Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

Management Rights Newsletter

A Labor Relations newsletter for our clients designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

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The RWGM Newsletter is published every quarter. All past and present Newsletters are available on our website at http://rwgmlaw.com/news/labor-newsletters/

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HAPPY HEALTHY NEW YEAR WISHES TO ALL!

EMPLOYEE FACEBOOK POSTS AND PROTECTED UNION SPEECH

Can a public entity discipline employees for speech posted on Facebook criticizing the Municipal Legislative body? More specifically, can discipline be applied when the statements made by the Union officers fall into the following three categories: a) improperly compensating road patrol deputies; b) insufficiently staffing the road patrol; and c) failing to reach a contract agreement with the road patrol deputies union? For the reasons set forth below, it is likely that the comments at-issue would be deemed speech protected by the First Amendment and, therefore, the employees could not be disciplined for these comments.

The question of when an employee may be subject to discipline for posting material on websites involves consideration of whether the content is protected speech under the First Amendment, and if not, whether there is actual or potential detrimental impact upon the workplace as a result of the employee's speech. The U.S. Supreme Court has held that where a public employee is speaking as an employee, he may be disciplined for the content of his speech. First, it must be determined "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 employee spoke as a citizen on a matter of public concern, then the analysis must proceed to the second step. The second step requires a determination as to "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Essentially, this requires an examination of whether the speech affects the employer's operations.

Determining whether an individual is speaking in their role as an employee or as a public citizen is not as simple as determining whether the speech took place on or off duty. As one court has recently stated: "the key inquiry is whether the statements were

made by plaintiff in her role as a disgruntled employee or her role as a concerned citizen." Courts "focus[] on the subject, manner, and context of the speech to determine whether it relates to topics that are indispensable prerequisites to effective performance of the speaker's primary employment responsibility..." Simply because an employee is speaking about their job duties, or information related to their job, does not automatically mean that the speech is made as an employee rather than a citizen. The Supreme Court has repeatedly recognized that "government employees are often in the best position to know what ails the agencies for which they work" and "public debate may gain much from their informed opinions." Therefore, speech by public employees related to their job duties, but not essential or integral to their job duties, is protected by the First Amendment.

It is somewhat difficult to classify speech related to terms and conditions of employment as either being made as an employee or a citizen. As noted by the Second Circuit, "[w]hile such speech is not made pursuant to duties imposed by the employer, such speech is made pursuant to duties that arise from the employment relationship between management and the union membership—the duty of union officers is to represent the membership in advocacy and negotiation as to the terms and conditions of employment." That said, the Supreme Court has clarified that "[t]he critical question … is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

The New York Court of Appeals weighed in and determined that employee speech deals with a matter of public concern when "it can be fairly considered as relating to any matter of political, social or other concern" or when "it is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public." Speech on a matter of public concern includes "information that enables members of society to make informed decisions about the operations of their government," and "important issues of Police Department policy."

A scenario to consider: Union and a Municipality are in negotiations. Impasse has been declared and although the parties are still talking, the Union President turns to Facebook to air his thoughts.

The "speech" is couched in terms that suggest the intent is to address perceived public safety concerns, and to bring the greater public's attention to perceived issues within the Sheriff's Office which affect them as citizens. Although certainly some of the "speech" can be characterized as personal grievances about the officer's own employment conditions, it ties these concerns to public safety and the expenditure of public funds. These topics are arguably related to more generalized matters of public concern.

Speech related to a person's employment may also be protected "union speech." However, not all union-related activity is a matter of public concern. The Second Circuit has held that "[l]abor versus management disputes, needless to say, almost invariably involve a conflict between the labor force and management over an issue that concerns the terms and conditions of employment. Such disputes often have a strong flavor of 'personal grievance' notwithstanding that the personal grievance is shared by numerous employees." The court went on to provide examples of labor-management disputes that would, in contrast, touch on matters of public concern, including "the delivery of services to the public…" Also in this category is the expense of public funds. These latter categories would be deemed matters of public concern and are protected by the First Amendment.

EMPLOYER INSTALLATION OF SECURITY CAMERAS

There is some conflicting PERB precedent on the issue of the installation of security/surveillance cameras in employee work areas. The most recent decision on the issue is the 2012 decision in Nanuet Union Free School District, 45 PERB ¶ 3007. Though the Board reached its decision on other grounds, it concluded that "in general, the decision by an employer to engage in videotape surveillance of a workplace for monitoring and investigating employees is mandatorily negotiable because it bears a direct and significant relationship to working conditions, it requires employees to be video-surveillance participants, and it intrudes upon employee interests including job security, privacy and personal reputation." This conclusion appears to be distinct from the question of whether the information is actually used for disciplinary purposes.

Whether a particular use of surveillance cameras is mandatory negotiable requires a fact specific weighing of the employer's and employees' interests. The factors to be considered include the nature of the workplace and the employer's core mission. The Board noted that the use of surveillance in a correctional facility, for example, would be integral to the employer's core mission and thus nonmandatory, so long as the videotaping is "necessary and proportional for meeting that mission." The Board will consider the scope and length of the videotaping and the availability of the images to third parties.

Prior to Nanuet, the leading case was City of Syracuse, 14 PERB ¶ 4645 (1981), in which the ALJ held that the installation of security cameras was a matter of "management prerogative," and did not become negotiable until the employee was required to participate in their use.

However, ALJs had declined to follow City of Syracuse in recent years, even prior to Nanuet. *See*, Town of Clarkstown, 44 PERB ¶ 4625 (2011) (finding the installation of video cameras in an employee work area for the purpose of monitoring employee conduct was mandatorily negotiable).

Based on Nanuet, the use of cameras would be the subject of mandatory bargaining if the video is to be used solely for monitoring employees; if there is continuous recording, retrievable for an indefinite period; if there are multiple cameras throughout the work area, rather than one at the entrance to record a trespasser, etc. This would be particularly true if the tapes could be reviewed at a later date to support a discipline.

REASONABLE ACCOMMODATION – NO OVERTIME

A City Police Dispatcher requests a reasonable accommodation. The employee, recently returned from full-time leave, has indicated that she can work her normal eight-hour shift, but is medically unable to work in excess of eight-hours. Essentially, she has requested that she not be required to work any overtime as a reasonable accommodation for her disability.

Whether this is an accommodation that the City is required to consider will depend on how frequently and consistently employees in this position are required to work overtime. If it is required regularly and consistently to the point that it is essential to the job that employees be available and able to perform overtime, then the City is not required to eliminate overtime as a reasonable accommodation. However, if the performance of overtime work does not rise to the level of an essential function, the accommodation request is reasonable. If overtime is deemed an essential function, the City should consider whether there is another position or shift for which the employee is qualified that does not require overtime in excess of eight hours per day.

To establish a *prima facie* reasonable accommodation claim, a plaintiff must allege that "with reasonable accommodation, plaintiff could perform the essential functions of the job at issue . . . and . . . the employer has refused to make such accommodations." Rodal v. Anesthesia Grp. Of Onondaga, P.C., 369 F.3d 113, 118 (2nd Cir 2004.) Although the Americans with Disability Act ("ADA") does not provide a definition for what qualifies as a "reasonable accommodation," the ADA regulations set out a nonexclusive list of different methods of accommodation. "Reasonable accommodations may include job restructuring, part-time or modified work schedules, or reassignment to a vacant position." 29 C.F.R. 1630.2(o)(2)(ii). The issue here will, therefore, turn on whether the performance of overtime is an essential function.

The term essential function means the "fundamental job duties of the employment position that the individual with a disability holds or desires . . . [it] does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). Factors to consider include: "(i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs." 29 C.F.R. § 1630.2(n)(3). The ADA specifies that "consideration shall be given to the employer's judgment as to what functions of a job are essential." 42 U.S.C. § 12111. However, courts have held that the employer's opinion does not need to be "blindly yielded to," and other factors should be considered as well. *See, i.e.*, Lewis v. Livingston County Ctr., 30 F. Supp. 3d 196 (WDNY 2014). These determinations must be made on a case by case basis. Wernick v. Fed. Reserve Bank, 91 F.3d 379, 385 (2d Cir. 1996.) Therefore, "the identification of the essential functions of a job requires a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." Id. at 140.

In cases involving a request for accommodation to limit or eliminate overtime, courts look also to whether the employer actually requires all employees in that position to perform the allegedly essential function. Id. In Lewis, the court declined to find that working overtime was an essential function even where the employer had a written policy stating that "it is understood that employees who cannot work overtime for a prolonged period of time cannot perform their job duties." Id. In other cases, courts have found that overtime was not an essential function, even when a policy states it is required, where exceptions to overtime requirements have been made on case-by-case bases in the past. Ward v. District of Columbia, 211 F.Supp. 3d 58 (D.D.C. 2016) In contrast, a court found that overtime was an essential function where the employer showed that working overtime was required of the employee in the past and of other employees in the position on a regular basis. Zaborowski v. Sealright Co., 2002 U.S. Dist. LEXIS 12396 (N.D.N.Y. July 9, 2002.) Another court found that overtime was an essential function for dispatchers based on the fact that dispatchers were required to work three to four overtime days a month, and the employer's attendance guidelines stated that those employees were subject to mandated overtime. McNeil v. Union Pac. R.R., 2019 Dist. LEXIS 85250 (W.D.N.E. May 21, 2018), *aff'd* 2019 U.S. App. LEXIS 25529 (8th Cir., August 26, 2019.)

CHANGE IN SICK LEAVE USE POLICY: DUTY TO BARGAIN

The Rochester Psychiatric Center (the "Center") (a public entity under NYS jurisdiction), and PEF are parties to a Collective Bargaining Agreement which, among other things, contained no explicit sick leave use language; however, since 1982, the Center had a policy ("past practice") which held that employees were not routinely required to submit a medical certificate for absences from work due to injury or illness. The policy had several exceptions under which "Management will require" medical proof to

support an absence. In 2012, the Center's Director of Nursing issued an email to the nursing staff that based on the needs of patients and the occurrence by staff of last minute call-outs from work, the policy was going to change so that "last minute call [outs] will require documentation supporting the [rationale] for the absence."

PEF filed an improper practice charge claiming a failure to bargain in good faith over a mandatory subject of bargaining. PERB agreed and the Center, represented by NYS, appealed all the way to the Appellate Division. The Court affirmed PERB's ruling:

> It is well settled that sick leave is a mandatory subject of negotiation. It is likewise well established that the procedures and policies for granting or terminating sick leave are mandatory. [citation omitted]
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> …the record reveals that since 1982 it was not the policy … to routinely require … [submission of] a doctor's certificate for each unscheduled absence … [T]he new restrictions presented an altered policy from the one that had been consistently applied uninterrupted for at least 30 years … [S]ubstantial evidence supports PERB's determination that a past practice existed and that [the Center] engaged in an improper practice by failing to engage in collective bargaining prior to any change.

Matter of State of New York v. NYS PERB, et al. (176 AD3d 1460 (3rd Dept. 2019))

NEW YORK STATE ENACTS PROHIBITION ON DISCRIMINATION/RETALIATION BASED ON REPRODUCTIVE HEALTH DECISIONS

New York State law has been amended to add protections for employees regarding their reproductive health decisions. The new law which became fully effective January 7, 2020, prohibits an employer from:

- Accessing an employee's personal information regarding the reproductive health decision(s) of the employee or the employee's dependents;
- Discriminating or taking retaliatory personnel action against an employee on the basis of the reproductive health decision(s) of the employee or employee's dependent(s);
- Requiring an employee to sign a waiver denying the employee the right to make their own reproductive health decision(s);
- Retaliating against an employee for exercising their rights under this statute.

Reproductive health decisions include things such as the decision to use or access a particular drug, device, or medical service related to reproduction or reproductive health. **The law includes a provision which states that employers with employee handbooks must include notice of the "rights and remedies" under the new law in these handbooks.**

An employee may bring a civil action in court for alleged violations of the law, and remedies may include back pay, benefits, attorneys' fees, injunctive relief, and liquidated damages (up to 100% of the actual damages), in certain circumstances.

The Legislative Memo accompanying the bill notes that after the Affordable Care Act was amended to require health insurance plans to cover birth control without out-of-pocket costs, some public sector employers made attempts to prevent employees from accessing the benefit. This law is intended to prohibit and provide a remedy for such activity. Although the Legislative Memo's "justification" suggests that the new law is aimed at private sector employers, the statute does not include a definition of "employer," nor does it indicate specifically that public sector employers are not covered. We recommend compliance, nevertheless.

As of now, the NYS Department of Labor has not issued any guidance on what specifically should be included in the notice in employee handbooks. At the very least, employers with employee handbooks should amend these documents to include reproductive health decisions as a protected category, stating that discrimination or retaliation based on these decisions of the employee or employee's dependent(s) is prohibited, and that medical records will remain confidential (if not already stated therein.)

NEW U.S. DOL RULE INCREASES EMPLOYEE ELIGIBILITY FOR OVERTIME

The U.S. Department of Labor ("DOL") has enacted new overtime rules that will increase the number of employees who may be eligible for overtime under the professional, administrative, and executive exemptions (known as the "white collar" exemptions), as well as under the "highly compensated employees" exemption.

Effective January 1, 2020, the salary level for the "white collar" exemptions is increased from $455/week ($23,660/year) to $684/week ($35,568/year). Employees must be paid on a salary basis, earn above this threshold, *and* perform duties which qualify as either administrative, executive, or professional in order to be exempt from overtime under this exemption.

Additionally, the total compensation requirement to qualify as a "highly compensated employee" is increased from $100,000/year to $107,432/year.

The new rule also allows employers to count non-discretionary bonuses and incentive payments (including commissions) paid regularly toward satisfying up to 10% of the salary level requirement.

The DOL proposed the new rule last year (as discussed in our Spring 2019 Newsletter.) The salary levels actually adopted are slightly lower than those proposed. As noted in that article, employees earning less than the new $35,568 threshold will very likely be eligible for overtime, regardless of their duties.
Employers must review their salary schedules to ensure that any changes in overtime eligibility are identified and the necessary payroll changes made to ensure the proper payments are made. Employers may wish to notify employees whose status has changed, although this is not required.

Please contact the firm with any questions regarding the implementation of this new rule.

CONGRATULATIONS

Join us in congratulating Senior Associate Elena Pablo on her recent marriage. We wish her many years of happiness and wedded bliss!