Free Speech and the Public Sector Workplace

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Free Speech in the Public Employment Arena: What Can You Say and What Can Get You in Trouble

This presentation will address the limits of free speech for public employees, both within and outside of the workplace. It will also address the obligations of employees to comply with data privacy and other laws in the course of their employment, as well as employee speech regarding union activities and whistleblower protections for employees speaking out against violations of the law.

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I. PUBLIC EMPLOYEE SPEECH RIGHTS ARE PROTECTED BY THE FIRST AMENDMENT IN CERTAIN CIRCUMSTANCES

Public employees do not leave their constitutional protections at the door. A State or political subdivision "cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression." *Connick v. Myers*, 461 U.S. 138 (1983). "Nevertheless, a citizen who accepts public employment must accept certain limitations on his or her freedom." *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488, 2493 (2011) (internal quotation omitted).

A. General Rule

1. As a general rule, public employees, as citizens, have the right to personally comment on matters of public importance without restriction or reprisal by their employer. *Garcetti v. Ceballos*, 126 U.S 1951 (2006); *see also Pickering v. Board of Education*, 391 U.S. 563, 574 (1968).

2. Courts apply a two-step analysis to determine whether the public employee's speech is protected by First Amendment: (1) is the employee speaking as a citizen on a matter of public concern; and (2) if so, does the public employer's interest in efficient public service outweigh the employee's interest in speaking. *Connick,* 461 U.S. at 146.

3. If the Court concludes that the speech is protected, the employee must then show that an adverse employment action, such a discharge/firing of the employee, is "causally connected" to the protected speech. Causal connection can be shown by the nearness in time of the speech and the adverse employment action (temporal proximity) along with other circumstantial evidence. In the typical case, the public employer disciplines or discharges the employee specifically because of speech it deems inappropriate. In those cases, there is no dispute about the adverse employment action or causation elements. The only dispute is whether the speech is constitutionally protected.

4. Verbal acts of harassment in the workplace are not protected speech under the First Amendment. *See Jarman v. City of Northlake*, 950 F.Supp. 1375 (N.D. Ill. 1997). Under Title VII, employers are not only permitted, but are required, to try to prevent verbal acts of harassment in their workplaces. Accordingly, a public employer's policy prohibiting verbal acts of harassment in the workplace does not generally implicate the First Amendment.

B. What is a Matter of Public Concern?

1. Generally, the courts have held that speech is constitutionally protected if it touches on a matter of public concern. *Pickering,* 391 U.S. at 574; *see also Thompson v. Minneapolis*, 300 N.W.2d 763, 766 (Minn. 1980). Matters of public concern include matters of social, political, or other concern in the community. *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000) (*citing Connick*, 461 U.S. at 147–48). The distinction, generally, has been between speech about public issues and comments on internal administrative matters.

2. Speech about the employee's duties, work conditions, and similar grievances are not matters of public concern. *See, e.g.*, *Jereczek v. I.S.D. 287*, 1991 WL 34701 (Minn. App. March 19, 1991).

3. Courts will look at "the content, form and context of the speech, as revealed by the whole record" to determine whether the speech qualifies as a matter of public concern. *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 833 (8th Cir. 2015) (quotation omitted).

4. When the speech relates to both public and private issues, "the speech is protected if it is *primarily motivated* by public concern." *Id.* (quotation omitted).

5. In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Court addressed a situation in which Edward Lane, the Director of a youth program at a college in central Alabama, did an audit of program expenses and found that an elected representative who was on the payroll was being paid but not working. The elected representative was terminated and later convicted of fraud. Lane testified under subpoena about these events. Lane was subsequently terminated and filed suit, arguing that he had been retaliated against for exercising his First Amendment rights. The Court unanimously determined that Lane's testimony was protected speech. The Court characterized this as the "quintessential example of citizen speech" on a matter of public concern. Moreover, the Court noted that "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."

C. When is an employee speaking as a private citizen?

1. Courts have generally focused on the public concern element, but an employee is generally not speaking "as a citizen" if he or she is speaking pursuant to his or her official job duties. *Garcetti*, 547 U.S. at 426. For example, courts have recognized that the First Amendment does not entitle public school teachers use their teaching time to advocate viewpoints or discuss topics that "depart from the curriculum adopted by the school system." *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

2. Whether the speech is private can be determined from the content of the speech. The Supreme Court has held that a statement is personal where it does "nothing to inform the public about any aspect of the [government

entity's] functioning or operation." *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

3. A public employee is likely not speaking as a private citizen in internal communication. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a deputy district attorney wrote an internal memorandum pursuant to his job duties suggesting that the office dismiss a case due to the misconduct of police and other district attorneys. He sued his employer after he felt he had been retaliated against based upon exercising his First Amendment right to free speech. The court held that an employer may discipline an employee for comments made pursuant to their official duties, as they are more properly considered the comments of the position, and not the individual who holds the position. While the First Amendment generally protects a public employee's right to speak as a citizen addressing matters of public concern, the right to free speech does not protect public employees who discuss matters related to their official duties.

4. However, some workplace communications by public employees on matters of public concern may be protected. In *Rankin v. McPherson,* 483 U.S. 378 (1987) a former clerical employee in a county constable's office was terminated for saying to a coworker, after learning of the assassination attempt on President Reagan, "if they go for him again, I hope they get him." The employee sued, and the U.S. Supreme Court held that her comments were protected by the First Amendment. The Court held that the employee's comments were on a matter of public concern, her disagreement with the President's policies, and that due to her work and the fact that the comment was made in private, there was no evidence that it interfered with the efficient functioning of the office.

D. When does the public employer's interest outweigh the employee's interest?

1. There is a two-step inquiry into whether a public employee's speech is entitled to protection. "The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418 (citations omitted).

2. Even when speaking as a private citizen on a matter of public concern, the employee's speech may be limited if public employer's interest outweighs the employee's interests in speaking.

3. The Supreme Court has "recognized that government employers often have legitimate interests in the effective and efficient fulfillment of their responsibilities to the public, including promoting efficiency and integrity in the discharge of official duties, and maintaining proper discipline in public service." *Lane*, 134 S. Ct. at 2381 (2014) (quotations and alterations omitted). However, "[A] stronger showing of government interests may be necessary if the employee's speech more substantially involves matters of public concern." *Id.* (quotations and alterations omitted).

4. If an employee is speaking as an individual on a political topic or other matter of public concern, the employer can only restrict that speech if it is disruptive to the employer's operations or necessary for it to operate efficiently and effectively. *Garcetti*, 547 U.S. at 411; *Belk*, 228 F.3d at 881.

5. The Eighth Circuit recently acknowledged that it has been inconsistent on the level of evidence of disruption an employer must present to satisfy its burden. "[I]t is not necessary 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." *Morgan v. Robinson*, --- F.3d ----, 2018 WL 670509, at *4 (8th Cir. Feb. 2, 2018) (quotation omitted). "Evidence of actual disruption . . . is not required in all cases." *Id.* (quotation omitted). However, "in every case in which we have noted that evidence of actual disruption is not necessary, we have gone on to find sufficient evidence of such disruption." *Id.*

6. **Judicial Factors** In determining if speech is "disruptive," courts will balance the following factors:

   a. The need for harmony in the office or workplace;

   b. Whether the employer's responsibilities require a close working relationship between the employee and co-workers when the speech in question has caused or would cause that relationship to deteriorate;

   c. The time, place, and manner of the speech;

d. The context in which the dispute over the speech arose;

e. The degree of public interest in the speech; and

f. Whether the speech impeded the employee's ability to do his or her job.

Porter v. Dawson Educ. Serv. Co-op., 150 F.3d 887, 893 (8th Cir. 1998); *see also Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 397 (8th Cir. 1995)

E. Employee protected if the employer believes employee is exercising a First Amendment right

1. The Supreme Court recently clarified that disciplining a public employee for conduct that the employer believes is First Amendment protected conduct is prohibited.

2. In *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412 (2016), the Supreme Court held that a public employer can violate an employee's First Amendment rights by taking adverse action against the employee for action that the employer believes is First Amendment activity, even if the employer is mistaken. In that case, a police officer was demoted when other officers observed him picking up a yard sign for a mayoral candidate who opposed the mayor who appointed the current police chief and other police department leadership. The officer was actually picking the sign up for his mother and was not involved in the mayoral candidate's campaign. The Supreme Court held that, "[w]hen an employer demotes an employee out of a desire to prevent an employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment…even if, as here, the employer makes a factual mistake about the employee's behavior."

F. Examples

Whether a particular employee's speech is protected by the First Amendment depends on the factors identified above. While this is not always the case, speech on the employer's work environment is generally not speech on matters of public concern. Whether other topics are a matter of public concern is more of a mixed bag, however. These cases illustrate this point.

1. **Workplace Issues.** In *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), the employee was dismissed after circulating a questionnaire regarding

interoffice transfers, the need for a grievance committee, and morale in the office. The court found that the speech was not protected because the employee was not speaking as a citizen on matters of public concern, but instead as an employee upon matters of personal interest.

2. **Labor Issues.** In *Tuttle v. Missouri Department of Agriculture*, 172 F.3d 1025 (8th Cir. 1999), the plaintiff claimed that his employer terminated him after he spoke out on matters of public concern, including, increases in salaries, promotions, and safety issues. The court held that his speech was not protected because he was speaking out as an employee on a matter of personal interest, not as a concerned citizen. Although the employee argued that his mention of another worker demonstrated that this was not about him, the court noted that since the employee was still speaking about internal policies that were relevant only to fellow employees the speech did not touch upon a matter of public concern.

3. **Pornographic Video.** In *City of San Diego v. Roe,* 543 U.S. 77, 78 (2004), a San Diego police officer who created a pornographic video and subsequently sold the video on the Internet was terminated for failing to comply with an order to remove references to the video and other similar videos on his web site. The police officer then sued alleging that the termination violated his First Amendment right to free speech. In addressing the threshold issue of whether the police officer was speaking as a citizen on a matter of public concern, the Court defined a public concern as something that is the subject of legitimate news interest or that is "of general interest and of value and concern to the public at the time of publication." Following this definition, the Court found that the police officer's Internet expression in this case did not qualify as a matter of public concern and the employer did not violate the officer's First Amendment rights by terminating him.

4. **Policy Complaint.** In *Porter v. Dawson Educ. Serv. Coop.*, 150 F.3d 887 (8th Cir. 1998), a special education coordinator in that case told a newspaper reporter that she disagreed with an Arkansas Department of Education ("ADE") policy requiring service providers to give the Department the names of students who received special education services. This comment was made in her official capacity and made cooperation between the school and ADE officials difficult. The court upheld her termination for the comments, finding that the School's interest in the effective functioning of the workplace outweighed her interest in speaking on a matter of public concern. The court found that the employee's comments undermined the effective functioning of the employer because the employee had to work closely with ADE

employees, the success of the employer depended on a good relationship with the ADE, the comments were made at a time which could disrupt the employer's operations, and the comments and continued refusal to follow the guidelines for the release of data impeded the employee's ability to perform her job.

5. **Employer's Failure to Provide Services.** In *Ryan v. Shawnee Mission Unified School District*, 437 F.Supp.2d 1233 (D. Kan. 2006), the court applied *Garcetti* to a claim made by a physical therapist who was terminated by a school district. The physical therapist alleged that the district violated her free speech rights by terminating her for complaining that the district did not provide adequate services to disabled children. In its decision, the court analyzed whether the therapist was speaking as a citizen as that term was understood in *Garcetti*. In doing so, the court began by listing the therapist's job duties and subsequently found that there was no room for serious debate that the overwhelming bulk of her statements were made pursuant to her therapist duties rather than in her capacity as a citizen. Thus, the court determined that most of her statements were not protected First Amendment speech. The court further concluded that the remainder of the comments for which the therapist had been fired, were not related to a matter of "public concern." These comments included allegations of mistreatment of one particular student, and comments related to comp. time. Since none of the therapist's comments were made *both* as a citizen and on a matter of public concern, the court concluded that the district was entitled to summary judgment on the therapist's first amendment claims.

6. **Misuse of Public Funds.** In *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000), the assistant city administrator was terminated soon after speaking privately with one of elected city aldermen to express her concern that another employee was receiving benefits to which she was not entitled. In finding that the speech in question did touch upon a matter of public concern, the court stressed the fact that the administrator's statements implicated her interests as a citizen/taxpayer by alleging the misuse of public funds.

II. PUBLIC EMPLOYEES' RIGHTS TO SPEAK IN THE WORKPLACE AND BEYOND

A. Restrictions on Employees' Speech in the Workplace

1. **Speech during Work Hours.** Employee speech during work time or through the use of employer resources can, in some cases, be considered

an official expression of the employer. In *Garcetti*, the United States Supreme Court found that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." 547 U.S. at 421. The *Garcetti* ruling indicates that when a public employee makes statements pursuant to his or her job duties, the employee is essentially speaking for the employer, and these statements should be differentiated from personal statements that the First Amendment may protect.

2. The principle that speech in the workplace is treated differently is illustrated by a recent case out of Illinois. In *Brown v. Chicago Board of Education*, 824 F.3d 713 (7th Cir. 2016), a teacher took a student's use of the "n-word" in a note passed in class as an opportunity for a "well-intentioned but poorly executed discussion" on civility and derogatory language. The teacher was suspended for five days, and sued the District, claiming that his First Amendment rights were violated. The Court reiterated the principle that the teacher was speaking as an employee rather than as a citizen, and his First Amendment rights were therefore not violated by being disciplined for his speech.

3. A number of circuit courts have held that academic speech and writing that may touch on politics or controversial topics is protected by the First Amendment. In *Demers v. Austin,* 736 F.3d 402 (9th Cir. 2014), a professor sued Washington State University, alleging that negative evaluations and discipline he received were retaliation for an accreditation plan he prepared and a draft chapters of a book. The Ninth Circuit held that *Pickering,* not *Garcetti,* applies to "teaching and writing on academic matters" by publicly-employed teachers, and that the professor's publicly distributed accreditation plan touched on a matter of public concern and was protected by the First Amendment. *See also Adams v. University of North Carolina-Wilmington,* 640 F.3d 550 (4th Cir. 2011)(professor's column criticizing University as religiously intolerant in a conservative publication protected by the First Amendment, even though the professor included the column in his promotion packet). *But see Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012) (head reference librarian at a university was not engaged in academic scholarship or teaching when recommending that a controversial book be assigned to incoming first-year students at Ohio State University.)

B. Speech on Social Media

1. Courts apply the same First Amendment analysis to public employees' speech that occurs online. For instance, in *Graziosi v. City of Greenville*,

775 F.3d 731 (5th Cir. 2015), the Fifth Circuit upheld the termination of a police officer for making statements on Facebook critical of the Police Chief. The posts concerned the Police Chief's decision not to permit officers to drive squad cars to a funeral for a neighboring town's officer who was killed in the line of duty. The officer wrote that if the Chief did not want to lead "he should get the hell out of the way!" The Court held that the employee was speaking as a private citizen but not on a matter of public concern. Instead her posts amounted to an internal grievance, which is not entitled to First Amendment protection. The Court also opined that even if the officer had spoken on a matter of public concern, the Police Department's interest in preserving loyalty and close working relationships and to prevent insubordination outweighed the officer's minimal interest in speaking on the issue. The Court noted that the police departments are afforded wide latitude to discipline or otherwise regulate its employees. This latitude may not extend to the same degree to other public employees, however.

2. A district court in Oregon also applied the principles of *Garcetti* and *Pickering* in *Shepherd v. McGhee*, 986 F. Supp. 2d 1211 (D. Ore. 2013). In that case, a child protective service (CPS) worker posted inflammatory comments about people receiving government assistance and suggested that anyone who has had their parental rights terminated should be sterilized. As part of her duties, the CPS worker could expect to be a witness at hearings in any case she worked on. The State's attorney in parental rights cases believed that the CPS worker's Facebook posts would be discoverable in litigation and that defense counsel would use the posts to show her bias and impeach her credibility. As a result, he would no longer call her to the witness stand. In addition, her posts would create distrust on the part of clients. The court did not rule on whether the CPS worker's online comments touched on a matter of public concern. Even assuming it did, the comments impaired her ability to perform her duties, particularly because she was in a position in direct contact with the public. The Court determined that the employer's interests in the efficacy and efficiency of its workplace outweighed any First Amendment interest the CPS worker had in making the comments.

C. Political Activity by Public Employees

1. Political speech is protected by the First Amendment, including political association such as membership in political parties or groups. *See Minnesota Fifth Congressional Dist. Indep.-Republican Party v. State ex rel. Spannaus*, 295 N.W.2d 650, 652 (Minn. 1980).

2. Political speech includes discussion on candidates for office and issue-based elections, including school referenda. *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 347 (1995)

3. Government actions which inhibit political speech or political association are generally subject to "exacting scrutiny." *McIntyre*, 514 U.S. at 347. In order to be valid, such an action must: (1) further a compelling interest; and (2) be narrowly tailored to achieve that interest." *Id.*; *see also Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 132 S.Ct. 2806, 2817 (2011).

4. **General Rule.** Minnesota Statutes, Section 211B.09 provides that "an employee or official of the state or of a political subdivision *may not use official authority or influence* to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. *A political subdivision may not impose or enforce additional limitations on the political activities of its employees*." (emphasis added).

   a. The law prohibits public employees or board members from using "official authority or influence" to "compel" a person to engage in political activities.

   b. Threats of disciplinary action against other public employees based on their political opinion violate this provision. *See Halvorson v. Nelson*, OAH File No. 4-6301-16282-CV (November 5, 2004).

   c. The Office of Administrative Hearings has found that a teacher's actions of: (1) refusing to permit a student to display a political sign in the classroom; and (2) wearing a political button in class did not violate this statute. *Tast v. Phillips*, OAH File No. 21-6379-16251-CV (October 29, 2004).

   d. Handing out political literature and asking employees if they have voted yet does not rise to the level of "compelling" the employee to take part in political activity. *Lilyquist v. Bernhejelm et al.*, OAH File No. 7-6310-16288-CV (November 10, 2004) (finding that the superintendent's improper urging to support a vote yes campaign may have violated Section 211B.09).

5. In *Morgan v. Robinson*, --- F.3d ----, 2018 WL 670509 (8th Cir. Feb. 2, 2018), the Eighth Circuit addressed First Amendment protections for direct political activity by a public employee. Donald Morgan, a Sheriff's Deputy, ran against Michael Robinson, the elected County Sheriff in a primary election. During the course of the election, Morgan made a number of statements that were critical of his boss' handling of department affairs and the poor morale of the department. After the Sheriff won re-election, the Sheriff terminated Morgan and cited these statements in the disciplinary letter. Morgan won reinstatement through labor arbitration and filed suit against the Sheriff, claiming retaliation. The Eighth Circuit held that the speech was made as private citizen on a matter of public concern, as they were made in the context of a political campaign on topics that were important to the broader community. The Eighth Circuit noted that the Sheriff "made an extremely minimal showing of actual or potential disruption," based on a handful of statements of other officers that the statements created uneasiness. Ultimately, the Court held that the speech was protected by the First Amendment, without using the *Pickering* balancing test.

D. Clothing and Buttons as Speech

1. Some Clothing is Protected Speech

a. In determining whether an article of employee dress is worthy of protection under the free speech clause of the First Amendment, the threshold inquiry is whether the article of dress is a symbol or expresses a particular point of view. *See Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 505 (1969). If the employee is not attempting to express anything of substance by wearing the article of dress, the free speech clause has no application at all. If the clothing is symbolic or expressive speech, it will be analyzed just as other speech would be. T-shirts or other articles of clothing containing written words are almost always considered "speech" within the meaning of the First Amendment.

b. For example, in the teacher's version of *Tinker*, a school district terminated an eleventh grade English teacher for wearing a black armband in protest of the Vietnam War. The district presented no evidence that the armband disrupted class activities. Nor did the armband influence students or lead to protests from any student, teacher, or parent. In the absence of such disruption, the court found that the school district had violated the teacher's First Amendment rights by terminating him for wearing the armband.

James v. Board of Educ. of Central Dist. No. 1, 461 F.2d 566 (2nd Cir. 1972).

2. **Clothing with Political or Union-Related Messages**

a. In *Communication Workers of America v. Ector County Hospital District*, 392 F.3d 733 (5th Cir. 2004), a carpenter employed by the defendant, Urbano Herrera, was disciplined for wearing a "Union Yes" lapel button while at work, in violation of the defendant's dress code policy, which prohibited employees from wearing any pins other than pins representing a professional association or the most current hospital service award. Herrera filed suit against his employer, alleging violation of his right to freedom of speech guaranteed by the First Amendment.

The court concluded that Herrera's pro-union speech was about a "matter of public concern" and that the Hospital's interest in enforcing its dress code was outweighed by Herrera's interest in exercising his First Amendment rights. Further, Herrera's protected speech was a substantial or motivating factor in the Hospital's decision to discipline Herrera, as is evidenced by the fact that Herrera's employer said that if Herrera had removed the pro-union button when asked to do so, he would not have been disciplined. Lastly, the court said that Herrera's clean employment record prior to the protected speech was evidence that he would not have been disciplined if he had not worn the pro-union button.

b. In *Scott v. Meyers*, 191 F.3d 82 (2nd Cir. 1999), the Second Circuit struck down a public employer's policy prohibiting the wearing of any buttons, badges, or other insignia after employees challenged the policy by wearing "Vote No" buttons in opposition to the ratification of the union contract. The court determined that the policy was overbroad and that the employer could not justify the ban based on any danger to the agency's effective functioning. The court did not decide whether union related speech was a "matter of public concern." Instead, the court found that a blanket prohibition on all expressive buttons generally prohibited speech on matters of public concern.

III. OTHER POLITICAL ACTIVITY IN THE WORKPLACE

A. Distribution of Materials on Employer Property.

1. Access to the facilities of a public employer must be administered in a viewpoint-neutral manner.

2. For example, permitting a "Vote Yes" group to use school district facilities for phone bank efforts or to set up a table at parent-teacher conferences, may turn what otherwise would be a non-public forum into a limited public forum. If a school district allows certain speakers or topics into its limited public forum, the district must then give every similarly situated group or individual whose speech is consistent with that topic access to the forum regardless of which viewpoint the group or individual is presenting. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819,829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

3. In other words, if an employer permits one political campaign to use school district facilities, the school district must also give opposing political campaigns equal access to its facilities.

4. This same rule applies to space on bulletin boards and similar forums.

B. Using Employer Resources for Political or Labor Activities

1. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). In the *Perry* case, the United States Supreme Court held that the First Amendment guarantee of free speech applies to a public employer's internal mail system, such as teachers' mailboxes in a public school. In doing so, the Supreme Court identified three types of fora: the traditional public forum, the designated or limited public forum, and the non-public forum. *Id.* at 45-48.

2. A public employer's internal mail system is generally considered to be a non-public forum, absent any evidence that the school district opened the mail system for public discourse. *See Perry*, 460 U.S. at 46. In *Perry*, the exclusive bargaining representative was granted access to teacher mailboxes and the internal mail system while a rival union was denied the same privilege. The Court held that the District's internal mail system was a non-public forum since the intended function was to facilitate internal communication. 460 U.S. at 39. The Court discussed the special relationship and responsibilities an exclusive representative has to its members that warranted the union having special access to the school

district's communications systems. The court found that the access policies of the school focused on a group's status, rather than the viewpoint expressed by the group. Accordingly, this selective access did not transform the mail system into a public forum.

3. *Education Minnesota Lakeville v. Independent School District No. 194*, 341 F.Supp.2d 1070 (D. Minn. 2004). In this case, the Lakeville School District had a policy prohibiting the distribution of campaign material in teachers' mailboxes. Education Minnesota Lakeville ("EML"), the local teacher's union, sought an injunction against the School District asserting that the District policy violated both the First Amendment and PELRA. EML also sought a Court order enjoining the School District from enforcing its campaign material prohibition so that it could distribute pro-John Kerry brochures in teachers' mailboxes.

   The Court declined to grant EML an injunction. In evaluating the union's likelihood of success on the merits, the Federal District Court reviewed the United States Supreme Court finding that the First Amendment's guarantee of free speech applied to teachers' mailboxes. *Perry Educ. Assoc.*, 460 U.S. at 44. Based upon the limited access to the teacher mailboxes in Lakeville to "school related business," the Court found that the mailboxes were a non-public forum. In a non-public forum, access to the forum can be limited based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Corneilus v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799-800 (1985).

   The Court found that the School District's policy was viewpoint neutral in that all political campaign material was prohibited. Moreover, the Court found that avoiding the appearance of political favoritism was a valid justification for limiting speech in a non-public forum. *Id*. Further the Court found that the teachers had alternative avenues for political discussion, including direct mail, internet websites and in-person conversations outside of the Lakeville teachers' mailboxes. For all of these reasons, the Court found the School District's policy did not violate the First Amendment.

C. Minnesota Public Employment Labor Relations Act (PELRA) Chapter 179A

1. Minn. Stat. § 179A.06, subdivision 1, dictates that PELRA does "not affect the right of any public employee or the employee's representative <u>to express or communicate a view, grievance, complaint, or opinion on any matter</u>

related to the conditions or compensation of public employment or their betterment, so long as this is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative."

2. Minn. Stat. § 179A.13: Public employers, their agents and representatives are prohibited from:

> (1) interfering, restraining, or coercing employees in the exercise of the rights guaranteed in [PELRA]
>
> (2) dominating or interfering with the formation, existence, or administration of any employee organization or contributing other support to it;
>
> (3) discriminating in regard to hire or tenure to encourage or discourage membership in an employee organization;
>
> (4) discharging or otherwise discriminating against an employee because the employee has signed or filed an affidavit, petition, or complaint or given information or testimony under [PELRA]
>
> . . . .
>
> (7) distributing or circulating a blacklist of individuals exercising a legal right or of members of a labor organization for the purpose of preventing blacklisted individuals from obtaining or retaining employment;
>
> ***
>
> (12) granting or offering to grant the status of permanent replacement employee to a person for performing bargaining unit work for the employer during a lockout of employees in an employee organization or during a strike authorized by an employee organization that is an exclusive representative.

IV. WHISTLEBLOWING IS PROTECTED REGARDLESS OF THE FIRST AMENDMENT

A. Despite the holdings in cases such as *Garcetti*, the Minnesota Whistleblower Act, Minn. Stat. § 181.932 still protects employees, including public employees, who speak out about certain matters occurring in the workplace. In fact, in *Garcetti*, the court specifically recognized whistleblower statutes as an avenue available to those seeking to expose governmental wrongdoing. 126 S. Ct. at 1962.

B. Employees are protected from adverse employment actions taken because the employee "in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932, subd. 1(1). Employees are similarly protected for participation in "an investigation, hearing, inquiry" when requested by the public body, or the public employee "communicates the findings of a scientific or technical study that the employee, in good faith, believes to be truthful and accurate, including reports to a governmental body or law enforcement official." *Id.*, subd. 1(2), (5).

C. Reports must be made in "good faith"—but "good faith" is defined broadly:

1. Prior to 2013, the Supreme Court of Minnesota stated that "good faith" requires the "putative whistleblower to act with the purpose of exposing an illegality." *Obst v. Microtron. Inc.*, 614 N.W.2d 196, 202 (Minn. 2000).

2. A 2013 amendment defined "good faith" if the employee makes statements or disclosures "knowing that they are false or that they are in reckless disregard of the truth." *See* Minn. Stat. § 181.931, subd. 4; Minn. Stat. § 181.932, subd. 3.

3. In *Friedlander v. Edwards Lifesciences et al.*, 900 N.W.2d 162 (Minn. 2017), the Minnesota Supreme Court found the amendment to the statute eliminated the requirement that the putative whistleblower act with purpose of exposing an illegality. The case involved an employee terminated after communicated an alleged violation of the law to superiors and coworkers. The employer asserted that the report was not "in good faith" because the individuals to whom it was reported were already aware of the allegedly unlawful conduct. The employer relied on *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 227 (Minn. 2010), decided before the 2013 amendments, to assert that "good faith" requires an employee to have made a report "to expose an illegality." The Minnesota Supreme Court held that the 2013 amendments eliminated that requirement. The Court held that a report would be in "good faith" so long the whistleblower did not make it knowing it to be false or in reckless disregard for its truth.

D. The Minnesota Whistleblower Act "does not permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law." Minn. Stat. § 181.932, subd. 5.

V. NO FIRST AMENDMENT RIGHT TO RELEASE GOVERNMENT DATA

A. The interplay between the Minnesota Government Data Practices Act and a public employee's First Amendment rights has never specifically been explored by the Courts. However, "[t]he Supreme Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Eggenberger v. W. Albany Twp.*, 820 F.3d 938, 942 (8th Cir. 2016) (quotation omitted). Rather, controls on the disclosure of data held by public entities is left to the "political forces." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14–15, 98 S. Ct. 2588 (1978).

B. Any person who willfully violates the MGDPA or whose conduct constitutes the knowing unauthorized acquisition of not public data is guilty of a criminal misdemeanor. A willful violation of the MGDPA by any public employee also constitutes just cause for suspension without pay or dismissal of the public employee. Minn. Stat. § 13.09.

C. Under Section 13.08, subdivision 1, a political subdivision is liable to a person who suffers any damages due to a violation of the MGDPA. That liability covers damages sustained, plus costs and reasonable attorneys' fees. *See Navarre v. South Washington County Schools*, 652 N.W.2d 9 (Minn. 2002). A "willful violation" can result in punitive damages of from $1,000.00 to $15,000.00 for each violation.

D. However, for the entity to be liable, the disclosure must have been within the scope of employment. *Walker v. Scott Cty.*, 518 N.W.2d 76, 78–79 (Minn. App. 1994). If the release is for personal reasons, the employee is acting outside of the scope of employment and the public employer is not liable.

E. As set forth in Section 13.055, subdivision 1, "unauthorized acquisition" means that a person has obtained, accessed, or viewed government data without the informed consent of the individuals who are the subjects of the data or statutory authority and with the intent to use the data for nongovernmental purposes. If the data was obtained for personal reasons, it was not obtained with appropriate authority.

F. Recent amendments to the MGDPA require that individuals whose data has been improperly accessed must be informed in writing.