Handling Election Battle Fallouts: Elections Pitting a Public Employee Against the Boss

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This article addresses the potential ramifications of taking adverse actions against public employees because of their political candidacies, examining two common "candidacy-related" claims -- First Amendment retaliation and due process claims.

While all elections have the ability to polarize our communities, the stakes are even greater where an election pits a current public employee versus his or her boss. Indeed, these elections pose unique challenges for local governments, pitting the employee's purported right to seek public office versus the government's interest in preserving order, discipline, and efficiency in the workplace.

In weighing these competing interests, many local governments have chosen to lay-off or discharge public employees seeking political office in the hopes of preventing conflicts in the workplace, misuse of sensitive information, and disruption of operations from these election battles. In turn, public employees have filed a variety of lawsuits against their local government employers, challenging the adverse actions taken against them because of their political candidacies.

We will now examine two of the most common "candidacy-related" claims: (1) First Amendment retaliation claims, and (2) due process claims.

First Amendment Concerns

Challenges to adverse actions taken against public employees based on their decisions to run for public office usually allege violations of one of two types of First Amendment rights: (1) freedom of speech, and (2) freedom of association.

To better understand the specific decisions addressing candidacy-related claims by public employees under the First Amendment, a brief overview of how the Supreme Court has generally dealt with free speech and free association claims in the public employment context is helpful.

A. Overview of Supreme Court's Free Speech and Free Association Decisions In The Public Employment Context

1. Free Speech Claims

It is well-accepted that public employees cannot be subjected to adverse action simply for exercising their constitutional rights. Nevertheless, a public employee's right to freedom of speech is not absolute because "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

In cases where a public employee has suffered an "adverse action" in retaliation for speaking on "a matter of public concern," the Supreme Court has evaluated the constitutionality of the action by applying a balancing test first enunciated in Pickering v. Board of Education, 391 U.S. 563 (1968). As the preceding sentence suggests, before the balancing test is applied, a public employee plaintiff must make two threshold showings:

(1) that he or she suffered an "adverse action," such as a termination, demotion, punitive transfer, refusal to promote, or reprimand. See Rogers v. Miller, 57 F.3d 986, 992 (11th Cir. 1995); Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000); and

(2) that his or her "speech can be fairly characterized as constituting speech on a matter of public concern." McCabe v. Sharrett, 12 F.3d 1558, 1565 n.3 (11th Cir. 1994). Absent extraordinary circumstances, First Amendment protection is unavailable when a "public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest." Connick v. Myers, 461 U.S. 138, 147 (1983).

Once these two threshold requirements are met, the Pickering test requires balancing "the interests of the [employee], 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 thought its employees." 391 U.S. at 568.

In applying the Pickering balancing test, the ultimate question is whether the employee's right to speak is outweighed by the public employer's interest in the effective operation of the workplace. McEvoy v. Spencer, 124 F.3d 92, 98 (2d Cir. 1997).

Factors utilized by courts to assess whether the interests of the government in regulating the speech outweigh the employee's interest, as a citizen, to speak on matters of a public concern include "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." Chesser v. Sparks, 248 F.3d 1117, 1124 (11th Cir. 2001) (internal quotations and citation omitted).

2. Free Association Claims

Free association claims in the public employment context typically involve plaintiffs who allege a government actor took some adverse action against them because of their political beliefs, affiliation, or association with a particular political party.

Since 1976, the United States Supreme Court has steadily expanded First Amendment protection to public employees from adverse action on the basis of partisan politics or political patronage. Specifically, in Elrod v. Burns, the Court held that several Republican non-civil service employees of a sheriff's office could not be discharged for political reasons when a Democrat was elected to replace a Republican sheriff. 427 U.S. 347 (1976). Similarly, in Branti v. Finkel, the Court held that two county public defenders, both members of the Republican party, could not be discharged solely because they were not affiliated with or sponsored by the Democratic party. 445 U.S. 507 (1980).

Pursuant to these decisions, a categorical approach is utilized for determining the parameters of a government actor's right to take adverse action against a public employee on the basis of political affiliation or association. In particular, the relevant inquiry is whether the public employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the" job at issue. Branti, 445 U.S. at 518.

B. First Amendment Candidacy-Related Claims Brought By Public Employees

A growing body of cases exist addressing First Amendment challenges to government actions taken in response to a public employee's decision to run for political office. What can be learned from these decisions is as follows.

1. The Mere Act Of Announcing A Candidacy For Public Office May Not Even Implicate the First Amendment

Although courts throughout the country appear split on the issue, a number of courts, including the Sixth and Seventh Circuits, have held that a public employee's mere announcement of a candidacy does not implicate First Amendment protections.[1] Thus, in certain jurisdictions, an adverse action, such as a lay-off or discharge, in response to a public employee's decision to run for office will not even trigger the employee's First Amendment rights. See Carver v. Dennis, 104 F.3d 847, 848, 850, 853 (6th Cir. 1997) (concluding discharge of deputy clerk because she announced her candidacy to run against her boss in the upcoming election was "neutral in terms of the First Amendment" because discharge was not premised on plaintiff's political beliefs, expression, or affiliations or "based on politics at all," but rather simply "for announcing her intention to take her boss' office") ; Bart v. Telford, 677 F.2d 622, 623-24 (7th Cir. 1982) (rejecting First Amendment claim of city employee who was required to take leave of absence after she announced her intent to run for mayor and noting "the only right specifically alleged [by plaintiff] is the right to run for public office. The First Amendment does not in terms confer a right to run for public office, and this court has held that it does not do so by implication either."); Burelson v. Colbert County-Northwest Healthcare Auth., 221 F. Supp. 2d 1265, 1275 (N.D. Ala. 2002) (announcement of public employee's candidacy to run for County Commission, "standing alone (i.e. with no evidence of partisanship or opposition to [defendant's] candidacy or his platform), does not . . . qualif[y] as protected speech under the First Amendment.").

Note, however, these decisions are limited to situations where the adverse action was prompted solely by the public employee's announcement of his or her candidacy. If evidence exists that something else is involved – such as treating that particular employee different than other employees who have decided to run for office or if the adverse action is taken because of the employee's platform or party affiliation – then even these courts would find the employee's First Amendment rights implicated. See Newcomb v. Brennan, 558 F.2d 825, 828 (7th Cir. 1977) (First Amendment implicated by firing of deputy city attorney after announcement of deputy's candidacy for Congress because the complaint "implicate[d] interests which are broader than a per se right to candidacy. . . . . Instead, it is a case where the plaintiff's candidacy was burdened because a state official wished to discourage that candidacy in particular.") (emphasis added); cf. Carver, 104 F.3d at 850 ("[T]he plaintiff's complaint does not allege, nor does the record contain any evidence whatsoever, that she lost her position because of her political beliefs. The complaint alleges and the record demonstrated only that [the defendant] fired her because of her rival candidacy, which is a different matter. The constitutionality of dismissing [plaintiff], a government employee, for her political beliefs, her expression of those

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[1] The issue does not appear to have been addressed by the Eleventh Circuit.

beliefs, or her political affiliations is not before us."); Bart, 677 F.2d at 624 ("something more than [a restriction on candidacy] ha[s] to be shown to bring the First Amendment into play"; "so long as there is there is no allegation . . . that [the defendant] singled [plaintiff] out because he did not like her views" or "that he would have let another employee in her position to continue on the job while running for mayor" the restriction was neutral in terms of the First Amendment).

As indicated above, the rule that mere announcement of a candidacy does not implicate the First Amendment has not been uniformly adopted by the courts. Specifically, a number of courts, including the Middle District of Georgia, have determined that a public employee's announcement of a candidacy constitutes speech on a matter of public concern, thereby giving rise to a viable free speech claim under the First Amendment. These courts, therefore, have applied the Pickering balancing test to assess whether the employee's First Amendment rights have, in fact, been violated. See Kent v. Martin, 252 F.3d 1141, 1144 (10th Cir. 2001) ("an employee's candidacy for political office undoubtedly relates to matters of public concern") (internal quotations omitted); Click v. Copeland, 970 F.2d 106 (5th Cir. 1992) (sheriff deputies' conduct in running for sheriff addressed matters of public concern); Deemer v. Decatur County Recorder's Office, 110 F. Supp. 2d 1177, 1181 (S.D. Iowa 1999) (deputy county recorder's announcement of candidacy for county recorder position addressed a matter of public concern); Zellner v. Ham, 735 F. Supp. 1052, 1054 (M.D. Ga. 1990) (Monroe County deputy clerk's announcement of her intent to run against the incumbent in upcoming election addressed a matter of public concern); compare Wilbur v. Mahan, 3 F.3d 214, 215, 217-19 (7th Cir. 1993) (analyzing sheriff's policy of requiring employee who runs for sheriff to be placed on administrative leave as "hybrid" issue implicating free speech and free association concerns and upholding policy insofar as it applied to employees holding confidential or policymaking positions given "the effects on the operations of government of forcing a public official to . . . retain, in a confidential or policymaking job, persons who are not his political friends and may be his political enemies.").

2. Even Where First Amendment Rights Are Implicated By The Public Employee's Candidacy, A Discharge Or Lay-Off Because Of That Candidacy Will Not Violate The First Amendment If It Would Further The Efficient Workings Of Government

As discussed above, courts are split as to whether the mere act of running for office implicates First Amendment protections. In any event, even where First Amendment protections are triggered by the public employee's candidacy or other related conduct, the public employer's actions in firing or laying-off the public employee in response thereto have been commonly upheld. In these situations, courts have typically applied the Pickering balancing test and concluded the government's interest in efficient workplace operations outweighs the employees' right to speech.[2]

In reaching this conclusion, the courts have focused on a number of factors, including: (1) the size of the office in which the public employee candidate works, see Warren v. Gaston, 55 F. Supp. 2d 1230, 1236 (D. Kans. 1999) (even assuming employee of clerk's office had First Amendment right to run for clerk position, termination did not violate the First Amendment because "the county's interest in avoiding conflict in the small-office environment of the clerk's office" outweighed employee's protected interest in her candidacy);

(2) whether the public employee candidate holds a position of trust and confidence to the incumbent, see Wilbur, 3 F.3d at 218 ("If . . . the candidate occupies a confidential or policymaking position under the boss, the political enmity that the candidacy is certain to engender entitles the boss to fire him."); Zellner, 735 F. Supp. at 1055 (discharge due to candidacy upheld where the employee running for office "had access to all of the papers and records for which her employer was responsible.");

(3) whether the public employee candidate is running for a position in which he or she would replace or become superior to his or her current supervisor, see Bart, 677 F.2d at 624-25 ("Discipline is impossible to maintain when a subordinate is running for a position in which he would be the boss of his present superiors, so it is reasonable to ask him to take a leave of absence during the campaign. . . . . The impairment of free speech brought about by the leave-of-absence requirement is indirect and probably very slight; the benefits in preserving order, discipline, and efficiency in public employment strike us as much greater than the cost to First Amendment interests."); and

(4) the nature of the relationship between the public employee candidate and the incumbent and the degree of contact they have with one another, see Zellner, 735 F. Supp. at 1056 ("Due to the close working relationship between plaintiff and defendant, and the great potential for actual or threatened disruption of the fulfillment of the responsibilities and duties of the office of clerk, the court finds that the defendant employer was justified in terminating the plaintiff employee who was challenging her for the position currently held by the defendant."); Deemer v. Decatur County Recorder's Office, 110 F. Supp. 2d 1177, 1178 (S.D. Iowa 1999), aff'd, 230 F.3d 1362 (8th Cir. 2000) ("The county recorder cannot be forced to retain a deputy recorder vying for her job, especially one whom she thought was her best friend. The lack of trust between the employees would clearly impede the efficient performance of duties in the recorder's office.").

Another significant factor considered by the courts in determining the validity of a discharge or lay-off because of a candidacy is the timing of the adverse action. For example, in Kent v. Martin, the plaintiff, a deputy clerk, was fired six months after her unsuccessful campaign to unseat the incumbent as the county clerk. 252 F.3d 1141, 1142 (10th Cir. 2001). In considering the deputy's claim under the First Amendment, the United States Court of Appeals for the Tenth Circuit distinguished situations where a public employee is discharged shortly after the announcement of his or her candidacy versus situations where the discharge occurs several months after the candidacy is announced. Specifically, in the former situation, the public employer merely has to come forward with "evidence of a prediction of disruption" to substantiate its interest in maintaining an efficient workplace under the Pickering balancing test; however, in the latter scenario, the public employer will have to make a greater showing of "actual disruption" by the employee to outweigh the employee's interest in his or her speech under Pickering. See id. at 1144-45.

Finally, that courts have commonly upheld the discharge or lay-off of a public employee as a result of the employee's candidacy does not mean the government can take any and all retaliatory acts against the employee because of the candidacy. In Wallace v. Benware, the United States Court of Appeals for the Seventh Circuit held that while the elected county sheriff could, without violating the First Amendment, discharge or demote the deputy who ran against him, the sheriff could not retain the deputy but engage in retaliatory harassment against him because of that candidacy. 67 F.3d 655, 661 (7th Cir. 1995). Indeed, such retaliatory harassment obviously could not be viewed as promoting efficient and effective government, and it would make little sense to permit the government to perpetrate such disruptive conduct. See id. at 662 ("Although we presume that a deputy's dismissal is aimed at serving the public interest in efficient and effective government, it would be illogical to apply the same presumption to harassment designed specifically to hinder or disrupt a deputy in performance of his duties.").

3. An Adverse Employment Action In Response To A Candidacy Will Be Upheld If The Government Would Have Taken The Same Action Regardless Of The Candidacy

Governments possess an affirmative defense to First Amendment claims whenever they can demonstrate they would have taken the same action regardless of the plaintiffs' constitutionally protected conduct. In particular, pursuant to this "mixed motive" defense, even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability if it can show by a preponderance of the evidence that it would have made the same decision absent the forbidden consideration. See Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 278 (1977); McCabe v. Sharrett, 12 F.3d 1558, 1565 n.5 (11th Cir. 1994).

Thus, for example, even if a public employee is able to demonstrate that his or candidacy or related conduct was a substantial or motivating factor for the challenged action and even if the challenged action would be otherwise impermissible, the government will nonetheless prevail if it can show that it would have taken the same action even absent the public employee's candidacy, such as because of the public employee's insubordination. See Click, 970 F.2d at (while "balancing clearly tip[ped] in favor of the plaintiffs" [two sheriff's deputies] on claim they were transferred to less desirable positions because of their decision to run for sheriff, government could nevertheless avoid liability if it could show it would have transferred plaintiffs regardless of their candidacy).

Due Process Concerns

Public employees also may challenge adverse actions taken against them because of their candidacies based on the Due Process Clause of the Fourteenth Amendment.

In these situations, public employees will likely assert they have a protected property interest in their employment, and thus they cannot be discharged, laid-off, or be subjected to other adverse employment actions without being afforded due process.

While the Due Process Clause provides two different kinds of constitutional protection – substantive due process and procedural due process – case law makes clear that challenges to adverse employment actions implicate only procedural due process concerns. See McKinney v. Pate, 20 F.3d 1550,1556 (11th Cir. 1994) ("areas in which substantive rights are created only by state law (as is the case with tort and employment law) are not subject to substantive due process protection"); id. at 1560 ("[I]n non-legislative cases, only procedural due process claims are available to pretextually terminated employees."). Thus, due process challenges to adverse employment actions stemming from a public employee's candidacy will be based on procedural due process.

Assessing a public employee's procedural due process claim requires a two-step inquiry. First, it must be determined whether due process even applies. And if so, it must then be determined whether the public employee was afforded adequate procedural safeguards before his or her rights were infringed. See Morrisey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

In regard to the first step, a public employee must show he or she has a protected property interest in his or her employment. See Brett v. Jefferson County, 123 F.3d 1429, 1433 (11th Cir. 1997). "State law determines whether a public employee has a protected property interest in his or her job." Warren v. Crawford, 927 F.2d 559, 562 (11th Cir. 1991).

Under Georgia law, "a public employee generally has no protected property right in such employment." Id. An exception exists, however, if the public employee can only be terminated for cause, such as where he or she is employed under a civil service system. See Brett, 123 F.3d at 1434; Warren, 927 F.2d at 562. To determine whether an employee is terminable at will or only for cause, courts will look at the totality of circumstances, including the employer's written personnel policy, the parties' expectations, and any employment contract. See Declue v. City of Clayton, 246 Ga. App. 487, 489 (2000). Notably, "[t]he issue is not dependent upon the presence of the specific words `for cause' in the employer's written personnel policies [or in the employment contract], as long as whatever provisions apply are meant to be analogous to allowing termination only for cause." Id.

If a public employee has a protected property interest in his or her employment, the second step of the procedural due process inquiry analyzes whether the employee was afforded adequate procedural safeguards before he or she was deprived of his or her property rights. Generally speaking, such adequate protection constitutes notice and an opportunity to be heard. Significantly, the Supreme Court has held that property interests may be revoked without a pre-deprivation hearing where there is an adequate post-deprivation procedure in place to ensure the plaintiff's interests were adequately protected. See Gilbert v. Homar, 520 U.S. 924, 930 (1997) ("This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause.").

Conclusion

Elections pitting a current public employee versus his or her boss have the potential to cause great disruption to local governments. As such, local government employers have routinely laid-off and discharged public employees running for political office in the hopes of preventing conflicts in the workplace, misuse of sensitive information, and disruption of operations from these election battles.

Courts have commonly upheld these government actions in the face of First Amendment challenges where the local government has made some showing that the actions further its interest in efficient workplace operations. Likewise, adverse employment actions will withstand procedural due process challenges where the public employee is terminable at will, or – if the public employee can only be terminated for cause – adequate notice and a hearing are provided.

[1] Notably, it is the government's burden to justify its actions under Pickering. See Morales v. Stierheim, 848 F.32d 1145, 1148 n.4 (11th Cir. 1988). Thus, the balancing will tip in the public employee's favor where the government has not shown its actions further efficient workplace

operations. See, e.g., Click v. Copeland, 970 F.2d 106, 112 (5^{th} Cir. 1992) (Pickering balancing weighed in favor of two sheriff's deputies who sued sheriff and county because they were transferred to less desirable positions after they announced their candidacy for sheriff where sheriff "did not argue . . . that [the deputies'] political candidacies had any effect on their performance, on others' performance, on discipline, . . . on harmony among co-workers [or] claimed any disruption at all.").