



### **Candidate Against Incumbent Sheriff Opposes His Termination by Asserting A First Amendment Retaliation Action Under 42 U.S.C. § 1983**

In *Morgan v. Robinson*, 881 F.3d 646 (2018), after a deputy sheriff ran against his boss, the incumbent sheriff, in a primary election, the sheriff terminated the deputy's employment with the County Sheriff's Office for statements the deputy made during the campaign. The deputy then brought this First Amendment retaliation action under 42 U.S.C. § 1983, and the sheriff moved for summary judgment on the basis of qualified immunity. The district court denied the sheriff's motion, and he appealed. The court affirmed.

On appeal, the sheriff focused the vast majority of his briefing on arguments related to the proper form of the qualified immunity analysis. In so doing, however, he neglected to realize that the Supreme Court has ascribed a unique test applicable to cases where a government employee alleges that his employer retaliated against the employee for exercising his First Amendment rights. In the first part of this test, the Court must discern whether the employee's speech is protected by the First Amendment: an inquiry that entails balancing the respective interests of the employee and the employer. Next, because the sheriff claimed he is protected by qualified immunity, the Court applied the standard inquiry asking whether "the official violated a statutory or constitutional right, and [whether] the right was clearly established at the time of the challenged conduct.

"A party is entitled to summary judgment only when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" (citations omitted).... Where the moving party claims entitlement to qualified immunity, however, an appeal may be taken "because immunity is effectively lost if a case is erroneously permitted to go to trial." *Id.*

#### **Was the Deputy's Speech Protected?**

"The Supreme Court has developed two lines of cases that assess how to balance the First Amendment rights of government employees with the need of government employers to operate efficiently." Where, as in this case, a case involves "overt expressive conduct," our court applies "the balancing test as found in the line of cases following *Pickering* and *Connick*. The typical *Pickering-Connick* case involves a government employee causing workplace disruption by speaking as a citizen on a matter of public concern, followed by government action adversely affecting the employee's job." (citation omitted).

The first question in the analysis asks whether the employee's speech was made as a citizen on a matter of public concern. Where this question is answered in the affirmative, the court next asks whether the employer "had an adequate justification for treating the employee differently from any other member of the general public." Finally, if each party has met their burden, the court applies the Pickering-Connick test<sup>2</sup> to balance the competing interests.

*Whether the speech was made as a citizen on a matter of public concern.*

"Speech by citizens on matters of public concern lies at the heart of the First Amendment, ... [and] [t]his remains true when speech concerns information related to or learned through public employment." (citations omitted). Indeed, "[t]here is considerable value ... in encouraging, rather than inhibiting, speech by public employees [because] '[g]overnment employees are often in the best position to know what ails the agencies for which they work.'" *Id.* If the employee was not speaking as a citizen on a matter of public concern, he or she "has no First Amendment cause of action based on his or her employer's reaction to the speech." (citation omitted). On the other hand, if this preliminary question is answered in the affirmative, "then the possibility of a First Amendment claim arises." *Id.*

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." (citation omitted). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." By contrast, where speech primarily serves the personal interests of the speaker, it warrants no protection because it has little value to the public at large. More specifically, a statement is personal where it does "nothing to inform the public about any aspect of the [government entity's] functioning or operation." (citations omitted).

First and foremost, "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (citations omitted). Based upon the sheriff's counsel conceding in the brief and during arguments that the context of the speech of the deputy supports the view that they pertained to matters of public concern.

Next, the content of the statements showed their import to the community as a whole. Of the statements, at least three concerned the communications and radio systems that emergency personnel used in the County. While one could conceivably argue that the statements expressed the deputy's personal dissatisfaction with the sheriff, these comments did not involve a "personal conflict," nor were they the result of "an already strained relationship". At most, the statements were critical of the manner in which the sheriff performed his duties as county sheriff, and "[s]peech that criticizes a public employer in his capacity as a public official ... addresses matters of public concern." (citations omitted). Therefore, the content of the statements supports the conclusion that they were matters of public concern.

Finally, the form of these statements demonstrates their public import. Many of these statements were made to a group of attendees during a forum held at a local high school. Other statements were made on the deputy's website, which was obviously open to the public. Still others were published in a local newspaper. None of them, however, were disseminated to a closed audience or reported as part of the deputy's official job duties. (citations omitted).

Accordingly, the Court found the deputy's statements were made as a citizen on matters of public concern.

*Whether the County Sheriff showed justification for the deputy's termination.*

Since the deputy's statements were on matters of public concern, "the possibility of a First Amendment claim arises," and the court turned to the question of whether the County Sheriff "had an adequate justification for treating [the deputy] differently from any other member of the general public." (citations omitted). No one disputed that the County Sheriff had an interest in maintaining the efficient operation of the County Sheriff's Office. (citations omitted). Indeed, just like their private counterparts, government employers "need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. (citations omitted). Importantly, there is no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." (citations omitted). But "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." (citations omitted).

The Court noted in passing that intra-office comments about "turmoil" and "difference[s] of opinion on how business should run" seem likely to be made any time an employee runs against his or her employer in an election. Other employees in the office may inevitably feel torn between the incumbent and the challenging employee given their personal relationships with each other. And this is especially true in a smaller county. Accordingly, these comments provide no "adequate justification for treating the employee differently from any other member of the general public." (citations omitted).

Since the Sheriff failed to show an adequate justification for his actions, the Court held that the deputy's speech was protected by the First Amendment and there is no need to resort to the Pickering-Connick balancing test.

### **Qualified Immunity**

The Court then turned to the question of whether the deputy was entitled to qualified immunity, which required the Court to determine whether the Sheriff's termination of the deputy violated a right secured by the First Amendment and whether that right was clearly established at the time of the termination. Since the Court determined that the deputy's speech was protected, his termination was an adverse employment action sufficient to violate his First Amendment rights. (citation omitted). ("The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity."). The Court then turned to the second inquiry, under which "[t]he relevant question ... is this: Could [the Sheriff] reasonably have believed, at the time he fired [the deputy], that a government employer could fire an employee on account of" the employee exercising his First Amendment right to free speech during a run for political office, where that speech had no disruptive impact on office functioning? (citation omitted). The answer to this question is an unequivocal "no."

No one disputes that "political speech ... is central to the meaning and purpose of the First

Amendment,” (citations omitted), or that “the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office”. For this reason, “the [Supreme] Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.” (citations omitted). Indeed, this is the very foundation upon which the Supreme Court decided *Pickering*:

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

391 U.S. at 572-73, 88 S.Ct. 1731.

The Court stated,

... [P]ublic officials have been on notice since the Court decided *Pickering* in 1968 that they may not sanction an employee for uttering protected speech when that speech neither impacts the employee’s official duties nor detracts from office efficiency. This is all the more true given the context in which [the deputy] spoke here: a political campaign, where “the First Amendment has its fullest and most urgent application.” (citations omitted). To the extent that there remains any ambiguity, we hold that a public employee cannot be terminated for making protected statements during a campaign for public office where that speech has no demonstrated impact on the efficiency of office operations. (citations omitted). (“In sum, a reasonable DA in Gilchrist’s position would have known that he could not fire an ADA running for public office for speaking publicly in his capacity as a candidate on matters of public concern.”).

The Court held that the district court correctly denied the sheriff’s motion for summary judgment.

To see the [full text of the decision](#).

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