Balancing Test and Other Factors Assess Ability of Public Employees to Exercise Free Speech Rights

William A. Herbert
Balancing Test and Other Factors Assess Ability of Public Employees To Exercise Free Speech Rights

BY WILLIAM A. HERBERT

Since the late 1960s, it has been settled law that a state or local government cannot condition public employment on a basis that infringes upon a public employee’s constitutionally protected interest in freedom of expression, but the way that federal and state courts have applied the legal standards in these cases has made it very difficult to predict the outcome in many free speech cases.

Inherent in the tests used to balance the interests involved is the reality that free speech protections for public employees are not absolute. Moreover, the background and composition of a particular circuit or appellate panel may affect the way the balancing test is applied. One circuit’s application of the balancing test may have little or no persuasive value in another circuit considering a case with similar facts.

In determining whether a public employer’s adverse action against a public employee for engaging in speech violates the First Amendment, the standard balancing test, first enunciated in Pickering v. Board of Education, seeks to balance the interests of the employee, as a citizen, to comment on matters of public concern, against the interests of the public employer in promoting the efficient performance of public services.

However, in New York State Correctional Officers and Police Benevolent Ass’n, Inc. v. State, the New York Court of Appeals refused to apply the Pickering test in assessing whether to vacate an arbitration award that reinstated a correction officer who had been disciplined for off-duty racist symbolic speech. The Court reasoned that applying the test to determine whether to vacate an arbitration award on public policy grounds would invade the province of the arbitrator and be inconsistent with the parties’ choice of forum.

In Waters v. Churchill, the plurality decision by the U.S. Supreme Court determined that, in applying the Pickering balancing test, the courts should consider what the employer reasonably believed the employee’s statements or conduct to be in forming the basis for its adverse personnel action. Under Waters, discipline can be imposed against a public employee for speech activity, “only if the facts of the case, as reasonably known to the employer, indicate that the employer’s interest in promoting efficiency of public services outweighs the employee’s interest in free speech.”

The Second Circuit has emphasized that before the Pickering balancing test can be applied, the public employee has the burden of demonstrating by a preponderance of the evidence that (1) the speech touched upon a matter of public concern, (2) the employee suffered an adverse employment decision, and (3) a causal connection exists between the protected speech and the adverse employment determination, so that it can be said that the speech was a motivating factor in the determination.

Was the Speech a Matter of Public Concern?

To determine the degree of protection provided by the First Amendment, the threshold consideration is whether the speech at issue addresses a matter of public concern. Speech addresses a matter of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the commu-
nity. The manner, time and place of the expression are relevant as well as the context in which it is made. The speech will be analyzed objectively and based on the entire record. The employee’s motivation and the choice of forum also are factors that will be considered in assessing whether a statement is one of public concern.

In Bartnicki v. Vopper, the U.S. Supreme Court determined that the content of an unlawfully recorded cellular telephone conversation between a public sector union president and the union negotiator touched upon a matter of public concern. During the conversation, the union representatives discussed the timing of a proposed strike, the difficulties created by public comments about the negotiations and the need for the union to respond more forcefully to the employer’s position during the negotiations. The majority of the Court concluded that the months of negotiations regarding the compensation for unit members were unquestionably a matter of public concern.

In Lewis v. Cowen, the Second Circuit held that the refusal by a policy maker to follow an order to serve as head of a governmental unit and to present changes in a governmental program “in a positive manner” to a governmental body touched upon a matter of public concern. The court stated that in determining whether speech touches upon a matter of public concern, a court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.

The Second Circuit has also ruled that a report dealing with the proper administration of state facilities for the incarceration of juveniles touched upon an issue of public concern. In Hale v. Mann, the court reversed the grant of summary judgment, concluding that a reasonable jury could conclude that the forwarding of a critical report regarding the administration of the facility, written by another, to superiors could be construed as protected speech under the First Amendment.

The fact that a statement may relate to a working condition does not render it unprotected per se. Therefore, “a statement concerning racial discrimination on the part of a public agency is a matter of public concern because it involves information that enables the members of society to make informed decisions about the operation of their government.” An internal protest to an employer’s personnel actions can touch upon a matter of public concern. A public employee’s internal complaint for being denied a promotion can constitute speech that touches upon an issue of public concern. Accusations of corruption made by a law clerk directly to a judge in chambers can constitute speech concerning a matter of public concern. However, a letter to a radio station that was signed “Overheated Worker” and sought to correct an earlier news story about the lack of air conditioning in a county building did not touch upon a matter of public concern.

The Second Circuit affirmed the dismissal of amended complaints by public employees alleging that they were adversely treated because they had complained about their job duties and promotion status and had commenced a Fair Labor Standards Act lawsuit regarding their salaries. The court determined that the employees’ speech was not, for First Amendment purposes, a matter of public concern.

Matters and speech regarding public safety are considered “quintessential matters of public concern.” Myers v. Hasara concluded that a health inspector’s comments to a mall manager regarding an open-air produce market allegedly violating city and state law, touched upon a matter of public concern. In reaching its holding, the Seventh Circuit noted, “It is important to good government that public employees be free to expose misdeeds and illegality in their departments. Protecting such employees from unhappy government officials lies at the heart of the Pickering cases, and at the core of the First Amendment.” Statements made concerning a public employer’s failure to comply with an affirmative action policy touch upon a matter of public concern. However, the filing of an EEOC charge and a title VII lawsuit that seeks damages for personal harm only, may not be viewed by the courts as touching upon an issue of public concern.

However, the 11th Circuit has held that a police officer’s speculative comment that the police chief might have stolen money from the evidence room touched upon a matter of public concern. Similarly, a principal’s letter criticizing the failure to renew her contract by the board of trustees as well as its failure to defend her against allegations of misuse of public funds did not touch upon a matter of public concern. One factor the Fifth Circuit used in reaching this legal conclusion was the principal’s use of official stationery in writing to the board of trustees.

A professor’s advocacy in the faculty senate regarding a no-confidence vote and criticism by the professor of a university regent, the university president and a proposed reorganization plan did not touch upon issues of public concern.

Decisions by a prison hearing officer may constitute communicative acts that touch upon a matter of public concern. Similarly, a letter sent by a state tax attorney to the governor alleging that the state tax department was granting illegal tax abatements and that political influence was negatively impacting the agency was found to touch upon an issue of public concern.
An allegation to an investigatory agency regarding alleged theft of money by a police chief touched upon an issue of public concern. Testimony given by an employee during a non-public hearing regarding disciplinary charges against her former supervisor was found to not touch upon a matter of public concern. In Maggio v. Sipple, the 11th Circuit focused on the fact that the purpose of the testimony was to support a grievance regarding alleged misconduct by the supervisor. Nevertheless, detrimental testimony during a trial in a lawsuit between a former co-worker and a state agency touched upon an issue of public concern.

Speaking on a topic that may be of public importance does not guarantee that the employee’s speech addresses a matter of public concern. In Kokkinis v. Ivkovich, the Seventh Circuit ruled that a police officer’s comments during a television interview regarding another officer’s sex discrimination lawsuit did not touch upon a matter of public concern. In Gonzalez v. City of Chicago, the same circuit concluded that statements regarding police corruption in reports prepared by a police investigator did not touch upon issues of public concern because “[t]hey are reports on his investigations as required by his employer.” Similarly, the Seventh Circuit, in Kuchenreuther v. City of Milwaukee, held that a note placed by a police union’s shop steward on the union’s bulletin board, stating her opinion regarding the police chief’s request that police officers donate money to an arts fund, did not touch upon an issue of public concern. In reaching its holding, the Seventh Circuit relied upon the shop steward’s articulated motive of “voicing my opinion.” The Seventh Circuit also held that the shop steward’s questioning of a policy requiring police to carry only one set of handcuffs was a mere complaint “about a change in equipment allocation.”

Finally, in Snider v. Belvidere Township, the Seventh Circuit concluded that a female employee’s complaint regarding her disparity in salary with other employees based on tenure did not touch upon a matter of public concern. In reaching this holding, the court distinguished between an employee who makes a complaint about a sex-based disparity in wages. In Padilla v. South Harrison R-II School District, the Eighth Circuit held that a schoolteacher’s testimony, during cross-examination in a criminal trial, about his opinion regarding the appropriateness of a teacher having a sexual relationship with a non-student minor, did not touch upon a matter of public concern.

Application of the Pickering Test

Once it is determined that the speech touched upon an issue of public concern, courts will balance the interests of the employee as a citizen to comment on matters of public concern with the public employer’s responsibility to provide efficient public services. The employer must establish either that the employee’s conduct interfered with the effective and efficient fulfillment of the employer’s responsibilities to the public, or the employer reasonably believed that the speech would interfere with governmental operations. When the speech substantially involves matters of public concern, it is entitled to significant weight under the balancing test.

In McEvoy v. Spencer, the Second Circuit reiterated that the nature of the job held by the public employee can play a significant role in the application of the Pickering test. The policy-making status of an employee is significant in the Pickering test but not conclusive.

Municipal regulations requiring employees to obtain permission before speaking with the media were struck down by the Second Circuit because they constituted unlawful prior restraint and violated the employees’ First Amendment rights. Two executive orders were issued governing contacts between employees of the city’s social services agencies and the media; the regulations were premised on the legal mandates protecting the confidentiality of the agencies’ clients. A city employee was disciplined for being interviewed while off-duty by the media regarding a high-profile case, without obtaining permission. The employee was quoted as stating that “the workers who are considered the best workers are the ones who seem to be able to move cases out quickly and ‘there are lots of fatalities the press doesn’t know anything about.’”

In MacFarlane v. Village of Scotia, the Third Department applied the Pickering test in an Article 78 proceeding that challenged the imposition of discipline against a police union official for the content of a letter he sent to four members of the village board. The letter criticized the position taken by the chief of police in a published letter to the editor regarding a well-publicized dispute over the 911 emergency call system. In his letter to the village trustees, the police union official stated, inter alia, “I was very surprised (as were many people I talked to) that the Chief of Police would jump into this political pot to publicly shaft his men and the P.B.A. and suck up to the Mayor in the same article.”
Although the court found that the letter addressed a matter of public concern, it held that the communication was not protected by the First Amendment because the village’s interests in having an efficient and effective police force outweighed the employee’s interest in commenting on the issue of public concern. The court explained:

In balancing the competing interest, the overarching factor forming our determination is that a police force is a quasi-military organization demanding strict discipline. The proof shows that respondent’s police force is a small one which mandates a close working relationship between its Chief of Police and officers if it is to operate efficiently and effectively. It is self-evident that this relationship was imperiled by the dissemination of petitioner’s letter to the Board.

The First Department rejected a constitutional challenge to the termination of a New York City police officer for posing nude for a magazine in which she “used her position, uniform and police equipment, without authorization, for her personal commercial benefit, and actively promoted the commercial product, in a manner that was likely to hold the department up to public ridicule.”

In Dangler v. New York City Off Track Betting Corp., the Second Circuit reiterated that in applying the Pickering test, allegations of an employer’s unlawful conduct will be given greater weight than other forms of employee speech:

Thus, although the public employer normally “need show only a ‘likely interference’ with its operations, and ‘not an actual disruption,’” Lewis v. Cowen, 165 F.3d at 163 (quoting Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir.), cert. denied, 516 U.S. 862 (1995) (emphases in Jeffries)), a public employer cannot, with impunity, fire an employee who “blew the whistle” on other employees’ violations of law on the ground that those disclosures impaired office morale.

In McCullough v. Wyandanch Union Free School District, the Second Circuit reaffirmed that high-level employees are entitled to limited First Amendment protections and are unlikely to prevail under the Pickering test when they have engaged in speech that is critical of their employer.

Similarly in Lewis v. Cowen, the Second Circuit emphasized that a public employer’s interests in running an effective and efficient office will be given the utmost weight where a high-level employee vocally and publicly criticizes the employer. In Lewis, the court held that the termination of a policy maker for his refusal to obey an order to present to an administrative board “in a positive manner” a change in public policy he privately opposed did not violate the First Amendment because of the employer’s reasonable belief that the refusal “might impair” governmental operations. In reaching its holding, the court distinguished its prior holding in Piesco v. City of New York, where the termination of a policy maker for testifying truthfully before a legislative committee was found to violate the First Amendment.

In Prager v. LaFaver, the 10th Circuit, affirming the denial of a motion to dismiss, determined that “office tensions” resulting from a state tax attorney disclosing to the governor the illegality of a tax abatement did not outweigh the substantial weight to be given to the attorney’s disclosure of governmental corruption.

In Johnson v. University of Cincinnati, the Sixth Circuit reversed the granting of summary judgment, which was based on the conclusion that a university’s interest in hiring prospective employees outweighed a vice president’s right to speak out regarding the university’s failure to follow its affirmative action program. The court concluded that there were contested issues of material fact on the impact of the vice president’s speech, warranting a trial.

In Kokkinis v. Iokovich, the Seventh Circuit stated, “Deferece to the employer’s judgment regarding the disruptive nature of an employee’s speech is especially important in the context of law enforcement.”

In Worrell v. Henry, the 10th Circuit held that a prosecutor’s office did not violate the First Amendment when it rescinded an offer to hire an individual to be a drug task force coordinator because he had testified as an expert defense witness in a murder trial. In applying the balancing test, the court found that the prosecutor’s interest in maintaining an efficient drug task force outweighed the individual’s right to testify as an expert witness.

In Anderson v. Burke County, Ga., the 11th Circuit reached very similar legal conclusions, based on the application of the Pickering balancing test as applied to a police department.

Similarly, in Edwards v. City of Goldsboro, the Fourth Circuit held that a police officer set forth a cause of action under the First Amendment by alleging that his municipal employer had disciplined him and prohibited him from engaging in the private, off-duty employment of teaching concealed handgun safety.

In Geer v. Amersqua, the Seventh Circuit ruled that, in applying the Pickering test, the manner and means of an employee’s speech are key considerations in balancing the respective interests of the employer and employee. The court found that because a firefighter used a news release rather than internal procedures to complain about perceived favoritism toward gays and women, the employer’s interest in disciplining the employee and maintaining order was quite substantial.

Prior Restraint of Employee Speech

In United States v. National Treasury Employees Union, the Supreme Court held that the Pickering test needed to
be modified when applied to situations involving cases of prior restraint. In striking down a federal law prohibiting federal employees from receiving honoraria for off-duty speeches and articles, the Supreme Court noted that Pickering and its progeny involved “post hoc analysis of one employee’s speech and its impact on that employee’s public responsibilities.”

The decision recognized that, with a prior restraint, the impact is more widespread than any single supervisory decision, and it found that a prior restraint chills potential speech rather than punishes actual speech. Therefore, it ruled that a public employer in a prior restraint case must demonstrate that “the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.”

In Metropolitan Opera Ass’n, Inc. v. Local 100, HERE, the Second Circuit vacated a preliminary injunction against a private sector union that had engaged in a series of protests against the Metropolitan Opera in New York City, seeking to persuade it and its patrons to compel its food service provider to cease resisting union representation. In vacating the injunction, the court found that the terms of the injunction constituted a broad prior restraint on speech that was unconstitutionally vague.

The Second Circuit has ruled that work rules prohibiting uniform employees from wearing buttons, badges or other insignia on their uniform violated the First Amendment rights of the employees. In affirming the lower court’s issuance of an injunction against the rule, the Second Circuit noted that the broad rule prohibited the wearing of buttons at all times “regardless whether the employee’s job ever places the employee in contact with the public and regardless whether the employee is in contact with the public while wearing the button.”

In Latino Officers Ass’n v. Safir, the Second Circuit affirmed the denial of a preliminary injunction sought by a group of Hispanic police officers seeking to challenge certain notice and reporting procedures with respect to police officers making public statements regarding police department matters. Under police regulations that applied at the time of the appeal, police officers were required to notify their department of their intent to speak and provide a summary of their comments after the fact. In denying the preliminary injunction, the Second Circuit acknowledged that the regulations had the potential to chill speech. Nevertheless, the court concluded that the potential chill was conjectural and insufficient to establish real and imminent irreparable harm. In addition, the court found that, in applying the Pickering test, the challenged regulations struck a reasonable balance between the interest of the officers speaking out on issues of public concern and the city’s strong interest in staying informed about police officers’ statements regarding the sensitive nature of police work.

However, in Latino Officers Ass’n v. City of New York, the court affirmed the granting of a preliminary injunction against a police department policy prohibiting members of a Latino police organization from marching in uniform behind their organizational banner in various parades, including the Puerto Rican Day Parade and the Dominican Day Parade. In its decision, the Second Circuit found that the District Court had correctly applied the holding in United States v. National Treasury Employees Union by placing a higher burden on the defendant to justify its parade policy because it constituted a prior restraint.

As discussed earlier, in Harman v. City of New York, the Second Circuit struck down municipal regulations requiring employees to obtain permission prior to speaking with the media, finding that the regulations constituted unlawful prior restraint and violated the employees’ First Amendment rights.

**Freedom of Association**

The First Amendment right of freedom of association can be a basis for challenging the termination of an employee for participating in organizational activities including union activity. In Boddie, the court held that the “public concern” standard did not apply to a firefighter’s free association claim based on union activity. However, other courts have applied the “public concern” standard to free association claims.

Nevertheless, the 10th Circuit affirmed the dismissal of a First Amendment complaint for failure to state a cause of action alleging that a plaintiff engaged in union activity and because of that activity was subjected to retaliation.

In Kuchenreuther v. City of Milwaukee, the Seventh Circuit found that the removal of postings from a negotiated union bulletin board at the workplace did not violate the First Amendment. The court reasoned that the postings did not comply with a police procedure requiring prior approval for all postings, even if such procedure was inconsistent with the terms of the collective bargaining agreement.
The 11th Circuit granted qualified immunity to individual county defendants who demoted a public sector union activist based on the content of a questionnaire sent to candidates for public office.80

In Stagman v. Ryan,81 the Seventh Circuit affirmed the granting of summary judgment dismissing a First Amendment claim by a non-attorney working for the Illinois attorney general’s office alleging that he was retaliated against for various union activities. In its decision, the court assumed that the speech was protected, but reaffirmed that not all union activities are protected by the First Amendment.82 In affirming the granting of summary judgment, the court found that the employee failed to demonstrate that the supervisory employees, who made the decision to terminate, were aware of his union activities or that the decision was responsive to those activities.

In Adler v. Pataki,83 the Second Circuit held that the First Amendment provided public employees with a right to maintain an intimate marital relationship free from undue public employer interference. There, a former deputy counsel for a state agency asserted that he had been terminated in retaliation for a well-publicized pending lawsuit by his wife who had been terminated from her position as an assistant attorney general. In addition, Adler alleged originally that he had been terminated for another reason: political patronage. However, in his appeal, Adler abandoned his political patronage claim, conceding that his position was a policy-making position. In reversing a grant of summary judgment against Adler, the court held that the activity of Adler’s wife in challenging her termination based on alleged employment discrimination could not reasonably be found to have justified the discharge of Adler from his state position. In holding that the First Amendment does protect a public employee’s right to maintain a marital relationship, the court noted that:

We need not decide in this case whether in some circumstances the conduct, or even the identity, of a wife might raise such serious concerns about her husband’s suitability for public employment as to justify the husband’s discharge (or the discharge of an employee wife because of the identity or conduct of her husband).84

Similarly, in Kipps v. Caillier,85 the Fifth Circuit, en banc, held that a former assistant football coach had a clearly established constitutionally protected right to familial association with his son. In addition, it found that his complaint alleging that he was terminated because his son chose to play football at another university stated a cause of action. Nevertheless, the court found that the defendants were entitled to qualified immunity because, under the unique facts of the case, defendants’ actions were objectively reasonable.

The Defense of Qualified Immunity

The defense of qualified immunity shields individual defendants from claims of monetary damages if it is objectively reasonable for the individual defendants to believe that their retaliatory conduct did not violate the employee’s First Amendment rights.86

In Johnson v. Jones87 the U.S. Supreme Court held that where the only issue on appeal is a question of “evidence sufficiency” as to the constitutional right, the denial of qualified immunity is not immediately appealable.88

In McCullough v. Wyandanch Union Free School District,89 the Second Circuit reiterated that:

A government agent enjoys qualified immunity when he or she performs discretionary functions if either (1) the conduct did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable to believe that the conduct did not violate clearly established rights. A right is clearly established if the contours of the right are sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant’s position should know about the constitutionality of the conduct. The unlawfulness must be apparent.90

A police chief was granted qualified immunity for firing a police officer who had voiced speculation that the police chief had stolen money from the evidence room because the officer’s “theory” was based mainly on the mere fact that the chief had been a manager over the evidence room.91

Although qualified immunity may shield individual defendants from a claim for monetary damages, it does not bar actions for declaratory or injunctive relief such as reinstatement.92

Like other aspects of First Amendment jurisprudence regarding the free speech rights of public employees, it is difficult to predict when qualified immunity will be granted in a particular case. For example in Piesco v. City of New York,93 the Second Circuit rejected the qualified immunity defense, holding that the constitutional right of a public employee to testify truthfully before a legislative body was sufficiently clear that a reasonable municipal officer would understand that to retaliate against an employee for such testimony would violate the First Amendment. Nevertheless, eight years later, qualified immunity was granted to state officials involving a similar dispute regarding the content of an employee’s testimony before a state board.94

Conclusion

As James Madison noted in The Federalist Papers No. 51, “if men were angels, no government would be nec-
ecessary. If angels were to govern men, neither external nor internal controls on government would be neces-

sary."

Despite our society's dedication to the principles of freedom of speech and freedom of association, con-
tained in the United States and New York State Constitu-
tions, there remains an ever-present temptation, by some executing governmental authority, to retaliate
against men and women who speak or act in opposition
to governmental policy. Such retaliation can be in the
form of unlawful prohibitions against speech and con-
duct or through disciplinary action and denial of terms
and conditions of employment.

The primary and necessary external check to such
governmental retaliation rests with an independent ju-
diciary which, along with labor arbitrators, can provide
public employees with an opportunity to challenge such
unlawful government action.

McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S.
138 (1983); Waters v. Churchill, 511 U.S. 661 (1994); United
States v. National Treasury Employees Union, 513 U.S. 454
(1994); Zaretsky v. New York City Health & Hosp. Corp., 84
5. Myers v. Vasara, 226 F.3d 821, 826 (7th Cir. 2000).
7. See Pickering, 391 U.S. 563; see also Sheppard v. Beerman, 18
F.3d 147, 151 (2d Cir. 1994); Bieluch v. Sullivan, 99 F.2d
666, 670 (2d Cir. 1993; Piesco v. City of New York, Dept of
Personnel, 933 F.2d 1149, 1155 (2d Cir. 1991).
8. Connick, 461 U.S. at 146.
9. Piesco, 933 F.2d at 1156.
10. Tao v. Freeth, 27 F.3d 635 (D.C. Cir. 1994); Ezekwo v. New
York City Health & Hosp. Corp., 940 F.2d 775, 781 (2d Cir.
11. Id.; Barkoo v. Melby, 901 F.2d 613, 618 (7th Cir. 1990).
13. 165 F.3d 154, 164 (2d Cir. 1999).
14. 219 F.3d 61 (2d Cir. 2000).
16. Tao v. Freeth, 27 F.3d 635, 640 (D.C. Cir. 1994) (citing
McKinley v. Eloy, 705 F.2d 1110 (9th Cir. 1983)).
(1979).
18. Tao, 27 F.3d at 640.
20. Luck v. Mazzone, 52 F.3d 475 (2d Cir. 1995).
22. Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337,
353 (4th Cir. 2000); See Lee v. Nicholl, 197 F.3d 1291, 1295
(10th Cir. 1999) (memoranda regarding traffic safety at a par-
ticular intersection); Edwards v. City of Goldsboro, 178
F.3d 231, 247 (4th Cir. 1999) (speech regarding proper
handling of firearms affected public safety); Kincade v.
City of Blue Springs, 64 F.3d 389, 396 (8th Cir. 1995) (ex-
pressing concerns about potential danger to community's
citizens).
23. 226 F.3d 821 (7th Cir. 2000).
24. Id. at 826.
25. Johnson v. University of Cincinnati, 215 F.3d 561, 584 (6th
Cir. 2000).
26. See Padia v. City of Miami, 133 F.3d 1443 (11th Cir. 1998);
Yates v. Madison Metropolitan Sch. Dist., 840 F.2d 412 (7th
Cir. 1988); Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985).
27. Stanley v. City of Dalton, Ga., 219 F.3d 1280, 1288 (11th Cir.
2000).
Cir. 2000).
29. Clinger v. New Mexico Highlands Univ., Bd. of Regents, 215
F.3d 1162, 1166–67 (10th Cir. 2000), cert. denied, 531 U.S.
1145 (2001).
31. Prager v. LaFaver, 180 F.3d 1185 (10th Cir.), cert. denied, 528
32. Stanley v. City of Dalton, Ga., 219 F.3d 1280, 1288 (11th Cir.
2000).
33. Maggio v. Sipple, 211 F.3d 1346 (11th Cir. 2000).
34. Id. at 1353.
36. Kokkinis v. Iovovich, 185 F.3d 840, 844 (7th Cir. 1999).
37. 239 F.3d 939, 941 (7th Cir. 2001).
38. 221 F.3d 967, 974 (7th Cir. 2000).
39. 216 F.3d 616 (7th Cir. 2000).
40. Id. at 620.
41. 181 F.3d 992, 997 (8th Cir. 1999).
42. Waters v. Churchill, 509 U.S. 903 (1993); Frank v. Relin, 1
F.3d 1317, 1329 (2d Cir. 1993).
43. Piesco v. City of New York, Dept of Personnel, 933 F.2d 1149,
1157 (2d Cir. 1991).
44. 124 F.3d 92 (2d Cir. 1997).
45. See id. at 102.
46. See Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998).
47. Id. at 118.
49. Id. at 574.
50. See id. at 575; see also Village of Scotia, 29 PERB ¶ 3071
(1996), aff’d sub nom. Village of Scotia v. New York State
(affirming a PERB finding that the same letter constituted
protected activity under the Taylor Law).
51. MacFarlane, 241 A.D.2d at 575 (citations omitted).
52. Shaya-Castro v. New York City Police Dep’t, 233 A.D.2d 233,
233, 649 N.Y.S.2d 711 (1st Dep’t 1996).
53. 193 F.3d 130, 140 (2d Cir. 1999).
54. 187 F.3d 272 (2d Cir. 1999).
57. 180 F.3d 1185, 1190–91 (10th Cir.), cert. denied, 528 U.S. 967
(1999).
58. 215 F.3d 561, 585 (6th Cir.), cert. denied, 531 U.S. 1052
(2000).
59. 185 F.3d 840, 845 (7th Cir. 1999).
60. 219 F.3d 1197 (10th Cir. 2000), cert. denied, 533 U.S. 916 (2001).
61. 239 F.3d 1216 (11th Cir. 2001).
62. 178 F.3d 231 (4th Cir. 1999).
64. Id. at 373.
66. Id. at 466–67.
67. Id. at 468 (citing Pickering, 391 U.S. 563, 571).
68. 239 F.3d 172 (2d Cir. 2001).
69. Id. at 176–78.
70. Scott v. Meyers, 191 F.3d 82 (2d Cir. 1999).
71. Id. at 88.
72. 170 F.3d 167 (2d Cir. 1999).
73. 196 F.3d 458 (2d Cir. 1999).
75. 140 F.3d 111 (2d Cir. 1998).
76. Boddie v. City of Columbus, 989 F.2d 745 (5th Cir. 1993).
79. 221 F.3d 967, 975 (7th Cir. 2000).
80. Anderson v. Burke County, Ga., 239 F.3d 1216 (11th Cir. 2001).
81. 176 F.3d 986 (7th Cir.), cert. denied, 528 U.S. 986 (1999).
82. Id. at 999 n.4.
83. 185 F.3d 35 (2d Cir. 1999).
84. Id. at 44.
86. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Smith v. Garrett, 147 F.3d 91 (2d Cir. 1998); Adler v. Pataki, 185 F.3d 35 (2d Cir. 1999); Frank v. Reline, 1 F.3d 1317, 1328 (2d Cir. 1993); Bieluch v. Sullivan, 999 F.2d 666, 669 (2d Cir. 1993); White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1064 (2d Cir. 1993).
88. Id. at 313.
89. 187 F.3d 272 (2d Cir. 1999).
90. Id. at 278 (citations omitted).
91. Stanley v. City of Dalton, Ga., 219 F.3d 1280 (11th Cir. 2000).
92. Adler v. Pataki, 185 F.3d 35 (2d Cir. 1999).