# COPS HAVE THE RIGHT OF FREE SPEECH, BUT NEED TO BE SMART ABOUT IT

*By Matthew A. Peluso, Esq.*

*"People demand freedom of speech as a compensation for the freedom of thought which they seldom use."*
*~ Soren Kierkegaard*

With the recent dispute between the acting police chief and the Bloomfield town council, the issue of a law enforcement officer's right to free speech is first-page news in Jersey. Because of their training and, in many cases, overly restrictive and even unlawful internal policies imposed by their employers, many law enforcement officers wrongfully believe that they cannot exercise their constitutional right of free speech at all. However, as the great Danish philosopher observed long ago, it is important that law enforcement officers think first, and then speak.

The protections of the Free Speech Clause of the First Amendment extend to all citizens. The First Amendment has been made applicable to the states by the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). New Jersey courts rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution, art. I, ¶ 6. *Horizon Health Cir. v. Felicissimo*, 263 N.J.Super. 200, 214 (App. Div. 1993).

Government employees, including law enforcement officers, do not enjoy the same freedom of speech as members of the general public. *Davis v. New Jersey Dept. of Law and Public Safety, Division of State Police*, 327 N.J.Super. 59 (Ch. Div. 1999). Government has a special authority to proscribe speech of its employees. Id. Government "may impose restraints on the job-related speech of public employees that would plainly be unconstitutional if applied to the public at large." *United States v. National Treasury Employees Union ("NTEU")*, 531 U.S. 454 (1995).

Courts in New Jersey have concluded that a public employer has legitimate concerns regarding unauthorized employee communications with the press based upon interests such as: "(1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to limit conduct that impedes the public employee's proper and competent performance of his duties; and (4) the need to encourage close and personal relationships between employees and their superiors." *Hall v. Mayor and Director of Public Safety in the Twp. Of Pennsauken,* 176 N.J.Super. 229, 232 (App. Div. 1980).

However, neither the federal government, nor any municipal, county or state agency can impose an employment regulation, policy or procedure that places an unjustifiable prior restraint on the freedom of speech of law enforcement officers. A citizen's interest in commenting on matters of public concern go to the core of freedoms protected by the First Amendment. *Roth v. United States*, 354 U.S 476 (1957). Thus, even public employees do not relinquish their First Amendment rights just by accepting public employment. As the U.S. Supreme Court ruled: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Such injury may arise where free speech is "either threatened or in fact being impaired at the time the relief [is] sought." *Id.*

Speech on public issues has traditionally occupied "the highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Speech relating to public concerns is to be contrasted with speech as an employee upon matters only of personal interest. *Id.* at 147. Only when the speech is determined to be of "public concern" and, therefore, constitutionally protected, will a court engage in balancing and inquire into whether the interests of the employees and the public, on the one hand, are outweighed by those of the government, on the other. *Pickering v. Bd. of Education,* 391 U.S. 563, 568 (1968). If the alleged speech does not involve a matter of public concern, the First Amendment does not protect the employee from employer discipline or permit the constitutionalization of otherwise private grievances. *Garcetti v. Ceballos,* 547 U.S. 401, 418 (2006).

"A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Garcetti, supra,* at 418. If a public interest or concern is established, then a court must balance the employee's interest in free speech against the "government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick, supra*, at 150.

A government agency has a heavy burden of proof when an internal policy applies to a broad category of speech applicable to a large number of employees, rather

than a more narrow restriction taken in the context of discipline, i.e., a ban that "chills potential speech before it happens." *Davis, supra*, quoting NTEU. When such a regulation is challenged, "[t]he government must show 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." *NTEU*, citing *Pickering* at 571.

When presented with alleged restrictions on the free speech of public employees, courts in this state must "arrive at a balance between the interests of the [employee] as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra*. In balancing employee and employer interests in this context, courts must consider not only the content of the speech, but also the "manner, time, and place in which it is delivered." *Connick, supra*, at 152.

In *Davis, supra,* African-American New Jersey State Troopers brought a lawsuit alleging racial discrimination and harassment. The lawsuit coincided with news coverage and public interest in allegations of racial profiling of African-Americans by the New Jersey State Police being used by the agency in the 1990s. During the pendency of the lawsuit, the officers were obtaining requests to give interviews to the press about the relationship between their allegations and the complaints of racial profiling. However, an internal State Police policy prohibited them from commenting publicly without first getting permission from supervisory personnel. *Id.*

In evaluating the content of the disputed speech, courts have recognized that certain subjects, such as racial discrimination, are inherently of public concern. *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988). Because the officers' proposed speech sought to voice civil rights concerns over certain questionable practices and activities of the State Police, the court in *Davis* found that their opinions were of considerable importance to the public.

Consequently, the court in *Davis* found that the internal policy's requirement of advance notice and pre-approval under a threat of professional discipline "raised the danger of self-censorship among State Police employees" and, thus, threatened the free exercise of their First Amendment rights. "Vigilance is necessary to ensure that public employers do not use their power over employees to silence discourse, "not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Id.*, quoting *Harman v. City of New York,* 140 F.3d 111, 118 (2d Cir. 1998).

A similar conclusion was more recently reached in In *re Disciplinary Action Against Gonzalez*, 405 N.J.Super. 336 (App.Div. 2009). In that case, a Detective employed by the Waterfront Commission of New York Harbor appealed a civil service determination that he had violated the Commission's Media and Public Relations Policy by contacting a reporter at NBC-TV to inform him of an allegedly unsafe and hazardous condition at his place of employment. *Id.* at 340. On appeal, Gonzalez argued that the Commissions' Media Policy was facially unconstitutional, and that the discipline imposed on him, based upon that policy, was unlawful. Gonzalez, who was President of the local Detectives Endowment Association, also argued that his conduct was constituted protected union activity for which he could not be disciplined. *Id.*

In deciding in favor of Gonzalez, the New Jersey Appellate Division ruled that he had not been speaking just "as an employee upon matters only of personal interest," but rather as a citizen on a matter of public concern. *Id.* at 351. Therefore, the court concluded that the Commission's media policy was overly-broad, and unconstitutional on its face because it did not provide "narrow, objective and definite standards." *Id.* The disciplinary sanction imposed on Gonzalez was consequently vacated, and he was reimbursement his lost wages, with interest.

As an attorney for law enforcement officers, I know that many members of the professional want to speak out about issues and problems that they confront on a daily basis. However, the determination of whether free speech is protected under the First Amendment or, instead, a violation of an employer's internal policy is often difficult even for experienced constitutional lawyers. Therefore, in order to avoid potentially serious disciplinary action, law enforcement officers should not attempt to unilaterally make any such decision without first contacting an attorney. By exercising some initial thought and self-restraint before publicly commenting on an issue, law enforcement officers can potentially avoid serious negative employment consequences.

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