



# Report on Metropolitan Microsite and Public Employee First Amendment Rights

Legal & Claims Committee

Item #7a

April 13, 2021

# Overview

- Open Session
  - Public Employee First Amendment Rights – General Principles
  - Public Employee Use of Public Employer’s Email System – General Principles

# The First Amendment to the United States Constitution

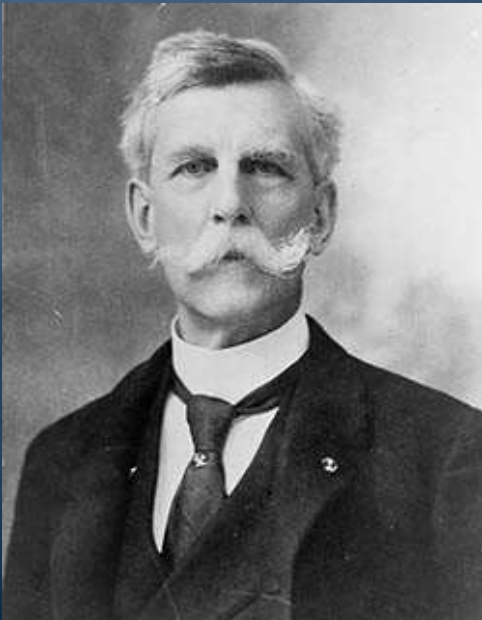
*Congress shall make no law respecting an establishment of religion,  
or prohibiting the free exercise thereof;  
or **abridging the freedom of speech**, or of the press;  
or the right of the people peaceably to assemble,  
and to petition the Government for a redress of grievances.*

# At First, Public Employee Free Speech Rights Were Limited

A policeman “may have a constitutional right to talk politics,  
but he has no constitutional right to be a policeman.”

-Justice Oliver Wendell Holmes

*(McAuliffe v. Mayor of New Bedford, (1892) 155 Mass. 216)*



# Public Employee First Amendment Rights Are Recognized

“The problem in any case is to arrive at a balance between the interests of the [public school] teacher, **as a citizen**, in commenting upon **matters of public concern** and the interest of the State, as an employer, in promoting **the efficiency of the public services** it performs through its employees.”

*(Pickering v. Board of Education, (1968) 391 U.S. 563)*



# Public Employee Free Speech Rights Become Stronger

“Vigilance is necessary to ensure that public employers do not use authority over employees to **silence discourse**, not because it hampers public functions but simply because **superiors disagree with the content** of the employees’ speech.”

*(Rankin v. McPherson, (1987) 483 U.S. 378)*

- Key factors:
  - Form
  - Content
  - Context of the whole record



# Public Employees: Freedom of Speech

“The **inappropriate or controversial** character of a statement is irrelevant to the question of whether it deals with a matter of public concern.”

*(Rankin v. McPherson, (1987) 483 U.S. 378)*

“Debate on public issues should be **uninhibited, robust, and wide-open**, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

*(New York Times Co. v. Sullivan, (1964) 376 U.S. 254)*

# Balancing Public Employee Free Speech Rights

- To act against an employee in this context, the employer must:
  - “demonstrate **actual, material and substantial disruption**” or a “**reasonable prediction of disruption**” in the workplace  
*(Robinson v. York, (9th Cir. 2009) 566 F.2d 817)*
- Example: **False statements** that are **recklessly made**. Disparaging co-workers without supporting evidence is “reckless.”  
*(Henton v. Carlson, (N.D.Cal. Apr. 9, 1999) No. C 97-4725 SI)*

The right: to speak on a matter of **public concern** as a **citizen**



# The Limits of Public Employee Free Speech (Part 1)

- Limits of Public Employee Free Speech:

Public employees **do not** have a First Amendment right to make statements “**pursuant to their professional duties.**”

*(Garcetti v. Ceballos, (2006) 547 U.S. 410)*

# The Limits of Public Employee Free Speech (Part 2)

- Limits of Public Employee Free Speech:

Speech that deals with **individual personnel disputes and grievances** and information **not relevant to the public's evaluation** of the public agency's performance is not of a public concern.

*(McKinley v. Eloy, (9th Cir. 1983) 705 F.2d 1110, 1114)*

Speech regarding specific personnel grievances  
**may not be** a matter of public concern

# Employee Concerns at Metropolitan: A Matter of Public Concern

- Issues relate to employee-employer relationships and MWD's performance of its duties
- Subject of public discussion and action by public, media and public agencies
  - Proposed State Legislation and requests for a State Audit
  - Statements by Members of the State Legislature
  - 5 Resolutions by public agencies, unions, political groups
  - Public Agency Letter of Concern regarding harassment
  - Discussed at Member Agency Board Meetings
  - 7 news articles/editorials/podcasts and interviews
  - 15 press releases issued by Bargaining Unit
  - Public comment at MWD and Member Agency meetings
    - 69 by staff
    - 24 by other members of the public

# Protected Speech: The Right to Use MWD's Email Systems

E-mail is a “fundamental forum for employee communication” and there is an employee right to use e-mail for MMBA-protected activity during *non-working time* or as *permissible non-business use* authorized by the employer.

*(Napa Valley Community College District (2018) PERB Decision No. 2563)*

- MWD Operating Policy I-02 authorizes “*occasional personal use* of computer resources”

