

WISCONSIN CHIEFS OF POLICE ASSOCIATION

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I. First Amendment to the U.S. Constitution provides: “. . . No law [shall be made] . . . abridging freedom of speech, . . . ”

II. What is constitutionally protected “freedom of speech”?

A. Speech (oral, written, cartoons, etc.) upon matters of “public concern”.

B. Do public employees have free speech rights? Yes, subject to overriding governmental interests in promoting efficiency in government affairs. *Pickering v. Bd. of Edu. of Township HSD*, 205 391 U.S. 563 (1968).

C. Typically, how does the case for an employee get presented? A 42 U.S.C. § 1983 suit is filed alleging an employee was treated negatively (e.g., loss of pay and benefits or undesirable working conditions) due in significant part in retaliation for exercise of protected speech.

Thereafter, the employer has the burden of showing it would have taken the same action in the absence of protected speech.

D. What is “a public concern”? Matters of political, social or other concern to the community.

Easy cases: Allegations of government corruption and malfeasance. Courts look to content, form and context of the speech (ordinary internal office or department affairs do not count).

Compare *Schad v. Jones*, 415 F.3d 671 (7th Cir. 2005) with *Spiegel v. Hull*, 371 F.3d 928 (7th Cir. 2004).

In *Schad*, the police officer wrongfully disclosed a tip to another officer and was transferred to a less desirable assignment. The Court found this to be primarily a matter of internal department concern and not a matter of “public concern.”

In *Spiegel*, the prison guard was transferred after she reported suspicious conduct of two of her supervisors who “appeared” to be engaging in unlawful behavior. The Court found her report a matter of public concern even though she never made it known outside the Department.

[In Summary: The Judge decides what a matter of public concern is.]

E. How employees raise matters of “public concern” can ruin an otherwise good claim. See *Cygan v. Wis. Dept. of Collections*, 388 F.3d 1092 (7th Cir. 2004).

A prison guard complained to Management and filed union grievances over low employee morale, poor training, lack of radios and staff shortages. The Court found she spoke out on matters of public concern but the way she did so was why she was fired (she allegedly was profane, confrontational and loud). The Court

found her consistently inappropriate manner of interacting with others, rather than the substance of her speech was why she was fired.

Lesson: How employees raise issues is important; the First Amendment is not a license to be obnoxious.

F. The *Pickering* balancing by the courts can result in limiting employee speech.

Even if speech is a public concern, an employer can win if it is shown that an important government interest justifies the punishment for speech. [e.g., The speech causes problems with discipline and harmony; breach of necessary loyalty and confidence; problems with getting the job done, etc.] *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

But mere speculation about how disruptive speech may be is not enough; actual harm or evidence that it was reasonable to conclude harm may occur is needed.

Example: *Gustafson v. Jones*, 290 F.3d 895 (7th Cir. 2002).

Two public officers were ordered to stop investigating a gun possession case; they raised concerns about the order, including getting the union President involved. The union sent a letter of complaint to the Police Chief and copied the elected leaders and the press. Four months later the two were involuntarily transferred, “for the good of the unit.”

No police department witness testified to any negative impact on the police department due to the two employees’ complaints; in fact, they told the Court they knew little or nothing about the complaints.

Each officer was awarded \$10,000 compensatory damages and \$180,000 in punitive damages [plus, presumably, attorney’s fees and costs.]

III. Union Organizing Versus Free Speech. Union organizing is a form of associational activity protected by the First Amendment. Attempting to organize fellow employees to form a union is a matter of public concern. However, not all union related issues (e.g: grievances) are of public concern. *Gregory v. Lund*, 54 F.3d 410 (7th Cir. 1995).

IV. Sampling of Cases Decided in 2005: