to the public
  - However, the Constable terminated her employment after the employee confessed to making the comment
  - The terminated employee filed suit in federal court stating the Constable violated her First Amendment right to free speech

Rankin v. McPherson

- The U.S. District Court for the Southern District of Texas granted summary judgment for the Constable
- On appeal, the 5th Circuit disagreed and remanded the case for trial
- On remand, the court held a hearing and once again ruled that the statements were not protected
- On the second appeal, the 5th Circuit reversed the lower court's ruling, holding that the plaintiff's comments addressed a matter of public concern, and thus required a showing that the employee's comments were outweighed by the Constable's interest in maintaining efficiency and discipline in the workplace
  - Further finding that, because McPherson's comments were only overheard by one co-worker and her job duties were so ministerial, there was hardly any potential for undermining the Constable office's mission
- The U.S. Supreme Court affirmed the 5th Circuit's ruling
  - The Supreme Court found that, under the circumstances, the Constable's interest in discharging McPherson was outweighed by her First Amendment right to free speech

Additional Cases

- *Connick v. Myers*, 461 U.S. 138 (1983):
  - Plaintiff, an assistant district attorney, upset with her impending transfer, prepared and distributed unsolicited questionnaires regarding the District Attorney's workplace environment
  - The District Attorney subsequently terminated plaintiff's employment and plaintiff sued in the Eastern District of Louisiana
  - The trial court found that the questionnaires were protected free speech and ordered her reinstatement and awarded backpay, damages, and attorney's fees
  - The District Attorney appealed the trial court's ruling, but the 5th Circuit affirmed the ruling
  - On appeal, the U.S. Supreme Court held that an employee grievance, such as the questionnaires in this action, does not rise to the level of public concern required for speech to be protected by the First Amendment

Additional Cases

- *Anderson v. Burke County, Ga.*, et al., 293 F. 3d 1216 (11th Cir. 2001):
  - Anderson, a Captain in the county's Emergency Management Agency ("EMA"), prepared a questionnaire regarding the EMA and distributed the questionnaire to political candidates in the county
  - In response, Defendants placed Anderson on probation for one year and demoted him to the rank of private
  - Anderson subsequently sued Defendants in the Southern District of Georgia, and the individual Defendants raised the issue of qualified immunity
  - The District Court denied qualified immunity on the First Amendment freedom of speech claim and Defendants appealed to the 11th Circuit
  - The 11th Circuit first addressed the free speech claim, finding that the county EMA's interest in securing discipline, trust, efficiency, and mutual respect among its ranks due to its status as a paramilitary organization greatly outweighed Anderson's interest in commenting/grieving about the EMA through the questionnaires
    - Additionally, the 11th Circuit found that the individual Defendants were entitled to qualified immunity

Other Recent Cases

- *Moss v. City of Pembroke Pines*, 782 F. 3d 613 (11th Cir. 2015):
  - Assistant Fire Chief, Richard Moss, criticized the City's pension concessions and pay cuts
  - He made such critical comments to the chief, various department employees, and members of the community
  - The City eliminated the Assistant Fire Chief position and terminated Moss' employment
  - Moss filed suit in the Southern District of Florida, where the trial court granted judgment as a matter of law in favor of Defendant and Moss appealed
  - The 11th Circuit held that the comments were made in furtherance of his job duties, and thus were not protected by the First Amendment
    - Additionally, the 11th Circuit found that the City's interest in promoting efficiency outweighed Moss' free speech interest

Other Recent Cases

- *Butler v. Bd. of Cty. Commrs. for San Miguel Cty.*, 920 F. 3d 651 (10th Cir. 2019):
  - Butler, an employee with the San Miguel County Road and Bridge Department, testified in a child custody hearing involving his sister-in-law and her ex—husband, who was also an employee with the Road and Bridge Department
  - At the hearing, Butler testified truthfully based upon his own personal knowledge to such questions such as the hours of operation for the Road and Bridge Department and never stated or implied that he was testifying on behalf of the County
  - After an investigation into his testimony, the Road and Bridge Department Director and the County's HR Director gave Butler a Written Reprimand and demoted him

Other Recent Cases

- *Butler* (cont.):
  - Butler subsequently sued both directors individually, as well as the County, in the District of Colorado for violating his First Amendment right to free speech
  - The District Court dismissed Butler's First Amendment claim with prejudice as his testimony at the custody hearing was not a matter of public concern
  - The 10th Circuit affirmed the District Court's decision noting that while the hours of operation of the Road and Bridge Department may have been relevant to the custody hearing, such information is a non-controversial fact and due to the personal nature of the testimony, Butler's speech was not regarding a matter of public concern

Other Recent Cases

- *McCaffrey v. Chapman, et al.*, 921 F. 3d 159 (4th Cir. 2019):
  - Deputy sheriff, Mark McCaffrey, supported Sheriff Michael Chapman's political opponent during Sheriff Chapman's re-election campaign
  - McCaffrey placed a sign supporting the opponent in his front yard, served as a delegate at the Republican convention in which the opponent was chosen, and served as an advisor to the Virginia Police Benevolent Association's Board of Directors as they screened candidates for endorsement
  - Upon winning the re-election campaign, Sheriff Chapman refused to reappoint McCaffrey as a deputy sheriff and McCaffrey filed a First Amendment claim in the Eastern District of Virginia
  - The District Court granted the Defendants' motion to dismiss for McCaffrey's failure to state a claim in his complaint and McCaffrey appealed
  - The 4th Circuit found that McCaffrey held a policymaking position with the county and therefore the Sheriff could refuse to reappoint McCaffrey without violating his right to free speech and political association
    - Additionally, the 4th Circuit found that the Sheriff's interest in efficiency outweighed the community's interest in hearing McCaffrey's expression of speech during the campaign

Other Recent Cases

- *Buchanan v. Alexander*, et al., 919 F. 3d 847 (5th Cir. 2019):
- The Board of Supervisors of Louisiana State University terminated Dr. Teresa Buchanan, a tenured associate professor, for her constant use of profanity and her in-class discussion of her sex life and that of her students
- Buchanan then filed a First Amendment claim in the Middle District of Louisiana
- The District Court granted the Defendants' motion for summary judgment and Buchanan appealed
- The 5th Circuit explained that public university professors are public employees and to establish a First Amendment claim for classroom speech, a plaintiff must show that the speech was made as a citizen on a matter of public concern and that plaintiff's interest in the speech must outweigh that of the university's interest in regulating the speech.
- The Circuit Court held that Buchanan's use of profanity and discussion of the sex lives of her and her students was not related to the purpose of teaching future pre-k through third grade teachers and therefore was not a matter of public concern
- Therefore, the 5th Circuit held that Buchanan's speech was not protected by the First Amendment

Other Recent Cases:

- *Lavallee v. Chronister*, 8:20-CV-2159-CEH-TGW, 2021 WL 3912188 (M.D. Fla. Sept. 1, 2021):
  - Sheriff's Deputy terminated after internal investigation into the Deputy's use of force during two incidents.
  - The Deputy brought claims against his employer under state and federal law including § 1983 claim for retaliation in violation of the First Amendment.
  - The Deputy alleged in his Complaint that his disclosures made during an internal investigation constituted protected free speech.
    - In particular, the Deputy complained during the IA investigation and subsequent disciplinary proceedings that, among other things, exculpatory evidence was omitted from the investigative report and summary and that members of the Review Board panel had a conflict of interest.
  - In considering the employer's motion to dismiss, the court disagreed.
  - In quoting *Garcetti v. Ceballos*, the court reiterated that statements made by public employees pursuant to their official duties are not protected by the First Amendment.

Accordingly, the court found that the Deputy failed to demonstrate that he was speaking on matters of public concern when he made disclosures pursuant to the IA investigation.

Impact of Social Media on the Limitations of Public Employees' First Amendment Speech Rights

- In *Rankin v. McPherson*, the Court emphasized the fact that only the employee's co-worker heard the comment in a private conference room
- In *Snipes v. Volusia County*, the employee's comments were broadcast on social media
- *Snipes* and other cases involving social media reveal that courts analyze speech posted on social media with greater scrutiny as the speech is readily available to the public
  - This availability allows the speech to have a greater impact on public employers' ability to operate efficiently

Detroit Firefighters' New Year's Eve Incident

- Discipline not challenged
- Homeowner filed lawsuit against the firefighters and the Department

Instructive Social Media Cases:

- *Dible v. City of Chandler*, 515 F. 3d 918 (9th Cir. 2008):
  - Police officer terminated for operating a website featuring explicit material regarding the officer and his wife
  - Officer filed suit in the District of Arizona, where the court granted summary judgment for Defendant and the officer subsequently appealed to the 9th Circuit
  - The 9th Circuit affirmed the lower court, holding that a police officer terminated for operating a sexually explicit website did not have a viable First Amendment claim as the Defendant's interest in efficient operation of the police department outweighed the officer's interest
- *Yoder v. University of Louisville*, No. 3:09-CV-00205, 2012 WL 1078819 (W.D. Ky. Mar. 30, 2012), aff'd, 526 F. App'x 537 (6th Cir. 2013):
  - The Western District of Kentucky found that a nursing student's First Amendment claim failed where the student posted patient information on the student's MySpace page in violation of the school's confidentiality agreement

Instructive Social Media Cases:

- *Bland, et al v. Roberts*, 730 F.3d 368 (4th Cir. 2013):
  - The 4th Circuit found that liking a political candidate's campaign page is protected speech under the First Amendment and the modern day equivalent of placing a political candidate's yard sign in one's yard
- *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454 (3d Cir. 2015):
  - High school English teacher posted derogatory comments such as "lazy a*****e" and "dresses like a street walker" regarding her students on her blog, causing significant parental backlash
  - After the school district terminated her employment, the teacher filed a lawsuit claiming Defendant violated her First Amendment right to free speech
  - The Eastern District of Pennsylvania granted summary judgment for Defendant and the teacher appealed
  - The 3rd Circuit upheld her termination, finding that the school district's interest in efficiently providing a public service outweighed the teacher's interest in making such speech

Instructive Social Media Cases:

- *Grutzmacher, et al. v. Howard Cty., et al.*, 851 F.3d 332 (4th Cir. 2017):
  - Plaintiff, a former Battalion Chief with the Howard County, Maryland Department of Fire and Rescue Services was terminated for politically motivated Facebook posts such as "lets all kill someone with a liberal … then maybe we can get them outlawed too" (directed towards gun control politics)
  - Plaintiff's post led to a slew of other inappropriate posts from subordinates, some posts of which Plaintiff "liked"
  - The Department terminated Plaintiff's employment for the fallout out and disruption that he caused the Department through his social media activities
  - Plaintiff then filed suit in the District of Maryland claiming that the Department retaliated against him for exercising his First Amendment right to free speech
  - The District Court granted summary judgment for the Department and the Plaintiff appealed
  - The 4th Circuit upheld Plaintiff's termination, finding that the Department's interest in efficiently providing a public service outweighed the Plaintiff's interest in making such speech and noting that his position as a Battalion Chief increases the potential for disruption

Instructive Social Media Cases:

- *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016):
  - Police chief issued a general order regarding social media which prohibited the dissemination of any information "that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees"
  - Two officers disciplined for posting comments critical of the Department's use of rookies for instructor and special assignment roles
  - Officers brought § 1983 action against the City and police chief
  - United States District Court for the Eastern District of Virginia granted both parties' motions for summary judgment in part and denied each in part
  - The District Court found that one of the officers spoke on a matter of public concern which outweighed the City's interests while the other officer spoke to a personal matter
  - The 4th Circuit held that both officers spoke on a matter of public concern and that the City's general order unconstitutionally restricted their speech

Instructive Social Media Cases:

- *Venable v. Metro. Govt. of Nashville*, 430 F. Supp. 3d 350 (M.D. Tenn. 2019):
  - Venable, a Metropolitan Nashville and Davidson County Police Department ("MNPD") police officer, posted comments on his Facebook account regarding the police shooting of Philando Castille in Falcon Heights, Minnesota
  - Venable's comments included, but were not limited to, the following:
    - "Yeah, I would have done 5," in response to a comment that Castile was shot 4 times.
    - "You don't shoot just one. If I use my weapon, I shoot to kill and stop the threat."
    - "It's real and it's what every cop is trained to do. Move to Mexico."
    - "Stop bitching about the people who protect you."
  - Venable's comments led to immediate complaints to MNPD from across the country
  - MNPD placed Venable on administrative leave and then terminated his employment
  - Venable responded by filing a lawsuit in the Middle District of Tennessee in which he included a § 1983 claim that MNPD violated Venable's First Amendment right to free speech
  - In dismissing Venable's § 1983 claim after consideration of the *Pickering* balancing test, the Court held that, although Venable's comments "touched on matters of public concern," MNPD's interests outweighed Venable's speech interests

Specifically, the Court found that "MNPD could reasonably predict that Venable's comments would be disruptive to its mission and affect officer morale. The comments were made directly in response to a police shooting at a time when police shootings were a hot topic of debate among members of the public and the subject of nationwide protests."

Instructive Social Media Cases:

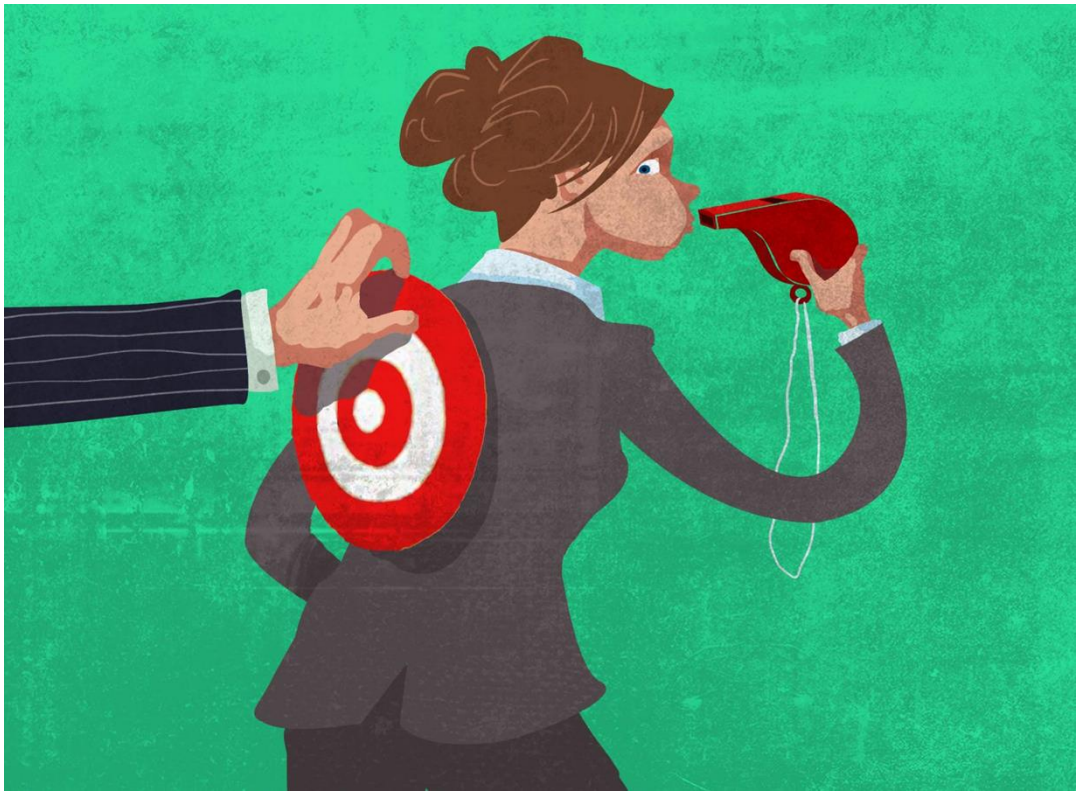
- *Bennett v. Metro Gov. of Nashville and Davidson Cty, Tenn.*, 977 F. 3d 530 (6th Cir. 2020):
- A Tennessee emergency dispatcher used a misspelled racial slur (a version of the "N" word) in responding to a comment on her Facebook post regarding President Trump's 2016 election victory
- The dispatcher's behavior was compounded by her failure to recognize the impact of her post on her co-workers
- The Metro Government terminated her employment after a disciplinary hearing
- The dispatcher subsequently filed suit in federal court in the Middle District of Tennessee
- The trial court held a trial regarding several factual issues and the court ultimately determined that the dispatcher's speech was protected
- Metro Government appealed the decision to the 6th Circuit
- In relying on the *Pickering* balancing test, the 6th Circuit found that the dispatcher's speech was not protected as it significantly impacted her ability to work with other employees in the Emergency Communications Center and detracted from the employer's mission

Statutes such as whistleblower and anti-retaliation statutes protect public employee speech as well

Whistleblower Statutes

- Florida's Public Whistleblower's Act ("FPWA")
  - Fla. Stat. § 112.3187
- Protects employee speech within the very narrow scope of the activity protected by the statute
  - The FPWA may protect a public sector employee who discloses an actual or suspected violation of law, rule, or regulation so long as the disclosure is made to the appropriate authority
  - Failure to strictly comply with whistleblower statutes may leave the employee's speech unprotected and subject the employee to lawful termination

Instructive Whistleblower Case



Instructive Whistleblower Case:

- *Lavallee v. Chronister*, 8:20-CV-2159-CEH-TGW, 2021 WL 3912188 (M.D. Fla. Sept. 1, 2021):
- Sheriff's Deputy terminated after internal investigation into the Deputy's use of force during two incidents.
- The Deputy brought claims against his employer under state and federal law including a claim for retaliation pursuant to Florida's Whistle-blower's Act.
  - The Deputy alleged in his Complaint that he disclosed during the internal investigation that key information was withheld from certain deputies' statements, exculpatory evidence was omitted from the investigative summary and report, another deputy violated procedure, members of the Review Board panel had a conflict of interest, and that the Deputy was pressured into admitting guilt in order to avoid termination.

Instructive Whistleblower Case:

- *Lavallee v. Chronister* (Cont.):
- The employer filed a motion to dismiss several counts of the Complaint, including the claim for retaliation.
- The employer argued that the Deputy failed to engage in protected activity under Fla. Stat. § 112.3187(5)(a) because the Deputy's disclosures "did not involve a violation or suspected violation of any federal, state, or local law, rule or regulation."
- The Deputy countered the employer's argument by arguing that his disclosures fell under Fla. Stat. § 112.3187(5)(b) which protects disclosure of "[a]ny act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency."

Instructive Whistleblower Case:

- *Lavallee v. Chronister* (Cont.):
- The court found that Plaintiff alleged "statutorily protected activity under the FWA" sufficiently to survive the motion to dismiss.
- In denying the employer's motion to dismiss as to the whistleblower claim, the court also found that the Deputy's disclosures to Internal Affairs and the Pre-Disciplinary Review Board constituted disclosures to an "appropriate local official."
  - The court relied on the Florida Attorney General's prior opinions in which "a transit authority's board of directors, a county's inspector general, and a town's ethics commission [qualified] as other appropriate local officials under the Act." (internal citations omitted).
- The court also found that the Deputy's disclosure did not need to be signed and in writing to satisfy the statute.
  - In arriving at its conclusion, the court distinguished disclosures at the Deputy's own initiative from those made pursuant to the internal affairs investigation and in connection with the Disciplinary Review Board Hearing.

Statutes Prohibiting Retaliation

- Statutes such as Title VII prohibit retaliation
- Such statutes allow employees to voice their concerns to their employer regarding potential violations of such statutes without the fear of repercussion so long as there is an objective good faith basis for the belief regarding potential violations
- For example:
  - Title VII protects an individual reporting discrimination even if the individual is not the target of the discrimination and is only aware of its occurrence
  - If the employer terminates the individual based on his/her complaint, the individual may sue for retaliation under Title VII
  - Therefore, Title VII protects speech such as reporting discriminatory behavior
  - It also protects speech regarding behavior that is not discriminatory so long as the reporter had an objective good faith belief that the conduct was discriminatory

Public v. Private

- It is important for public employers to understand the extent to which employers may restrict employee speech in the private workplace. Understanding the differences between the limitations on employee speech in the public and private workplace are especially important for managers and supervisors moving from the private sector to a public sector position.

Don't Let Supervisors Get Confused Because They Came From the Private Sector

- Private sector employers enjoy great freedom in limiting the speech of their employees
- The First Amendment does not apply to private sector employers
- Private sector employers are free to limit many forms of employee speech including:
  - Political speech
  - Disparaging speech (beware of NLRA)
  - Speaking as a representative of an employer without permission
  - Use of curse words (beware of NLRA)
  - Social and personal topics
  - Most other forms of speech
- Private sector employers do not have to give at-will employees notice of the types of speech the employer may find terminable

Florida's Public Employees Relations Act ("PERA")

- Examples of protected speech:
  - Speech regarding wages
  - Speech regarding workplace issues and concerns
  - Speech regarding efforts to unionize
  - Speech regarding workplace safety
  - Any other form of speech concerning the terms and conditions of employment

Public Employees Relations Commission ("PERC") Cases

Case in Point:
City of Coconut Creek, 19 FPER ¶ 24117 (1993)

- Employee disciplined for sleeping on the job and the employee grieved the discipline
- While the grievance was pending, the employee called his supervisor a "f_ing liar" and the City discharged the employee for same
- The employee filed an unfair labor practice charge with PERC alleging that the termination was pretext for his pending grievance
- In analyzing whether an adverse employment action constitutes an unfair labor practice, PERC applies the burden shifting analysis set forth in *Pasco County School Board v. PERC,* 353 So.2d 127 (Fla. 1st DCA 1977):
  - "The burden is initially upon the charging party to show by a preponderance of the evidence that his or her protected activity was a substantial or motivating factor in the employer's decision to take disciplinary action; If that burden is sustained, the burden shifts to the employer to show that, notwithstanding the existence of factors related to protected activity, it would have made the same decision."

Case in Point:
City of Coconut Creek, 19 FPER ¶ 24117 (1993)

- In applying this analysis, PERC found that the employee's conduct directed at his supervisor was not protected activity nor was the conduct or termination connected to the employee's pending grievance
- PERC explained that "[i]mproper motivation must be established by objective facts or reasonable inferences drawn therefrom and cannot be based upon the mere suspicion that an adverse action be taken for protected activities"
- Accordingly, had the employee established that the termination for the employee's conduct was in fact pretext for the employee filing his grievance, then PERC may have reinstated his employment despite the employee's profane speech

Case in Point:
International Union of Police Associations, AFL-CIO and John Szabo, Charging Parties, v. Volusia County Board of County Commissioners, Respondent, 44 FPER ¶ 273 (2018)

- Deputy posted on the union's private Facebook page his displeasure with the Chief Deputy's treatment of certain deputies in regard to their body-worn cameras
- A member of the Facebook page sent a screenshot of the post to management and the deputy was terminated
- While PERC acknowledged that employees have the right to engage in concerted activities, PERC explained that this right "does not protect mere griping"
- Ultimately, PERC summarily dismissed the charge as the deputy failed to include the Facebook message in his charge rendering PERC unable to evaluate the nature of the communication

Case in Point:
School Board of Brevard County, 26 FPER ¶ 31166 (2000)

- Teachers made anonymous written complaints regarding the hiring practices and alleged misuse of funds by an elementary school principal
- The Superintendent did not return the teacher who spear-headed the written complaint effort to her previous elementary school assignment for the 1999-2000 school year
- The union filed a unfair labor practice charge with PERC asserting that the School Board's action was retaliatory
- PERC found that the teachers' written complaints constituted protected concerted activity
- PERC further held that the "[f]act that letter contained some factual inaccuracies or comments that could be considered defamatory was insufficient to render the letter unprotected"

National Labor Relations Act("NLRA")

- The NLRA does not apply to public employers
- But, National Labor Relations Board ("NLRB" or "Board") decisions may be instructive for cases involving public employers before PERC

Case in Point:
National Labor Relations Board v. Pier Sixty, 855 F. 3d 115 (2d Cir. 2017)

- Facts
  - Pier Sixty operates as a catering company in New York, New York
  - In 2011, its employees began seeking union representation in what became a tense organizing campaign that included constant threats from management
  - Pier Sixty employee Hernan Perez was upset with his supervisor and management due to their hostility and disrespect toward the employees, including Perez
  - While on his authorized break, Perez posted a profanity laced rant on Facebook regarding his boss and boss' mother

National Labor Relations Board v. Pier Sixty

- Facts (cont.)
  - Perez's Facebook post contained the following:
    - "Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!"
  - Perez removed the post three days later, but not before the post was brought to the attention of Pier Sixty management
  - After a brief investigation, Pier Sixty terminated Perez's employment a week later
- National Labor Relations Board ("NLRB") Charge
  - On the same day as his termination, Perez filed an NLRB charge claiming Pier Sixty terminated his employment in retaliation for his engagement in protected concerted activities
  - After a six-day bench trial, the NLRB found that Perez's post was not so "opprobrious" as to lose NLRA protection

National Labor Relations Board v. Pier Sixty

- 2nd Circuit's Decision
  - NLRB petitioned the 2nd Circuit to enforce its ruling and Pier Sixty cross-petitioned for the court's review
  - The 2nd Circuit agreed with the NLRB's ruling, finding that Pier Sixty violated the NLRA
  - The court cited several reasons for its determination that Perez's post was not so egregious as to exceed the NLRA's protection
    - The subject matter of the post included content regarding the upcoming union election
      - The election was highly contentious and the employer threatened employees who supported unionization
    - Pier Sixty tolerated the widespread use of profanity among its employees
    - The comments were made on Facebook, a website the co-workers use to communicate with each other, and the comments did not occur in the immediate presence of customers and did not disrupt the catered event
  - The court also noted that Perez's post pushes the outer limits of the NLRA's protection

Lessons from *Pier Sixty*

- Courts give the NLRB great deference in enforcing the NLRA
- The more contentious an employment issue is, the more leeway the Board may give employees
- The employer's workplace atmosphere, such as the allowed use of profanity in the workplace, is considered when determining whether speech is so egregious that an employee loses NLRA protection
- The NLRB and courts will consider whether the speech occurred on the clock and the forum of the speech
  - Speech posted online may receive more protection than that uttered in the actual presence of customers, especially when the employee thinks that the post is only viewable by friends
  - Both may consider whether the employee's speech disrupted the employer's business

Other Examples of Protected Offensive Speech

- *Cooper Tire & Rubber Co. v. NLRB*
  - Employees were actively picketing the employer as vans full of replacement workers, mostly African-Americans, passed the picket line
  - A picketing employee shouted "Hey, did you bring enough KFC for everybody?" and "Hey anybody smell that? I smell fried chicken and watermelon."
  - The company terminated the employee's employment and the employee filed an NLRB charge
  - The NLRB found in favor of the employee and ordered his reinstatement
  - After considering evidence that the employee made no physically threatening gestures and that there was no evidence that the replacement workers heard the employee's comments, the 8th Circuit affirmed the NLRB's ruling

Other Examples of Protected Offensive Speech

- *Airo Die Casting, Inc.*, 347 NLRB 810 (2006)
  - Employees picketing while the employer brought in replacement workers
  - A picketing employee advanced towards the replacements with both middle fingers extended and yelled "f*** you n******"
  - The employer terminated the employee for violating its harassment policy
  - The NLRB found that the employee's speech did not differ from the atmosphere surrounding the picketing and, without any threats or violence, was protected by the NLRA

Other Examples of Protected Offensive Speech

- *Consolidated Communications, Inc. v. NLRB*
  - Picketing employee grabbed his crotch, presented his middle finger, and yelled "f*** you" at non-picketing employee
  - The employer suspended the employee for his obscene actions
  - The NLRB determined that the suspension violated the NLRA
  - The D.C. Circuit affirmed the NLRB's decision stating that, although the employee's actions were "totally uncalled for and very unpleasant," they could not be objectively perceived "as an implied threat of the kind that would coerce or intimidate a reasonable [replacement] employee from continuing to report for work"

The NLRB's Apparent Shift During the Trump Administration

- *Alstate Maintenance and Trevor Greenidge*, Case 29-CA-117101 (Jan. 11, 2019)
  - Greenidge was employed as a skycap at an airport and was responsible for assisting passengers with their luggage
  - Upon arrival of a soccer team, Greenidge complained to his supervisor that when "we did a similar job a year prior … we didn't receive a tip for it"
  - The skycaps refused to assist in moving the team's equipment and were discharged
  - The question brought before the Board on appeal from the Administrative Law Judge was whether Greenidge's complaint constituted concerted activity protected by the NLRA
  - The Board narrowed the definition of "concerted activity" when it focused on whether Greenidge's activities were concerted when he complained in a group setting, ultimately finding that there was no indication that Greenidge's complaint was anything more than a personal gripe to his superiors, regardless of whether it occurred in a group setting

- *General Motors*, Case 14-CA-208242
  - On September 5, 2019, the NLRB issued a notice seeking amicus briefs regarding whether it should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature
  - The Board specifically referenced the *Pier Sixty, LLC* and *Cooper Tire & Rubber Co.* decisions in its notice
  - In its decision, the Board departed from *Pier Sixty* and *Cooper Tire*
  - The Board determined that "abusive conduct is not protected by the [NLRA] and should be differentiated by conduct that is protected"
- BUT, the Republican majority over the five member Board ended in August 2021
- Employers should expect the Board to revert back to its former leniency on abusive conduct so long as the conduct relates to protected concerted activities

Conclusion

- The First Amendment applies to public sector employers which must be careful not to infringe on an employee's First Amendment right to free speech
- Public employers may limit certain protected speech if the speech may interfere with the employer's legitimate interest in promoting efficiency in performing its functions
  - Courts analyze speech posted on social media with greater scrutiny as the speech is readily available to the public
- Public employers should avoid infringing on an employee's statutorily protected speech such as speech regarding the terms and conditions of employment which may be protected by Florida's Public Employees Relations Act
- If a public employer is unsure whether it may prohibit a certain type of speech, then it should consult labor and employment counsel

Questions?

Gregory A. Hearing
Shareholder
GrayRobinson, P.A.
813-273-5000
gregory.hearing@gray-robinson.com