

First Amendment Rights in the Workplace: Restrictions on Limiting Speech

Presented by :

Michael J. Rose, Esq.
Rose Kallor, LLP

Assisted by :

Taylor J. LaPira, Esq.
Robert J. Schroeder

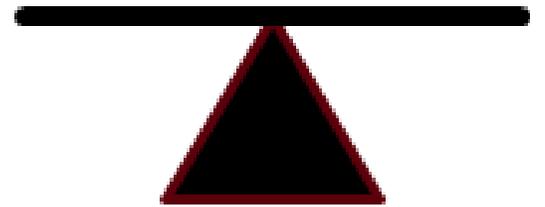
750 Main Street, Suite 309
Hartford, CT 06103

Tel: (860) 361-7999
Email: mrose@rosekallor.com

Today's Agenda

- ▶ Protected Speech under the First Amendment
- ▶ Protected Speech under Conn. Gen. Stat. § 31-51q
- ▶ Case Examples
- ▶ Fact Patterns

π +



General Framework to Determine Whether Speech in the Public Workplace is Protected

Step 1: Does the First Amendment apply to the speech at issue?

- (A) Is the speech on a matter of public or private concern?
- (B) Was the speech made as a citizen or as an employee in your official capacity?

Step 2: (If the First Amendment applies...) Apply the *Pickering* Balancing Test

- Does the value of the speech outweigh the potential for disruption or harm?



NOTE: this presentation discusses the government's role as an employer, NOT the government as a sovereign

Difference Between Speech in The Public Workplace vs. The General Public

- The Court recognizes that a public employer has an interest in "promoting the efficiency of the public services it performs." *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968)
- Non-employer example: *Snyder v. Phelps*, 562 U.S. 443 (2011)
 - Westboro Baptist Church picketed near a soldier's funeral service.
 - The signs reflected views including:
 - The United States is overly tolerant of sin, and
 - God kills American soldiers as punishment.
 - The family of the deceased soldier sued Westboro Baptist Church for defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.
 - Westboro Baptist Church defended themselves by arguing that their speech was protected under the First Amendment.

Federal Constitutional Framework

First Amendment protections occur if:

- Employee spoke:
 - On a matter of public concern;
 - As a citizen; and

Under the *Pickering/Garcetti* balancing test

- The value of the speech outweighs the potential for disruption or harm.



Step 1: Does the First Amendment Apply to the Speech at Issue?

A. Is the speech on a matter of public concern or is the speech private?

▶ *Pickering v. Board of Ed.*, 391 U.S. 563 (1968):

- A teacher wrote a letter to a news station criticizing the Board of Education's allocation of educational and athletic funds and inaccurately referenced publicly available information on the topic.
- Rule: "The problem in any case is to arrive at a balance between the interests of the teacher 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 through its employees."
- Here the Court held that "...the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration including the school board cannot, in a society that leaves such questions to popular vote, be taken as conclusive."
 - This is true regardless of criticism in such statements.

▶ Whether speech "addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

Step 1: Does the First Amendment Apply to The Speech at Issue?

B. Did the individual speak as a citizen or employee pursuant to his/her official duty?

- ▶ *Garcetti v. Ceballos*, 547 U.S. 410 (2006)
- ▶ Whether the First Amendment protects an employee's expression made pursuant to their official responsibilities.
- ▶ Rule: When a public employee makes an expression within the ordinary scope of their official responsibilities, they are speaking as employees and are not entitled to First Amendment protection.
- ▶ Courts must determine:
 - Whether (1) the employee spoke as a citizen, (2) on a matter of public concern
 - If so, the *Pickering* balancing test applies.
- ▶ The Supreme Court found the employee's expression was not protected under the First Amendment.
 - Government employers need control over their employees' words and actions.
 - The employee made the expressions pursuant to his official duties.
 - The employee did not act as a citizen when conducting his daily professional activities
 - Employers have a heightened interest in controlling speech made by employees in their official capacities.

Step 2: *Pickering* Balancing Test

Pickering v. Board of Ed., 391 U.S. 563 (1968)

- ▶ Whether a teacher's public criticism of a proposed tax increase to benefit the School Board is protected by the First Amendment.
- ▶ Courts are tasked with balancing:
 - The interests of an employee as a citizen commenting on matters of public concern
 - The interests of the State, as an employer, in promoting efficiency and order
- ▶ The Supreme Court found the teacher's speech to be protected.
 - Statements are not tied to his daily work as an art teacher.
 - No issues regarding discipline by immediate supervisors or harmony among coworkers.
 - "Teachers are ... the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent."

Connecticut Statutory Protections

- ▶ Conn. Gen. Stat. § 31-51q
 - State employers or political subdivision
 - Who subject or threaten to subject any employee to:
 - Discipline
 - Discharge
 - Based on their free speech rights under the First Amendment or the Connecticut Constitution
 - Shall be liable for damages and costs
 - Unless the free speech interferes with the employee's job performance or working relationship with the employer

Connecticut Framework

- ▶ First Amendment protections occurs if:
 1. Employee spoke
 - On a matter of public concern; and
 - As a citizen or as an employee pursuant to their job duties in certain circumstances (*Trusz*);
 2. Under the *Pickering/Connick* balancing test
 - The value of the speech outweighs the potential for disruption or harm

What's different under the Connecticut framework?



Trusz v. UBS Realty Investors, LLC., 319 Conn.175 (2015)

- ▶ Whether the *Garcetti* rule applies to claims that an employer violated Conn. Gen. Stat. § 31-51q by disciplining or discharging an employee who exercises their free speech rights under the Connecticut Constitution.
- ▶ The Court held that speech pursuant to an official job duty is protected if the speech is:
 - on a matter of public concern; and
 - implicates an employer's dishonesty, other serious wrongdoing, deliberately unconstitutional action or threats to health and safety.

Step 1: Does § 31-51q Apply to the Speech at Issue?

A. Is the speech on a matter of public concern or is the speech private?

Belinsky v. Town of Monroe, No. FBT-CV19-6085544-S, 2023 Conn. Super. LEXIS 2213 *1 (Conn. Super. Ct., Sept. 1, 2023)

► Facts:

- Employee was employed as a part-time transportation coordinator for the Social Services/Senior Center for the Town of Monroe.
- On February 22:
 - When the Employee left work she saw the senior bus go behind a bank building, so the Employee stayed in the area noticing that the bus did not move for 30 minutes.
 - The Employee then ran some errands and observed the bus in a different bank parking lot. The bus proceeded to head in a direction not on the route itinerary for the day.
 - The Employee followed the bus and saw the driver enter a senior home with bags in her hands.
 - The Employee proceeded back to senior center and called her son's father asking him to keep an eye on the bus and let her know when it left the residence.
 - The Employee reported the observations to her Director and the Administrative Assistant because bus drivers were not allowed in senior's homes.
- After multiple other occurrences, including yelling at other employees for scheduling senior citizen transportation, the Employee was terminated.
- The Employee claimed that she was terminated in retaliation of her report to her Director on February 22. Further the Employee claims that her speech is on a public concern because:
 - The driver violated the transportation policy and
 - It is in the citizen's interest to know where the bus drivers are at all times, who's in the bus, and who's in the vehicle is a liability for the town.

Step 1: Does § 31-51q Apply to the Speech at Issue?

A. Is the speech on a matter of public concern or is the speech private?

- ▶ *Belinsky v. Town of Monroe*, No. FBT-CV19-6085544-S, 2023 Conn. Super. LEXIS 2213 *1 (Conn. Super. Ct., Sept. 1, 2023)
- ▶ Holding: The content, form, and context of the speech, and reason for the Employee's speech on February 22 did not satisfy the requirements that the speech was on a matter of public concern.
- ▶ Rationale: At trial, the Employee did not present sufficient evidence to demonstrate that the bus driver drove herself around for personal reasons, and that it is important for taxpayers to know where the bus drivers are at all times.
- ▶ To determine whether speech is on a matter of public concern the court considers:
 - Whether the statements relate to any matter of political, social, or other concern to the community, and
 - The content, form, and context of a given statement as revealed by the whole record.
- ▶ Additionally, whether a statement is made in "private" is not determinative of whether it was based on an issue of public concern.

Step 1: Does § 31-51q Apply to the Speech at Issue?

B. Did the individual speak as a citizen or employee pursuant to his/her official duty?

Trusz v. UBS Realty Investors, LLC., 319 Conn. 175, 179 (2015)

▶ Facts:

- The plaintiff was employed by the defendant, UBS Realty Investors, LLC, as the head of the valuation unit and managing director.
- The plaintiff reported to the defendant what he considered to be valuation errors in breach of the defendants' fiduciary duties.
- After an investigation, the defendant concluded there was no breach of fiduciary duty, but the plaintiff continued to express his opinion that the defendant was in breach of fiduciary, legal, and ethical obligations.
- Subsequently, the plaintiff made a claim at the Commission on Human Rights and Opportunities claiming that the defendant discriminated and retaliated against him partially in breach of Conn. Gen. Stat. § 31-51q.

▶ Issue: Does the ruling in *Garcetti* apply to Conn. Gen. Stat. § 31-51q?

Step 1: Does § 31-51q Apply to the Speech at Issue?

B. Did the individual speak as a citizen or employee pursuant to his/her official duty?

Trusz v. UBS Realty Investors, LLC., 319 Conn. 175, 179 (2015)

- ▶ Holding: No, *Garcetti* does not apply to Conn. Gen. Stat. § 31-51q?
- ▶ Speech pursuant to an official duty is protected if the speech is:
 - on a matter of public concern; and
 - implicates an employer's dishonesty, other serious wrongdoing, deliberately unconstitutional action, or threats to health and safety.

Step 1: Does § 31-51q Apply to the Speech at Issue?

B. Did the individual speak as a citizen or employee pursuant to his/her official duty?

Brown v. Office of State Comptroller, 211 F. Supp. 3d 455 (D. Conn., Sept. 29, 2016)

- ▶ The plaintiff was a staff attorney assigned by the State to provide legal services to the Retirement Services Division.
 - The plaintiff claimed she was the attorney of the State Employees' Retirement System (SERS).
- ▶ The plaintiff opined/alleged that SERS was not being administered in accordance with its written terms.
- ▶ The plaintiff allegedly reported the perceived "misconduct" to her supervisor and prepared a legal memorandum identifying the mismanagement of SERS and disclosed possible state and federal law violations.
- ▶ The Deputy Comptroller allegedly instructed the plaintiff to alter the memorandum in a manner that replaced certain facts with false statements.
- ▶ The plaintiff then made a report to the State of Connecticut Office of Auditors and filed a whistleblower complaint. The plaintiff was subsequently laid off.
- ▶ The parties did not dispute that the speech was on a matter of public concern.

Step 1: Does § 31-51q Apply to the Speech at Issue?

B. Did the individual speak as a citizen or employee pursuant to his/her official duty?

Brown v. Office of State Comptroller, 211 F. Supp. 3d 455 (D. Conn., Sept. 29, 2016)

▶ Federal: First Amendment

- Holding: The plaintiff's report to the Auditors and refusal to edit her memorandum was speech as a citizen.
- Rationale:
 - (1) Report to the auditors.
 - The report to the CT Office of Auditors demonstrated that a civil analogue existed because a report to the auditors was an avenue that any citizen could have taken.
 - (2) Refusal to put false information in her memorandum.
 - The First Amendment protects both compelled speech and compelled silence.
 - Further, the refusal to speak dishonestly is not part of an official job duty.

▶ Connecticut: Conn. Gen. Stat. § 31-51q

- Holding: The plaintiff's report to the Auditors and refusal to edit her memorandum was speech as a citizen. Even if it was speech pursuant to official job duties the speech would still be protected under Connecticut law.
- Rationale:
 - The plaintiff alleged in her reports that both types of speech were brought to uncover corruption, unethical practices, and violations of state and federal tax laws.

Step 1: Case Example

▶ *Ezekwo v. New York City Health & Hosps. Corp.*, 940 F. 2d 775 (2d Cir., Apr. 17, 1991)

▶ Facts:

- The plaintiff is a medical doctor accepted into an ophthalmology residency program.
- After her first year in the program, she began to direct several verbal complaints to the director of the program.
- The plaintiff also authored a series of letters and memorandum concerning areas of personal dissatisfaction. Content included:
 - Failure of attending physicians and lecturers to be present at scheduled times;
 - The manner in which she was treated by the Director and attending physicians;
 - The manner in which the Director evaluated her performance;
 - Plaintiff's lack of opportunity to perform surgery;
 - Plaintiff's lack of personal attention she received from attending physicians;
 - Lack of proper hospital maintenance;
 - The director's poor management and motivational skills; and
 - The poor teaching methods of attending physicians;

**Was the plaintiff's
speech on a matter of
public concern?**

Step 1: Case Example

Ezekwo v. New York City Health & Hosps. Corp., 940 F. 2d 775 (2d Cir., Apr. 17, 1991).

▶ Holding:

- No, the plaintiff's speech was private speech and therefore not protected under the First Amendment.

▶ Rationale:

- The plaintiff's alleged protected speech included her complaints, statements, and memorandums.
- The plaintiff's complaints, statements, and memorandums were:
 - Personal in nature; and
 - Generally related to her own situation within the residency program.
- ▶ "The district court correctly reasoned that the mere fact that one or two of Ezekwo's comments could be construed broadly to implicate matters of public concern does not alter the general nature of her statements." *Id.* at 781.

Applying the Federal Constitutional Framework

Finnimore v. Lennon, No. 3:22-CV-1563 (SRU), 2024 WL 4304610 (D. Conn. Sept. 26, 2024)

► Facts:

- The plaintiff was employed as an East Haven Police Department (EHPD) officer.
- The plaintiff spoke out about alleged misconduct within the EHPD.
 - Plaintiff testified before a federal grand jury regarding EHPD's corrupt practices.
 - Plaintiff submitted internal reports against other officers for misconduct.
- The plaintiff applied and interviewed for promotional opportunities within the EHPD after discussing the alleged misconduct.
- EHPD promoted other officers ranked lower on the promotional list rankings.
 - The plaintiff began to raise complaints with the EHPD's corrupt promotion practices
- EHPD initiated an internal investigation against the plaintiff, imposing a five-day suspension without pay for “insubordination” and “unbecoming behavior.”

Under the First Amendment, are misconduct complaints and promotion complaints made (1) as a citizen, (2) on a matter of public concern, and (3) have individual value that outweighed the potential for disruption or harm?

Applying the Federal Constitutional Framework

Finnimore v. Lennon, No. 3:22-CV-1563 (SRU), 2024 WL 4304610 (D. Conn. Sept. 26, 2024)

▶ Holding:

- Plaintiff plausibly alleged that the misconduct complaints are protected under the First Amendment.
- Plaintiff failed to allege that the promotion complaints are protected under the First Amendment.

▶ Rationale:

- Misconduct Complaints
 - Police misconduct is a topic of political, social, and general concern to the community.
 - Investigating and reporting on police misconduct fell outside of the plaintiff's job requirements because he served no managerial role in the department.
 - The plaintiff complained about misconduct within the EHPD and members of the Board of Police Commission, not his immediate supervisor.
 - The court found that a single instance of engaging in unprofessional behavior at a public meeting did not outweigh the value of Plaintiff's speech under the *Pickering* balance test.
- Promotion Complaints
 - The plaintiff's complaints regarding promotion corruption were not matters of public concern because the plaintiff only sought relief for himself.

Applying the § 31-51q Framework

Michel v. City of Hartford, 226 Conn. App. 98, 317 A.3d 49 (2024)

► Facts:

- The plaintiff was employed by the Hartford Police Department.
- A fellow employee told the plaintiff that he was being discriminated against by his supervisor on the basis of his race.
- The plaintiff reported his co-worker's complaint to the commander of his unit and was instructed "not to get involved."
- The co-worker filed a complaint with the Commission on Human Rights and Opportunities (CHRO).
 - Plaintiff supported the filing of his co-worker's claim and testified at the CHRO hearing
- Plaintiff was then removed from certain supervisory positions, from assignments that would provide overtime, and assigned to unfavorable shifts.

Did the plaintiff act (1) as a citizen, (2) on a matter of public concern when he complied with the CHRO hearing, and did the speech (3) have individual value that outweighed the potential for disruption or harm?

Applying the § 31-51q Framework

Michel v. City of Hartford, 226 Conn. App. 98, 317 A.3d 49 (2024)

▶ Holding:

- Plaintiff plausibly alleged testifying at a CHRO hearing was protected under Conn. Gen. Stat. § 31-51q.

▶ Rationale:

- Although testifying at judicial proceedings was included within the plaintiff's ordinary job duties, providing testimony regarding a co-worker's discrimination claim was not within the scope of a police officer's duties.
 - Therefore, the plaintiff acted as a citizen.
- The court found that speaking out against discrimination and testifying that discrimination exists in the workplace can be protected under the First Amendment and Conn. Gen. Stat. § 31-51q.
 - Therefore, the plaintiff's speech touched on a matter of public concern.
- The court determined that the plaintiff was also not required to allege that his speech did not create a substantial disruption.

Gaynor v. City of Meriden

▶ Facts:

- The plaintiff was an officer for the City of Meriden.
- The Chief of the Meridan Police Department had a son who was also an officer.
- The plaintiff observed a cell block video of the son assaulting a handcuffed prisoner and reported the video to the Department's chain of command.
- The plaintiff testified at the son's federal criminal trial.
- The Department then allegedly retaliated against the plaintiff by:
 - Denying him training opportunities
 - Giving negative performance evaluations
 - Placing him on administrative leave pending an internal affairs investigation
 - Terminating his employment

While the Court did not resolve whether the plaintiff's speech was protected under the First Amendment, do the facts suggest First Amendment protection?

Fact Pattern 1

- ▶ A staff member in the City Clerk's Office suspects that a custodial employee is an undocumented immigrant.
- ▶ The staff member's duties primarily regard administrative function of the Town Council
- ▶ The staff member complains to their supervisor, insisting that the Town investigate the custodial employee.
- ▶ After two weeks the staff member notices the custodial employee is still employed at the Town Hall.
- ▶ The staff member loudly confronts the custodial employee in the hallway, while a Town Hall meeting is occurring.
- ▶ Upon hearing the staff member berating the custodial employee, the Town Hall meeting went to recess to break up the altercation.
- ▶ The next day the staff member was terminated.

Is the staff member's speech to the custodial employee protected under the First Amendment and Conn. Gen. Stat. § 31-51q?

Fact Pattern 1 - Answer

- ▶ The speech is likely not protected under the First Amendment.
- ▶ Why?
 - The staff member likely spoke as a private citizen.
 - The staff member's speech did not concern their duties in the City Clerk's office.
 - The content of the speech was related to broader issues of social and political concern, not personal grievances.
 - *Pickering/Garcetti* Balancing Test
 - The staff member's comments were highly disruptive to the normal functioning of the Town Hall meeting.
 - Members of the public witnessed the staff member's speech, which reflects on the City Clerk's office.
 - The staff member's coworkers observed the speech, which could affect their working relationship.

Fact Pattern 2

- ▶ A physical education teacher at a public middle school attends a DEI training designed for teachers.
- ▶ Teachers from throughout the District virtually attended the DEI training.
- ▶ During a breakout session, the teacher makes comments about the exercise targeting white, Christian male teachers in a discriminatory manner.
- ▶ Other participants in the breakout session report the comments to the District.
- ▶ The District conducts an investigation and provides a written reprimand for inappropriate and unprofessional comments made during the training.

Under the First Amendment and Conn. Gen. Stat. § 31-51q, was the criticism of the professional development training protected speech?

Fact Pattern 2 - Answer

- ▶ The speech is likely protected under the First Amendment.
- ▶ Why?
 - The teacher spoke as a private citizen.
 - The teacher's duties involved engaging with students in class, not critiquing social identity exercises.
 - The teacher chose to voice his opinion that the training targeted teachers in a discriminatory manner based on race and gender.
 - The content of the speech was related to broader issues of social and political concern, not personal grievances.
 - *Garcetti*- an employee speaks as a citizen when discussing politics with a co-worker.
 - *Pickering/Garcetti* Balancing Test
 - The teacher's comments were not made to students or parents.
 - Only the breakout group witnessed the teacher's comments.
 - Teachers from the breakout group will have limited future contact with the teacher.

Fact Pattern 3

- ▶ A teacher at a public elementary school hangs a crucifix on her classroom wall.
- ▶ The crucifix is located near her desk among personal and instructional posters that are visible to the students in the classroom.
- ▶ The school has a policy that provides teachers with a checklist on how to ensure the physical environment of a classroom is student centered and task oriented.
- ▶ Students complained to school administration that the teacher is exposing them to religion in the classroom.
- ▶ The school instructs the teacher to take down the crucifix, to which the teacher responds that she hung up the crucifix as a personal expressive item to make the classroom more conducive to learning.

Is the religious speech protected under the First Amendment and/or Conn. Gen. Stat. § 31-51q?

Fact Pattern 3 - Answer

- ▶ The speech is likely not protected under § 31-51q or the First Amendment.
- ▶ Why?
 - The content of the speech is religion, which deemed to be speech on a matter of public concern.
 - Even though the speech is public, the teacher gave it pursuant to his/her official job duties.
 - The school policy stated that it was the teacher's responsibility to "ensure the physical environment of a classroom is student centered and task oriented."
 - The teacher herself stated that she placed the crucifix on the wall to make the classroom more conducive to learning
 - *Garcetti*- the speech is not protected by the First Amendment as it is pursuant to the teacher's official job duty.
 - *Trusz*- the speech is not protected by § 31-51q because it does not implicate an employer's dishonesty, other serious wrongdoing, deliberately unconstitutional action, or threats to health and safety.

Fact Pattern 4

- ▶ A public works employee created a personal TikTok account, where they liked, shared, posted, and reposted videos and memes regarding the murder of Charlie Kirk.
- ▶ The employee's primary duties involve maintenance on the sewage system
- ▶ The posts included various comments stating Kirk "got what he deserved" and conspiracy theories that Erika Kirk, his widow, orchestrated the murder to be with Vice President Vance.
- ▶ The Department of Public Works received a letter from a "concerned citizen" complaining about the employee's posts.
- ▶ The same week, a local newspaper published an op-ed piece about the social media usage of public employees and specifically mentioned this employee in the Department of Public Works.
- ▶ The employee's supervisors determined that the employee's TikTok posts violated the core values of the Department
- ▶ The Department subsequently terminated their employment.

Is the employee's social media usage protected under the First Amendment and/or Conn. Gen. Stat. § 31-51q?

Fact Pattern 4 - Answer

- ▶ The speech is likely protected under § 31-51q or the First Amendment.
- ▶ Why?
 - The employee likely spoke as a private citizen.
 - The employee's speech did not occur in the workplace and was on the employee's private social media account.
 - The content of the speech was related to broader issues related to personal political opinion, not personal grievances.
 - *Pickering/Garcetti* Balancing Test
 - The employee has a strong First Amendment interest in discussing a current political issue.
 - The employee's First Amendment interest is weakened by the insulting and disparaging manner in which the speech occurred.
 - While the Department has an interest to prevent disruption, the potential for these social media posts to disrupt the workplace are low given the employee's lack of interaction with the public.
 - The Department did not conclude the speech would cause a disruption in their decision to terminate the employee, only that the speech went against the Department's core values.

Byrd v. Middletown Bd. of Educ.

▶ Facts:

- The plaintiff is a teacher in the Middletown School District.
- The plaintiff taught middle schoolers the Human Sexuality Health Curriculum along with the District's Cultural Diversity Curriculum.
- During the lesson involving “recognizing racial epithets,” the plaintiff began her lesson on racial slurs by explicitly saying the slurs aloud.
- Students objected to the use of certain racial epithets, criticizing the plaintiff’s use of the language and recording the plaintiff during her lesson plan.
- The District then called the plaintiff to a *Loudermill* hearing and informed Plaintiff that she could:
 - Accept an alternative teaching position at a different school;
 - Accept a tutoring position for students who were expelled; or
 - Be terminated
- The plaintiff accepted the tutoring position but later took FMLA leave and alleged she was constructively terminated.

Limitations of Free Speech

- ▶ Employees' freedoms are not absolute
 - *Snyder/Westboro Baptist Church* limited the Government as a sovereign
- ▶ Broad discretion for the Government as an employer
 - *Garcetti* endorses this power when the targeted speech is directed at “the entity’s operations”
- ▶ *Trusz* further protects employee speech in public workplaces if:
 - Speech involves a comment on employer’s official dishonesty
 - Deliberately unconstitutional action (employer?)
 - Serious wrongdoing (employer?)
 - Threats to health and safety (employer?)

Questions?

DISCLAIMER: This seminar is intended to be for informational and educational purposes only and does not constitute legal advice. If you have any questions about the content of these materials, or are in need of legal advice, please feel free to contact Attorney Michael J. Rose at Rose Kallor, LLP.

How Rose Kallor, LLP Can Better Assist Municipalities

- ❖ Rose Kallor has established a “hotline” with the Connecticut Interlocal Risk Management Agency (“CIRMA”) in which all CIRMA LAP members can participate.
- ❖ The hotline was developed to provide municipalities with a prompt response to emerging issues within the workplace.
- ❖ Each municipality who utilizes the hotline will receive up to one hour per month of complementary legal advice.
- ❖ If more than an hour is necessary to resolve the issue for which you used the hotline, services are billed at a negotiated rate through CIRMA.
- ❖ Plus, access to newsletters and legal updates relating to employment law.

HOTLINE INFORMATION

PHONE: (833) 544-4110

E-MAIL: cirmahotline@rosekallor.com

Appendix:

- ▶ In *Belinsky v. Town of Monroe*, No. FBT-CV19-6085544-S, 2023 Conn. Super. LEXIS 2213 *1, *1 (Conn. Super. Ct., Sept. 1, 2023), the court questioned whether the plaintiff's report to her director that a bus driver was not following protocol was protected speech. The general rule, pursuant to § 31-51q, is that speech in the workplace is protected when the speech is made by a citizen on a matter of public concern. Speech is a matter of public concern when it is related to any political, social, or other concern to the community. This is determined by evaluating the content, form, and context of a given statement. Here, the court held that the bus driver's report to her director was not speech on a matter of public concern because the plaintiff did not present enough evidence to support that her speech was protected under Conn. Gen. Stat. § 31-51q.
- ▶ In *Brown v. Office of State Comptroller*, 211 F. Supp. 3d 455, 463 (D. Conn., Sept. 29, 2016), the court questioned whether the plaintiff's report to the Connecticut Office of Auditors, and refusal to alter her memorandum with false information, was speech protected under the First Amendment and § 31-51q. Here, the plaintiff discovered that the State Employees Retirement Commission was not being administered in accordance with its written terms. In response, the plaintiff alerted her supervisors and wrote a memorandum outlining the mismanagement and violations of federal and state law. Subsequently, her supervisors asked her to alter the memorandum's information, and the plaintiff reported the mismanagement to the Connecticut Office of Auditors. The court held that the speech was properly alleged as protected speech under the First Amendment and § 31-51q. The Court reasoned that the report to the Connecticut Office of Auditors was an act of civil analogue because it was an act that a citizen could have taken. Additionally, it would likely be protected speech under § 31-51q regardless of its federal protection because even if the speech was considered pursuant to official job duties it was brought to uncover corruption, unethical practices, and violations of state and federal tax laws.

Appendix

- ▶ In *Connick v. Myers*, 461 U.S. 138, 140 (1983), the defendant-employer appealed the decision of the Court of Appeals that held the plaintiff-employee's speech from her questionnaire was protected under the First Amendment. Here, the plaintiff-employee was an assistant district attorney. Her supervisor notified her that she would be transferred to a different part of the criminal court, which she objected to. Despite her objections, her supervisor proceeded to transfer her. Before the transfer was complete, the plaintiff-employee distributed a questionnaire to fifteen different district attorneys. Subsequently, she was fired for insubordination, refusal to accept the transfer, and because the speech in the questionnaire would be damaging if it was publicized. The Court held that the speech was not protected under the First Amendment, reasoning that even though some of the speech was on a matter of public concern, the damage to the public employer outweighed the speech at issue under the *Pickering* balancing test. The damage outweighed the plaintiff-employee's right to free speech because the language in the questionnaire disrupted the office, undermined the supervisor's authority, and destroyed close working relationships.
- ▶ In *Ezekwo v. New York City Health & Hosps. Corp.*, 940 F. 2d 775 (2d Cir., Apr. 17 1991), the court questioned whether the plaintiff's speech was a matter of public concern. The general rule pursuant to the First Amendment is that speech as a citizen on a matter of public concern is protected speech. Here, the plaintiff was a medical doctor who was accepted into a residency program. The plaintiff was successful in their first year of the residency program, but the plaintiff began to complain to the Director of the program and wrote a letter and memorandum outlining personal concerns. The court held that the plaintiff's complaints, letters, and memoranda constituted private speech which was not protected under the First Amendment, reasoning that the speech raised personal grievances.

Appendix

- ▶ In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that public employees that make statements pursuant to their official duties are not speaking as citizens for First Amendment purposes. Here, the plaintiff, a supervising deputy district attorney, was asked to review an affidavit used to obtain a search warrant in a criminal matter. As a regular duty of his job, the plaintiff reviewed the affidavit and found that it contained serious misrepresentations. The plaintiff reported these misrepresentations and continued to relay his findings to the court despite being ignored by supervisors. The plaintiff claims that he was retaliated against for reporting the misrepresentations. The Court found that, because the plaintiff's expressions were made pursuant to his official duties, he did not have protections under the First Amendment because the speech owed its existence to the plaintiff's official responsibilities. Therefore, the plaintiff did not speak as a citizen.
- ▶ In *Lane v. Franks*, 573 U.S. 228 (2014), the Court held that a public employee's truthful testimony under oath, given outside the scope of their ordinary job duties, is speech as a citizen under the First Amendment. Here, the plaintiff was a director for a state youth program that oversaw the financial and administrative duties of the program. The plaintiff discovered that a State Representative was improperly on the program's payroll and terminated the Representative. The termination triggered a federal investigation, where the plaintiff testified on his discovery. The plaintiff was then terminated. The Court determined that citizens have an obligation to society to provide sworn testimony in judicial proceeding. The Court also found that political corruption and a misuse of state funds was a matter of public concern. Defendants failed to demonstrate there was any disruption that would tip the *Pickering* scale in favor of the government. Therefore, the plaintiff's speech was protected under the First Amendment.

Appendix

- ▶ In *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 565 (1968), the appellant-plaintiff, Marvin Pickering, petitioned the United States Supreme Court to determine whether his letter to the local newspaper regarding the Board of Education constituted public speech. Pickering was a teacher in the Township High School District 205 under appellee-defendant, Board of Education. Pickering wrote a letter to the public newspaper that criticized the Board of Education's handling of bond issue proposals. Subsequently, the Board of Education terminated Pickering and then conducted a hearing of the decision where they determined the letter was "detrimental to the efficient operation and administration of the schools of the district" because statements in the letter were allegedly false. The Court held that the contents of the letter were on a matter of public concern because the letter discussed the school's requirement for additional funds. Further, the letter was not detrimental to the operation and administration of the schools of the district. The Court reasoned that the statements were critical, not factual, of the Board of Education and any false statements were not reckless or intentional because all the information referenced was public information. The Court found noted that the information referenced in the letter was not obtained through Pickering's job as a teacher nor related to anyone he closely worked with. Therefore, the speech did not impede Pickering's ability to do his job nor the work environment and was protected under the First Amendment.

Appendix

- ▶ In *Trusz v. UBS Realty Investors, LLC.*, 319 Conn. 175, 179 (2015), the plaintiff was an employee at the defendant-employer, UBS Realty Investors. While employed there, the plaintiff reported what he considered to be valuation errors in breach of the defendants' fiduciary duties. After an investigation, the defendant concluded there was no breach of fiduciary duty, but the plaintiff continued to express his opinion that the defendant was in breach of fiduciary, legal and ethical obligations. Subsequently, the plaintiff made a claim at the Commission on Human Rights and Opportunities claiming that the defendant discriminated and retaliated against him partially in breach of Conn. Gen. Stat. § 31-51q. The questions answered by the Connecticut Supreme Court included, (1) what is the scope of protection afforded by the free speech provisions of state constitution to a public employee's speech in the workplace, and (2) is the protection afforded by § 31-51 to an employee's speech in a private workplace coextensive with or narrower than the protection afforded by the speech provisions of the state constitution to speech by an employee in a public workplace. The Court first held that speech on all subjects should be protected to the maximum extent possible. Additionally, the interests of an employer in controlling its own message and preserving workplace discipline, harmony and efficiency provides the proper test for determining the scope of a public employee's rights under the free speech provisions of the state constitution when an employee is speaking pursuant to his/her official duties. Following this, the Court held that this protection applies to the private workplace for claims involving the state constitution.

Appendix

- ▶ In *Finnimore v. Lennon*, No. 3:22-CV-1563 (SRU), 2024 WL 4304610 (D. Conn. Sept. 26, 2024), the plaintiff was a police officer in the East Haven Police Department (EHPD). The plaintiff spoke out about alleged misconduct within the EHPD, which included testifying at a grand jury trial and reporting individual officers. The plaintiff applied for several promotions but was ultimately passed over for officers with lower promotional list rankings. The plaintiff then began to speak out regarding corrupt promotion practices. The EHPD initiated an internal investigation on the plaintiff and suspended him without pay for five days for insubordination and unbecoming behavior. The District Court found that the plaintiff failed to allege that the promotion complaints were protected under the First Amendment, but plausibly alleged that the misconduct complaints were protected under the First Amendment. The court determined that the promotion complaints were not a matter of public concern because the primary aim for raising the complaints was for the plaintiff's personal gain. Conversely, the court determined that the misconduct complaints were a matter of public concern because police misconduct is a political and social concern of society. Further, the plaintiff made the misconduct complaints as a private citizen because he had no official duty as an officer to raise the complaints. When applying the *Pickering* balancing test, the court found that the defendants failed to demonstrate how the plaintiff's unprofessional behavior at a public meeting rose to a level of substantial disruption. Therefore, the District Court found that the plaintiff plausibly alleged his misconduct complaints were protected under the First Amendment.

Appendix

- ▶ In *Michel v. City of Hartford*, 226 Conn. App. 98, 317 A.3d 49 (2024), the plaintiff was employed by the Hartford Police Department. A co-worker told the plaintiff that he was being discriminated against by his supervisor on the basis of his race. The plaintiff reported his co-worker's complaint to the commander of his unit and was instructed "not to get involved." The co-worker filed a complaint with the Commission on Human Rights and Opportunities (CHRO) and testified at two CHRO hearings in support of his co-worker. Plaintiff was then removed from certain supervisory positions, from assignments that would provide overtime, and assigned to unfavorable shifts. The Appellate Court found that the superior court improperly granted defendant's motion to strike the Conn. Gen. Stat. § 31-51q claims because the plaintiff spoke as a citizen on a matter of public concern when he testified at the CHRO hearing. The court reasoned that it was outside the scope of the plaintiff's official duties to testify on a co-worker's discrimination hearing. Further, the court found that speaking out against discrimination is a matter of public concern, which can be protected under Conn. Gen. Stat. § 31-51q. Finding that the plaintiff was not required to sufficiently allege that his speech did not substantially or materially interfere with his job performance or working relationship with his employer, the Appellate Court reversed the motion to strike.

Employment Law Update

Connecticut

Alaimo v. Verdi, No. DBD-CV-24-5020603-S, 2025 WL 3641524 (Conn. Super. Ct. Dec. 9, 2025)

The Superior Court of Danbury determined that the defendants violated a fixed term employment contract by disbanding the business venture in bad faith and is liable for unpaid wages for the remainder of the term. Here, the plaintiff entered into a business venture (VHC) with the defendants where the plaintiff contracted to work for VHC as an excavator for a term of at least five years. The agreement provided the plaintiff receives an annual salary, a share of the profits, employee benefits, and is subject to a noncompete clause. VHC suffered financial challenges and terminated the employment relationship after two years. The plaintiff brought a lawsuit alleging there was a fixed term employment contract, and the defendants breached the contract.

The court found that a fixed term employment contract existed because the contract provision stated the plaintiff would work for VHC for at least five years. Under public policy, it would be unconscionable to enforce the noncompete clause and force the plaintiff to work for VHC for the fixed term. The court found that, although the plaintiff did not perform work for the remainder of the fixed term, he is entitled to lost wages because the employer, VHC, wrongfully terminated the employment agreement. Therefore, the plaintiff was able to recover lost wages under Connecticut General Statute section 31-72.

Eldridge v. Hosp. of Cent. Connecticut, 230 Conn. App. 666, 330 A.3d 604 (2025)

In *Eldridge*, the plaintiff was a nurse who suffered from alcoholism and bipolar disorder. The plaintiff decided to take a medical leave of absence under the state and federal Family Medical Leave Acts to undergo treatment for her conditions and depression. While the plaintiff was on leave, the Department of Public Health began to investigate the plaintiff's history of alcohol abuse. After an investigation, the Department expressed concerns regarding the plaintiff's ability to work as a nurse and recommended disciplinary action. In response to the Department's concerns and recommendation, the Board Examiners for Nursing suspended the plaintiff's Connecticut nursing license. The Hospital terminated the plaintiff's employment at the end of her medical leave, and the plaintiff brought claims for disability discrimination, failure to accommodate, and retaliation under the Connecticut Fair Employment Practices Act (CFEPA).

The Connecticut Appellate Court determined that the superior court appropriately granted judgment to the Hospital. The superior court found, and the Appellate Court agreed, that there was no genuine issue of material fact to the Hospital's reasoning for terminating the plaintiff. The court found that terminating the plaintiff for her inability to work due to the loss of her Connecticut nursing license was a legitimate, nondiscriminatory reason for her termination. Therefore, the Hospital was entitled to summary judgment.

Castelino v. Whitman, Breed, Abbot & Morgan, LLC., 233 Conn. App. 467, 342 A.3d 245, *cert. denied*, 353 Conn. 914, 344 A.3d 155 (2025)

In *Castelino*, the plaintiff was hired as an administrative assistant for a paralegal at a law firm during the COVID-19 pandemic. The plaintiff was informed that the position was “mostly” remote, but she would be expected to go into the office on an “as needed” basis. The plaintiff learned that COVID-19 testing was occurring in the same office building as the law firm and, due to her diabetes and asthma, requested an accommodation to work exclusively remotely. The defendant denied her request and the plaintiff continued to work at the firm. After one month of employment, law firm personnel began to express frustration with the plaintiff’s performance and eventually terminated her employment. The plaintiff filed a complaint with the Commission on Human Rights and Opportunities (CHRO) and then filed a lawsuit under the CFEPA for disability discrimination, retaliation, and failure to accommodate.

The Connecticut Appellate Court determined that the superior court appropriately granted judgment to the law firm. The court found that the plaintiff’s poor performance was a legitimate, nondiscriminatory reason for termination. Further, the Appellate Court ruled that the trial court must conduct a fact specific inquiry to determine the essential functions of the job. In examining the facts of this case, the court noted that the plaintiff knew the position required some level of in-person work and being in the office was an essential function of the administrative assistant position. Therefore, the law firm was entitled to summary judgment.

Begley v. State, 234 Conn. App. 820, 344 A.3d 982 (2025)

In *Begley*, the plaintiff was a state trooper with the Connecticut State Police. The plaintiff led the Connecticut Intelligence Unit (CIU) of the State Police. In 2016, the plaintiff received a report that Detective Citta in the Hartford Police Department, who was a liaison to the CIU, had behaved in a sexually inappropriate manner. The plaintiff reported the conduct and Detective Citta was removed from his position. As a result, Detective Citta stopped sending information to the CIU until the plaintiff was removed from his position. The investigation into Detective Citta’s conduct determined the claim to be unsubstantiated. Three years later, the plaintiff was transferred from the CIU to a Troop in Hartford and placed on the midnight shift. The plaintiff filed a lawsuit claiming retaliation under the CFEPA for filing the 2016 sexual harassment report.

The Connecticut Appellate Court determined that the superior court appropriately granted judgment to the defendants. The court found that there was no factual basis for connecting the defendant commissioner to the alleged retaliation because the defendant commissioner had no knowledge that the plaintiff was involved in the report or investigation until after it was concluded. Further, there was no evidence that Detective Citta’s lack of cooperation with the CIU reflected on the plaintiff because the plaintiff had no role in the decision to transfer Detective Citta from the CIU. Therefore, the defendants were entitled to summary judgment.

Long v. Town of Putnam, 236 Conn. App. 290, 347 A.3d 178 (2025)

In *Long*, the Town sought to fill the finance director role by hiring an assistant finance director and promoting that employee to finance director. The plaintiff interviewed and was hired as the assistant finance director. Soon after, she discovered she was pregnant and informed the Town. The plaintiff went on maternity leave, and the Town hired a finance director as the plaintiff's replacement. When the plaintiff returned from maternity leave, the Town changed her job duties and reclassified her as an hourly employee with a reduced work schedule, causing her to earn \$15,000 less than in her previous role. The plaintiff filed a complaint with the CHRO and later filed a lawsuit alleging pregnancy discrimination under the CFEPA.

The Connecticut Appellate Court reversed the superior court's decision to grant summary judgment to the Town, finding that a jury could find that the plaintiff suffered pregnancy discrimination and the Town's reasoning for their actions may be pretextual. The Appellate Court stated that a change in job duties, even with the same title, and a reduction in pay could demonstrate an adverse employment action that occurred when the plaintiff returned from maternity leave. Further, those adverse employment actions could give rise to an inference of discrimination. The Town submitted that they placed the plaintiff in this role because (1) a prerequisite to promotion was submitting an annual audit timely and properly, (2) there was \$45,000 deficiency in the department's budget, and (3) there was a vacancy in the department, so the plaintiff was asked to take on those duties. However, the court found that these reasonings could be determined as pretextual because (1) the replacement financial director hired after plaintiff went on maternity leave failed to submit the annual audit timely and properly, (2) the replacement financial director was making more than offered to the plaintiff in the financial director role, and (3) the vacant position opened in June of 2020, while the plaintiff was fulfilling those duties in May of 2020. Therefore, the superior court erred in granting summary judgment for the Town.

Second Circuit

Tudor v. Whitehall Cent. Sch. Dist., 132 F.4th 242 (2d Cir. 2025)

In *Tudor*, the plaintiff was a schoolteacher who suffered from PTSD. In 2008, the plaintiff was granted an accommodation under the ADA that allowed her to leave campus for one fifteen-minute break during each of her morning and afternoon "prep periods," when she was not responsible for overseeing students. In 2016, a new school administration reprimanded the plaintiff for leaving school grounds despite her accommodation. The District informed the plaintiff that she could take morning breaks and could only take afternoon breaks if another District employee could watch her students. The plaintiff continued to take afternoon breaks regardless of her coverage. The plaintiff filed a failure to accommodate claim under the ADA.

The plaintiff testified that even without additional accommodation, she was able to "perform the essential functions of her job," which led the district court to grant summary judgment for the District. The Second Circuit reversed the District Court's decision, holding that an employee with a disability is qualified to receive a reasonable accommodation under the ADA even if she

can perform the essential job functions without a reasonable accommodation. Therefore, the district court erred in granting summary judgment for the District.

Frazier v. X Corp., 155 F.4th 87 (2d Cir. 2025)

In *Frazier*, a group of employees brought employment-related claims against X Corp to JAMS, in accordance with the Dispute Resolution Agreement in their employment contracts. After several months, the parties began to dispute about who would pay the arbitral fees. When X Corp refused to pay, JAMS refused to appoint an arbitrator and the proceedings stopped. The employees sued in district court to compel arbitration, stating that X Corp was failing, neglecting, or refusing to arbitrate under the Federal Arbitration Act.

The Second Circuit ruled that, once the parties in an arbitration chose an arbitral body, a refusal to pay ongoing fees alone is not a violation of the Federal Arbitration Act. The courts have no role under the Federal Arbitration Act to intervene to review rulings regarding fees of an ongoing arbitral proceeding, which applies to the arbitrator and the arbitral body. Therefore, the district court erred in ordering X Corp to pay the arbitral fees in the proceeding.

United States Supreme Court

Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303 (2025)

In *Ames*, the plaintiff was a heterosexual woman who interviewed for a management position at the defendant organization. However, the organization hired a lesbian woman for the role. The organization then demoted the plaintiff and later hired a gay man to fill her previous role. The plaintiff filed a lawsuit alleging discrimination in violation of Title VII due to her sexual orientation. The district court granted summary judgment in favor of the organization because the plaintiff had not shown background circumstances to support the suspicion that the organization is an employer who discriminates against the majority.

The Supreme Court found that the background circumstances rule that requires a member of a majority group to satisfy a heightened standard to prevail on a Title VII claim is unlawful. The Court found that Title VII has a clear standard for discrimination claims and makes no distinctions between plaintiffs in a majority or a minority group. Instead, Title VII protects individual plaintiffs based on their protected characteristics. Therefore, the Supreme Court overturned the district court and resolved the circuit split as to whether majority-group plaintiffs are subject to a different evidentiary burden than minority-group plaintiffs.

Notably in his concurrence, Justice Thomas wrote that the *McDonnell Douglas* framework lacked any basis in the text of Title VII and created difficulties for lower courts in applying the standard. This led him to state that, if the issue came before the Supreme Court, he would be willing to consider if the *McDonnell Douglas* framework should be overturned. While this should be a concept to be aware of, the *McDonnell Douglas* framework is still binding and applicable law in all Title VII cases.