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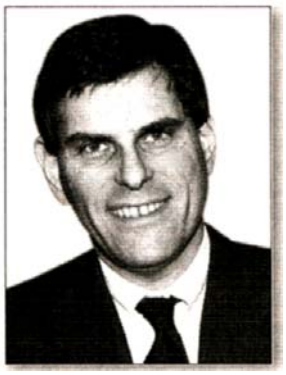
Representing the City as Public Employer



The city of New York, in order to provide services to its residents and fulfill its many other responsibilities, employs slightly more than 250,000 workers (including teachers and other public school employees). The city relies heavily on its employees' professionalism and expertise. However, like any employer, it is from time to time involved in legal controversies with individual employees or groups of workers.

As one of his first reforms upon taking office as the city's Corporation Counsel, Michael A. Cardozo established a discrete unit in the Law Department to provide the city with legal representation in these matters, the Labor and Employment Law Division.

The division presently employs 42 attorneys, who typically defend the city against claims of discrimination and retaliation under the main employment-related statutes: Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the New York State and city Human Rights Laws. The division also represents the city in claims brought under the Equal Pay Act and the Fair Labor Standards Act and claims based on collective bargaining agreements and civil service law. In addition, because government employees enjoy not only many of the same protections as private sector employees, but also certain protections offered by the U.S. Constitution, division attorneys frequently have the opportunity to litigate constitutional issues arising out of the employment relationship. This article will focus on recent developments in constitutional law that affect the city's relationship with its employees.

First Amendment

Courts have long acknowledged a tension between a public employee's legitimate interest in engaging in constitutionally protected speech, and the equally legitimate government interest in ensuring that employee speech does not adversely affect the ability to provide services to the public. Traditionally, courts have balanced the competing interests of government employees and the government employer in this area by using the so-called *Pickering* test. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Essentially, under *Pickering*, a court must first determine whether the employee's speech is deserving of constitutional protection as pertaining to a "matter of public concern." If the speech is protected, the government employer may only take action against the employee if it can demonstrate a reasonable concern for potential workplace disruption that outweighs the value of the speech. If, on the other hand, the speech is a matter of "purely personal interest," the government is given wider latitude in dealing with the employee.

A recent decision of the U.S. Court of Appeals for the Second Circuit involving city employees, *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir., 2006), has helped clarify whether the *Pickering* test applies when the government employer took action because of off-duty, non-job related speech of an employee. The *Locurto* decision upheld the termination of a New York city police officer and two firefighters for their participation in a racially charged Labor Day parade float in 1998. The employees, among other things, appeared in blackface, displayed watermelons and buckets of fried chicken, and, in the case of one of firefighters, held onto the back of the float in a parody of the then-recent murder-by-dragging of an African-American man in Texas. The incident engendered significant press attention and public notoriety after a videotape of the incident was widely broadcast by local and national television outlets. The employees were brought up on disciplinary charges and, after the charges against them were sustained in whole or in part following disciplinary hearings, were discharged. They then sued for reinstatement and back pay, alleging that the city's action abridged their speech rights. The trial court found for the employees, concluding that the city terminated their employment in retaliation for the content of their speech rather than for a reasonable concern for potential disruption. *Locurto v. Giuliani*, 269 F.Supp.2d 368 (S.D.N.Y. 2003).

The city appealed to the Second Circuit Court of Appeals, which reversed the District Court's determination and found for the city. In doing so, it used an approach which departed slightly from the *Pickering* methodology. The court reasoned that it was "more sensible" to give off-duty, non-work-related speech the presumption of First Amendment protection "regardless of whether, as a threshold matter, it may be characterized as speech on a matter of public concern." *Locurto*, 447 F.3d at 175. Consequently, the analysis is taken up with the second part of the *Pickering* test, where the government employer must demonstrate: (1) that the employee's activity was likely to interfere with government operations and (2) that the government acted in response to that likely interference and not in retaliation. *Locurto*, 447 F.3d at 176. The question of whether the employee's speech dealt with a matter of public concern would only be addressed later in the "balancing of interest" portion of the *Pickering* analysis, if the government employer advanced that far.

In performing the *Pickering* analysis, the Second Circuit declared its "recognition that the government may, in some circumstances, legitimately regard as 'disruptive' expressive activities that instantiate or perpetuate a widespread public perception of police officers and firefighters as racist." *Locurto*, 447 F.3d at 178. The court explained that certain aspects of the government's operations depend on public trust. The court rejected the plaintiffs' arguments that considering public perceptions would be tantamount to a "heckler's veto."

Drawing on prior cases involving New York city employees, *Melzer v. Bd. of Educ.*, 336 F.3d 185 (2d Cir. 2003) and *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002), the court noted that the provision of some government services requires a special degree of public trust. Consequently, the government employer can legitimately respond to activities which may erode or destroy that trust and thus potentially disrupt the provision of those services. In *Melzer*, the court examined the relationship existing between parents of public school students and the teachers and school system to which the parents entrust their children. The plaintiff was a public school teacher who, off-duty, participated in organizational activities devoted to promoting pedophilia. The court noted that there was a special relationship between parents and the public school system. Without the parents' cooperation the public school

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system could not function. Therefore, the government employer was justified in taking action against a teacher whose off-duty conduct threatened to destroy the relationship between the parents and the school system.

In *Pappas*, the plaintiff was a police officer who generated considerable media attention after anonymously sending racist and anti-Semitic diatribes in response to mail solicitations from charities. The Second Circuit upheld disciplinary action against the police officer, noting that the effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias . . . .If the police department treats a segment of the population . . . with contempt . . . respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. *Pappas*, 290 F.3d at 146-7 (citations omitted).

The decision in *Pappas* pointed to the result made unambiguous in *Locurto*, that a government employer may take action to ensure that its employees do not, through off-duty conduct, degrade the necessary relationships of trust between government and the public.

In some respects, *Pappas* was a harder case than *Locurto*. The officer in *Pappas* worked with computers and had less contact with the public than many members of the Police Department. Moreover, the officer in *Pappas* tried to conceal his identity. The court, however, focused on the special nature of his position as a police officer, explaining that:

[t]he fact that he was assigned to work on computers does not make him any less a cop, either in fact or in public perception . . . If the press became aware of his dissemination of racist diatribes, it would report that this was done by a police officer -- not that it was done by a person employed to work on Police Department computers. *Pappas*, 290 F.3d at 149-150.

The importance of the Second Circuit's decision in *Locurto* was that it ended any argument that the only workplace disruption to be considered under *Pickering* was disruption among co-workers. It is now clear that any disruption of the provision of government services which could result from an employee's actions is relevant, whether by causing "disharmony among the troops" or by alienating the public served by the employee and his or her co-workers. *Locurto*, 447 F.3d at 182-83. The *Locurto* Court also reaffirmed the long standing principle, articulated in *Connick v. Myers*, 461 U.S. 138, 152 (1983), that the government employer need not wait idly by for the disruption to occur but may act to prevent the disruption in the first place.

Due Process

While the majority of municipal employees, like many private sector employees, are covered by collective bargaining agreements which dictate arbitration procedures for resolving disciplinary matters, most municipal employees also have constitutional due process rights requiring notice of charges and a hearing prior to disciplinary action, including termination. A recent case handled by the division, *Gansas v. City of New York*, 2006 U.S. Dist. LEXIS 52419 (S.D.N.Y. 2006), turned on whether due process requires that the pre-termination hearing be held before a neutral adjudicator. In *Gansas*, plaintiff was the captain of the Staten Island ferry involved in the fatal accident of Oct. 15, 2003. Mr. Gansas claimed that the city had deprived him of due process because, after he was served with disciplinary charges alleging that he had failed to cooperate with the investigation into the accident, his pre-termination hearings took place before managers within the city's Department of Transportation who, he claimed, were biased against him. Relying on substantial precedent, Judge Glasser of the District Court dismissed Mr. Gansas' claim, ruling that because he had been afforded the opportunity for a post-termination hearing before a neutral adjudicator (in this case, a labor-management arbitrator), due process was satisfied. The fact that the post-termination hearing never occurred did not warrant a different result, the court held, since due process requires only that a public employee be afforded the opportunity for a post-termination hearing before a neutral hearing officer. Plaintiff has filed a notice of appeal.

Self-Incrimination

On rare occasions, government employees are subjects in criminal investigations for activities related to their employment. In such circumstances, such employees often refuse to cooperate with the city's investigation into possible misconduct, contending that the right against self-incrimination prevents the city from compelling them to answer questions. This issue was recently litigated in *Waugh v. Fire Department*, S.Ct. N.Y. Co., Index No. 103546/05, in which a firefighter present at a firehouse when a female visitor claims she was raped by several firefighters refused to answer the questions of an investigator with the city's Department of Investigation. Although he was granted "use immunity," the firefighter maintained that he could not be compelled to answer questions unless he was granted broader "transactional immunity."

Acting Supreme Court Justice Karen S. Smith, relying on *Matt v. Larocca*, 71 N.Y.2d 154 (1987), found that the firefighter was required to cooperate with the investigation. In that case, the Court of Appeals stated:

Where a public employee . . . refuses 'to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself * * * the privilege against self-incrimination would not [be] a bar to his dismissal' . . . . 71 N.Y.2d at 159-160.

Justice Smith concluded that the firefighter had weighed the "relative risk of the potential loss of his employment as against the possibility that, in his particular circumstances, his testimony could somehow be used in any such prosecution for a criminal offense even though the testimony and its fruits could not be used in any such prosecution" and opted not to respond to the Department of Investigation's questions. Consequently, the court upheld the termination of his employment. The firefighter's appeal of the decision is pending.

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