CHAPTER 3

"FREE SPEECH" RIGHTS IN THE WORKPLACE: HOW SHOULD ARBITRATORS DRAW THE LINES?

I. INTRODUCTION

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Like all other provisions of its Bill of Rights, the First Amendment to the U.S. Constitution restrains government but not the conduct of private entities such as private sector employers.[1] Similarly, in Canada, constitutional restraints on speech are limited generally to those imposed by the government.[2] Consequently, a public employee in the United States who is discharged for publicly criticizing his or her employer has a First Amendment claim and may or may not win a court action contesting the discharge, depending upon the nature of the criticism. A private sector employee, similarly discharged, would have no First Amendment protection. His or her action would be dismissed by a court for "lack of state action."[3] Questions concerning the nature of the criticism would not be reached and resolved.

Suppose, however, that a union represented the private sector employee and that the governing collective bargaining agreement contained a just cause clause and grievance arbitration procedures. Instead of taking the case to court and making an abortive First Amendment argument, the employee files a grievance that the union takes to arbitration. How, if at all, should the arbitrator treat what the employee and the union describe as "a right to free

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[1]The First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Supreme Court has determined that the First Amendment covers state and local governments, notwithstanding its express singular reference to "Congress."

[2]*See generally* Greenawalt, *Free Speech in the United States and Canada*, 55 Law & Contemp. Probs. 5 (1992).

[3]*See Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356–57 (Ill. 1985); *Rozier v. St. Mary's Hosp.*, 411 N.E.2d 50, 54 (Ill. Ct. App. 1980).

speech" and a breach of the just cause clause of the agreement through interference with that right?

Arbitrated "free speech" cases are on the rise. In published arbitration decisions found in Labor Arbitration Reports covering the last five years, 48 discipline cases raising free speech issues are reported. Some of the cases involving employee speech do not present serious "free speech" issues. For example, arbitrators almost always reject free speech allegations when the speech is part of a pattern of conduct plainly leading to a finding of punishable insubordination.[4] In one-on-one sexual harassment encounters, free speech is not viewed as the issue but what was said and whether it amounted to sexual harassment as we understand verbal sexual harassment today.[5] Likewise, arbitrators virtually never tolerate racial, ethnic, and sexual slurs on free speech grounds, although they may grant a grievance over these issues on some other basis. Cases of these classes seem to reveal that arbitrators are fully aware that free speech rights are not absolute and that both public and private sector employers in many instances have a legitimate and transcendent interest in regulating what employees say and write.

At the same time, there are free speech cases where employer interests in suppressing speech are arguably minimal and the employee's right to be free from arbitrarily imposed discipline is protected by a contractual just cause clause, the Constitution, or both. Cases in that class tend to divide roughly along these contextual lines: the use or distribution of potentially offensive ethnic, racial, or sexual material;[6] public or internal criticism of management;[7] and teachers' potentially offensive classroom statements.[8]

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[4]*See, e.g., McGill Mfg. Co.*, 73 LA 561 (Gibson 1979).

[5]In most one-on-one sexual harassment cases, the free speech contention is not even made by the union.

[6]*RMS Technologies, Inc.*, 94 LA 297 (Nicholas 1990); *Kraft, Inc., Sealtest Foods Huntington*, 89 LA 27 (Goldstein 1987).

[7]*United Grocers, Inc.*, 93 LA 1289 (Snow 1990); *U.S. Army Soldier Support Ctr.*, 91 LA 1201 (Wolff 1988) (derogatory remarks on union bulletin board, employer grievant); *Dep't of the Air Force*, 90 LA 1065 (Cohen 1988) (false and misleading newspaper statements—employer grievant); *U.S. Dep't of Navy*, 75 LA 889 (Aronin 1980) (newspaper article alleging employer reprisals against union supporters—employer grievant); *City of Berkeley*, 88 LA 603 (Staudohar 1987) (public statement that supervisor is lesbian); *Montebello Container Corp.*, 85 LA 1011 (Kaufman 1985) (calling Latino foreman "puto"); *City of Los Angeles, Harbor Dep't*, 84 LA 860 (Weiss 1985) (news article calling chief financial officer "head inquisitor"); *News-Sun Div. of Copley Press, Inc.*, 91 LA 1324 (Goldstein 1988) (relocation of union bulletin board containing "disloyal, critical . . . and obscene" material); *San Diego Gas & Elec. Co.*, 82 LA 1039 (Johnston 1983) (written reprimand for newspaper article alleging atrocious safety record); *Huron Forge & Mach. Co.*, 75 LA 83 (Roumell 1980) (discharge for locker room distribution of leaflet urging strike and advocating violence against racists, Nazis, and members of the Ku Klux Klan).

[8]*See, e.g., Dinsmore v. University of Me.*, 66 FEP Cases 852 (1994).

In the sexual material and slur prohibition cases, American employers often argue that they seek to avoid liability under Title VII of the Civil Rights Act of 1964, which, among other things, now makes sexual harassment unlawful.[9] In the criticism of management cases, the U.S. Supreme Court has provided some guidance by drawing a line between matters in which the "public has an interest" and those in which it does not.[10] Loyalty considerations lurk in the shadows of these lines. In 1992, the Canadian Supreme Court upheld a statute banning materials that are "degrading" or "dehumanizing" to women. Free speech arguments based on Canada's counterpart to the U.S. Constitution's First Amendment were rejected.[11]

Examining this group of cases, we might ponder two general questions: First, how, if at all, should constitutional free speech rights guide arbitrators in public sector cases, those in which a governmental entity restrains speech in some form or manner in disciplining an employee? Should the arbitrator follow judicial interpretations of constitutional free speech protections and rely less—or perhaps not at all—on an agreement's just cause clause? Second, in similar private sector cases, to what extent, if at all, might the arbitrator be guided by free speech constitutional principles in the interpretation of an agreement's just cause clause?[12] After all, "just cause" means many things to many people: freedom from arbitrariness, basic unfairness, discrimination, among many other generalizations. Does "just cause" also mean that a private sector employer's conduct is a just cause violation when it parallels conduct that would be a government employer's unconstitutional restraint on speech? Is there no such thing as contrac-

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[9] *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[10] *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968).

[11] *Butler v. The Queen*, 1 S.C.R. 452 (1992).

[12] The issue posed is distinguishable from the question of whether an arbitrator should *ignore* an applicable just cause clause and rely instead on a statutory, constitutional, or other external law standard in deciding a private sector grievance, where the agreement does not expressly incorporate external law. In the question posed, the arbitrator addresses the just cause clause as the incipient point of analysis and relies on external law—in this case the First Amendment—to interpret the just cause clause. Might the arbitrator's analysis then "draw its essence from the agreement?"

tual free speech rights? If there is, to what extent as compared with constitutional contours?

Drawing from a collage of arbitration and court cases, and some hypothetical questions, the panel will explore, first as a panel and then with the audience, a line of arbitrator "free speech" issues. In each of them, a collective bargaining agreement prohibits discharge and discipline "except for just cause." In each, the union takes a grievance to arbitration and argues that the imposed discipline violated constitutional "free speech" rights and also violated the just cause clause in the agreement. How should each case be decided and why?

Scenario 1. ABC Corporation, a manufacturer of farm machinery, fired G. Grievant for having made a quiet pro–abortion rights speech to a small group of other employees during a lunch break on company premises. A company rule provided that "all discussions of abortion on company premises are prohibited and punishable."

Scenario 2. Same as Scenario 1, except that the employer is the City of Metropolis.

Scenario 3. ABC Corporation, a private entity, suspended G. Grievant for three days. In his own copy of a company in-house magazine, Grievant had marked up several pictures with sexual and racial slurs. He showed the marked magazine to three male friends and then placed it in a storage bin just below his desk and out of public view. Nonetheless, a supervisor discovered it.

Scenario 4. Same as Scenario 3, except that the employer is the City of Metropolis.

Scenario 5. The city of Metropolis has a Department of Power (CMDP). CMDP operates a nuclear power plant just outside the city. G. Grievant was discharged for writing a letter to the editor of Metropolis' largest newspaper. The letter concluded, "The careless way this plant is operated, every life in Metropolis is in mortal danger." At the arbitration hearing, it is established that Grievant's statement was not true but that he had a good-faith belief that it was true.

Scenario 6. Same as Scenario 5, except that the nuclear power plant is operated by Nucleonics, Inc., a private entity.