

September 1, 2011

Dear Client:

As part of our commitment to provide you with a legal resource that can offer cogent day-to-day advice and clear strategies for a secure future, we offer our pledge to also be your partner in information. We recognize the need for you to be immediately responsive to the changing requirements of the law, government regulations, and community needs. As such, our office will prepare *Action Papers* in response to the ever-changing laws and regulations affecting public education. Receipt of an Action Paper is an indication that your School District may want to consider changing a practice or policy. It also may indicate that your District is required by law to initiate or discontinue a practice or policy.

RE: PUBLIC EMPLOYMENT-FIRST AMENDMENT

On June 20, 2011 the United States Supreme court decided Borough of Duryea v. Guarnieri, No. 09-1476, holding that a government employer's allegedly retaliatory action against an employee does not give rise to liability under the Petition Clause of the First Amendment unless the employee's petition relates to a matter of public concern.

"The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." The Petition Clause provides that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances".

The Borough of Duryea, Pennsylvania fired its police chief who then filed a union grievance and was reinstated. The Borough then gave directives to the police chief regarding his job duties, which led to him filing another grievance. The arbitrator for the second grievance

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ordered that some of the directives be modified or withdrawn. The chief of police then filed suit under 42 U.S.C. §1983 against the borough, its council and some individual council members, alleging that his first union grievance was a petition protected by the Petition Clause of the First Amendment, and he alleged that the directives issued upon his reinstatement were retaliation for that protected activity.

The district court instructed the jury that the suit and grievance were constitutionally protected activity. A jury awarded him almost \$100,000 in compensatory and punitive damages, and the district court awarded \$45,000.00 in attorney's fees. On appeal, the Third Circuit affirmed, concluding that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern."

The Supreme Court granted certiorari to resolve a conflict in the Courts of Appeals, and vacated and remanded the decision of the Third Circuit. In its prior cases, the Supreme Court has established that when a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern. If it is a matter of private concern, the courts must balance the First Amendment interest of the employee against the state's public interest, as an employer, in promoting the efficiency of the public services it performs through its employees.

In this case, the Supreme Court held that the Third Circuit was incorrect in its conclusion that the Petition Clause claims are not limited to matters of public concern. The Court held that the framework, used to govern Speech clause claims by public employees would be applied to the Petition Clause, thereby protecting both the interest of the government and the First Amendment rights. "The right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process, it is not a right to transform everyday employment disputes into matters for constitutional litigation in federal courts."

This case has solidified the requirement for a public employee's speech claim to rise to liability it must be speech on a matter of public concern and not just a private grievance.

Should you have any questions, please feel free to contact our office.

Best regards,

ANDREWS & PRICE

