Legally Relevant

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Employee Rights and Their Limits

Employment law continues to be a hot topic, with employee claims and lawsuits against their employers at all-time highs. The cases reported in the news generally involve major employers, but most of the rules apply to all employers – large and small.

This article will cover a couple of areas of particular interest to cities and rural water districts.

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"Freedom of Speech"

This topic is of special interest because the rules governing governmental entities, like cities and RWD's, are different than they are for private businesses. This can be very confusing for board members and council members whose experiences lie primarily in the private sector where free speech rules don't protect employees. To make matters worse, the answer to most of these free speech questions is not what you would expect.

We are all generally familiar with the right of all Americans under the First Amendment to the Constitution to exercise "freedom of speech". But that is not really what the Constitution says. It actually says that "Congress shall make no law . . . abridging the freedom of speech". This is interpreted broadly to apply not just to passing laws, but to all actions of government, including managing employees and contractors. The Fourteenth Amendment extended this right to the states so municipalities are subject to the same rules as the Federal government.

So, consider this example:

An employee of a small Kansas company posts to his Facebook page: "I hate my job. Company X is a lousy place to work. My boss only works to help his office pals, and never listens to anyone else. With all the complaints we get about him and the quality problems he causes, I don't know why anyone buys anything from us. I can't wait to get a new job."

So what happens? This employee may be looking for a new job sooner than he thought; especially if his boss finds out about this post from his Facebook friends. This "speech" is not protected by the Constitution or in most instances, anything else.

This employee has gripes about his employer, but he is being disloyal. Even if everything he said is true, in most cases the employer has every right to terminate him as a result.

But change the facts for this example:

An RWD employee who works at the water treatment plant posts on her Facebook page "I hate working at this place. My boss only does things to help out his friends and never listens to anyone else. Whenever an employee tells him what we need to do to fix the quality problems we are having, he ignores it. I don't know why the board of directors won't help when he is acting like an idiot."

This employee also has gripes, and she is being every bit as disloyal to her employer as the employee working for the private company in the example above. But, there is a key difference. She works for a governmental entity, not a private employer. So, she has the right of "free speech" regarding her employer that the private employee does not have. Firing her in this case may very well result in a claim being made for deprivation of civil rights through a lawsuit brought in federal or state court, entitling her to damages and attorney's fees.

So, what can the municipal employee say about their employer? Can they insult their bosses, the public and the board or council without fear of being fired? No, as the law provides the statements must be matters of "public concern" and not just personal complaints. As shown in the example above, the water plant employee was complaining about a boss and a board that seemed to do nothing in regards to quality problems, which would be a matter of public concern. Merely stating insults, or recounting personal problems with an employer, are not matters of public concern that are protected by the Constitution.

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This distinction is important to know not only for employment questions, but also for hiring outside contractors. In 1996 a lawsuit with Kansas ties went all the way to the Supreme Court on the right of an independent contractor of Wabaunsee County to be critical of the board of county commissioners in matters of public concern. When it was shown that the County had fired the contractor for being outspoken on matters that were of public concern, this was considered retaliation that violated the First Amendment. While it had to be proven that the contractor was fired because of the speech, and not for other reasons, this is still a significant extension of the right to free speech beyond just regular employees.

There are also special rules to consider for employees who act as "whistleblowers" as to public issues. Generally, employees reporting infractions of rules, regulations or laws pertaining to public health or safety are not only protected by First Amendment rules, but also laws that protect whistleblowers. As with other free speech rights, the purpose of the speech cannot be merely to cause problems for an employer or to publicize a personal opinion. Instead the complaints must be about real public harms that have not been resolved by the normal process.

"Right to Privacy"

Many water and wastewater system employees now have electronic devices provided to them by their employers, including cell phones, smart phones, tablets and laptops. In addition, most employees have personal workspaces that can be used for both office and personal uses. These devices, the software and the workspace itself are all provided for the convenience of the employer, making the employee much more efficient than would be possible without them. However, these things also can be used for personal communications, or as a storage place for private items. What rights do employees have with respect to

their personal use of these devices, services and work areas? And what right does the municipal employer have to inspect this equipment and the employee's workspace?

This is another area where the private employer has a different standard to work under. Generally, a private employer, as owner of the electronic device or work area, has free reign to inspect these items to determine what the employee is doing with company property. But the municipal employer is subject to the Fourth Amendment's restrictions against unlawful searches and seizures. While this would make one think of warrants and police searches that are a staple of television dramas, the rules for employee searches are more relaxed than what is portrayed in these shows.

The Supreme Court has determined that a public employer is under a lesser standard to justify a search of an employee's work area or electronic device than in a police search. First, the Supreme Court looks at whether the employee has a "reasonable expectation of privacy." This is a test that considers all the factors in the workplace to see if the employee could reasonably think that the information passed by the electronic device, or information that was stored in the work area, is private. This could be as simple as the fact that the workplace was in a separate area of the facility that other employees rarely go to, or that the municipal employer provided a smart phone, yet never monitored usage and never required usage to be limited to public business. On the other hand, requiring accountability as to phone usage or text messaging charges could be interpreted as limiting privacy. In a recent Supreme Court case the court found that a police officer did not have a reasonable expectation of privacy in a pager that transmitted text messages, because the employer had said on several occasions that it would monitor texts and required that the device would only be used for official business.

The best option for public employers is to have personnel policies in place that make it clear that work areas and electronic devices are subject to inspection, and are to be primarily used for public business.

Second, the Supreme Court required that the search be for a legitimate work-related reason, and be limited in scope. In this recent case, the court determined that the need to investigate the significant costs incurred for overuse of the texting between police officers was an appropriate work-related purpose. In addition, the employer did not treat the alleged use as an excuse to rummage through the officer's work area, or investigate what he did with the pager on his time off. A public employer must have a good reason for the search and needs to limit its search accordingly.

Because these cases are based upon the unique and individual facts of each situation, it is impossible to outline clear rules that establish a line that should not be crossed. The best option for public employers is to have personnel policies in place that make it clear that work areas and electronic devices are subject to inspection, and are to be primarily used for public business. This means that there would be no expectation of privacy for the employee. Also, the municipal employer should not randomly seek to inspect electronic devices in an attempt to catch employees. Instead the inspection should be based upon some reasonable public purpose, such as abnormally high cell phone costs, or the problem of computer virus intrusions that may be due to unauthorized uses.

Conclusion

The Constitutional rights of public employees make employment decisions more complicated than those in the private sector. Public employees have the right to free speech, as long as the matters are those of real public concern, and not personal insults. Public employees have rights against intrusive searches of phones and workspaces, however, clear policy from the employer can establish proper actions that a public employer can take without violating those rights. As always, clear procedures and documented actions by the employer can help to ensure that problems will be kept to a minimum.