FREEDOM TO SPEAK IN THE PROFESSIONAL SPORTS AND THE PROFESSIONALIZED SPORTS SETTING

Submitted By:

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Plenary Two: Retaliation/First Amendment in the Workplace
Legal Constraints on Freedom to Speak: From the Gridiron to the Classroom
The rights of free speech for employees in professional sports vs. the public sector; the distinction between private employers/public officials and employees; free speech issues within the collective bargaining context; the free speech rights of non-employee athletes (Olympic Sports/National Teams), the tension of rights under the Olympic and Amateur Sports Act of 1978 ("Stevens Act"); the State Actor test (revisiting the US Supreme Court 1985 decision in the "Gay Olympics" case, 483 U.S. 522 (1987).

I. Introduction: Athletes Speaking Out

The right to speak freely on political matters in professional sports was an issue that was pushed to the forefront of public consciousness in 2016. It was a quarterback, demoted from his prior starting position with the San Francisco 49ers named Colin Kaepernick who became the public face of speech in sports. Kaepernick during the 2016 preseason announced that he would no longer stand for the National Anthem. Citing solidarity with causes, including the Black Lives Matter movement, Kaepernick began kneeling during the playing of the Star Spangled Banner. It was a protest that attracted a stunning amount of attention including public thoughtful responses both in support of it and in against it from as unlikely sources as soccer star Megan Rapinoe, who joined it with a similar action of her own, and Supreme Court Justice Ruth Bader Ginsburg, who called it "really dumb." http://www.cnn.com/2016/10/14/politics/ruth-bader-ginsburg-apologizes-colin-kaepernick/

Kaepernick's protest proved to be prescient when two more police shootings of unarmed African-American men in Tulsa and Charlotte also made headlines during the football season. It was a protest he continued throughout the season, where he ultimately regained his starting job and was name the 49ers most valuable player on an awful 2-14 team. What the future holds for him is an open question. He is a free agent heading into this next season and there likely will be teams, owners and fan bases that will not welcome him.

It is clear we are living in an era of increased athlete activism harkening back to the 1960s when athletes frequently took bold public stands on important issues whether it was Muhammad Ali risking his career and prison to exercise his rights as a conscientious objector to military service; star amateur basketball players Lew Alcindor (later known as

Kareem Abdul-Jabbar) and Bill Walton refused to play for the U.S. in amateur basketball. The presence of Olympic star Rafer Johnson and NFL standout Rosie Grier on campaign trails with Robert F. Kennedy as he sought the presidential nomination in 1968 culminated with their being among those who subdued Kennedy's killer on the scene of his assassination. Female athletes likewise used the public forum their fame provided to make political statements on equality. Perhaps most famously, Billie Jean King, who helped create a women's professional tour, led a movement to boycott tournaments due to prize money disparities. Her defeat of 55 year-old former men's tennis champion Bobby Riggs in a nationally-televised prime time television event known as "the Battle of the Sexes," being the most remembered and symbolic of these.

It is a truism to say that political activity and speech from pro athletes has declined, at least in public, as lucrative player contracts and endorsement contracts rose in value during the 1980s and beyond. Basketball legend Michael Jordan is famous for a statement of caution attributed to him when he declined to campaign for African-American Harvey Gantt against racist candidate Jessie Helms, "Republicans buy sneakers, too." Whether Jordan actually said these words is a matter of some dispute. http://www.slate.com/articles/sports/sports_nut/2016/07/did_michael_jordan_really_say_republicans_buy_sneakers_too.html

But the general ethos that athletes should refrain from taking stances that endanger their marketability as players or perhaps more crucially as endorsers remained the norm at least until the last several years. NBA veteran Jason Collins came out as American team sports' first openly gay athlete to highly favorable and supportive public response in 2013. He even found marketing advantage and likely extended his career a season more. Although his 7'0" height and Stanford educated demeanor may have helped, too.

Then NBA player outcry helped NBA Commissioner Adam Silver take decisive action with regard to banning Los Angeles Clippers owner Donald Sterling from operating his team for life in 2014. More recently, Silver has led the NBA to pull its All-Star Game from Charlotte and collegiate leagues, including both NCAA and the North Carolina based Atlantic Coast Conference (ACC), to ban championship level events from

the state in response to HB1. So while there has been a general warming to political speech coming from the sports arena this has been far from clear or universal. So exploring the legal rights of professional athletes in the current environment is a worth task. We will see three distinct groups of contexts based on the legal status of the athlete as employee, the status of the employment contract and the status of the employer.

II. Athletes in Collectively Bargained Sports

Courts have been historically disinclined to equate sports performance or sports activity with free speech or expression. An excellent article by Genevieve Lakier of the University of Chicago in the University of Pennsylvania's Journal of Constitutional Law explores this complex relationship that denies to athletic performance the same protections given to forms of expression as diverse as exotic dancing and jazz music very well.
http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11402&context=journal_articles

Lakier, while mostly concerned with the treatment of sport as a whole, does note that sports leagues have more or less effectively regulated the expression and activity of the players and participants in these sporting events. In fact it is a big part of the business of sport.

Colin Kaepernick's first brush with freedom of speech or expression issues in the NFL wasn't his anthem protest. Rather he was fined $10,000 for violating league rules in wearing Beats headphones on the field and in post-game press conferences. The NFL had sold the exclusive rights to all headphone and communication device technology to Bose for multiple millions.

http://www.espn.com/nfl/story/_/id/11671032/colin-kaepernick-san-francisco-49ers-fined-10k-beats-dre-headphones

More to the point of expression, Kaepernick has also been fined for using inappropriate language on the field after throwing an interception.

http://www.foxsports.com/nfl/story/colin-kaepernick-s-11k-fine-reduced-49ers-bears-slur-appeal-101514

Most sports leagues have effectively collectively bargained every issue from dress, to uniforms, to headbands and logos, to sock height, to which headphones may be worn inside arenas and locker rooms with their players unions. Courts have generally supported these restrictions, including limitations on the use of social media by athletes in and around sports events.

Starting with the proposition that sports leagues and teams are private actors and athletes in and around the sporting context lack first amendment protection, most speech inside professional sports is not protected. Players may be subject to team or league discipline subject to the limitations of the collective bargaining agreement. A sampling of these rules from sport to sport, is provided as follows.

A. NFL Rules

We have largely been discussing the NFL, so far in this paper. In the league's most recent collective bargaining agreement, executed by its management council, and its union, the National Football League Players Association (NFLPA) in 2011 has two significant articles on player discipline that primarily regulate speech.

https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf

Article 42 deals with team discipline of players and standardizes penalties ranging from throwing a football into the stands during a game to losing a portion of a playbook. It does however, include (XV) that allows a team to suspend a player for up to four games for conduct detrimental to the team.

> ARTICLE 42 CLUB DISCIPLINE Section 1. Maximum Discipline: (a) 2011 League Year. For the 2011 League Year, the following maximum discipline schedule will be applicable: (i) Overweight—maximum fine of $470 per lb., which fine may be assessed no more than twice per week, with each week beginning on Monday and ending on Sunday, and with each fine at least three days apart (e.g., Monday–Thursday, Tuesday– Friday, etc.). (ii) Unexcused

late reporting for mandatory off-season minicamp, meeting, practice, transportation, curfew, scheduled appointment with Club physician or trainer, scheduled promotional activity, scheduled workout, weigh-in, or meal—maximum fine of $1,770. (iii) Failure to promptly report injury to Club physician or trainer—maximum fine of $1,770. (iv) Losing, damaging or altering Club-provided equipment—maximum fine of $1,770, and replacement cost, if any. (v) Throwing football into stands—maximum fine of $1,770. (vi) Unexcused late reporting for or absence from preseason training camp by a player under contract except those signed as an Unrestricted Free Agent pursuant to Article 9—fine of $30,000 per day. For this Subsection and Subsection (vii) below, preseason training camp shall be defined as the period beginning with the first day of a Club's training camp through the final preseason roster reduction date. (vii) Unexcused late reporting for or absence from preseason training camp by a player under contract signed as an Unrestricted Free Agent pursuant to Article 9— fine of $30,000 per day, plus one week's Paragraph 5 Salary for each preseason game missed. (viii) Unexcused missed mandatory meeting, practice, curfew, scheduled appointment with Club physician or trainer, material failure to follow Club rehabilitation directions, scheduled promotional activity, scheduled workout, weigh-in, or meal—maximum fine of $9,440. (ix) Unexcused failure to report to or unexcused departure from mandatory offseason minicamp—maximum fine of $10,000 for the first missed day, which amount shall increase by $10,000 per day for each day of the player's absence or departure (e.g., a player who misses all three days of minicamp may be fined up to $60,000). (x) Material failure to follow rehabilitation program prescribed by Club physician or trainer—maximum fine of $9,440. (xi) Unexcused missed team transportation—maximum fine of $9,440 and transportation expense, if any. (xii) Loss of all or part of playbook, scouting report or game plan—maximum fine of $9,440. (xiii) Ejection from game—maximum fine of $25,000. (xiv) Any material curfew violation the night prior to the Club's game may be considered conduct detrimental to the Club. 181 (xv) Conduct detrimental to Club—maximum fine of an amount equal to one week's salary and/or suspension without pay for a period not to exceed four (4) weeks. This maximum applies without limitation to any deactivation of a player in response to player conduct (other than a deactivation in response to a player's on-field playing ability), and any such deactivation, even with pay, shall be considered discipline subject to the limits set forth in this section. The Non-Injury Grievance Arbitrator's decision in Terrell Owens (Nov. 23, 2005) is thus expressly overruled as to any Club decision to deactivate a player in response to the player's conduct.

https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf

More serious and less defined are rules governing Commissioner discipline contained in Article 46. Commissioner discipline in the NFL does not provide the right of neutral review to a system arbitrator the way club discipline does. The effect of which penalty is used was a focal point of the Brady Deflategate case, that went up on appeal to the Second Circuit, and commanded the national stage during much of 2015. But Commissioner discipline turns on the notion of conduct detrimental to the game.

ARTICLE 46
COMMISSIONER DISCIPLINE
Section 1. League Discipline: Notwithstanding anything stated in Article 43:
(a) All disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed

exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner.

(b) Fines or suspensions imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such notification, the player, or the NFLPA with his approval, may appeal in writing to the Commissioner.

(c) The Commissioner (under Subsection (a)), or the person appointed by the Commissioner under Subsection (b), shall consult with the Executive Director of the NFLPA prior to issuing, for on-field conduct, any suspension or fine in excess of $50,000.

(d) The schedule of fines for on-field conduct will be provided to the NFLPA prior to the start of training camp in each season covered under this Agreement. The 2011 schedule of fines, which has been provided to and accepted by the NFLPA, shall serve as the basis of discipline for the infractions indentified on that schedule.

The designated minimum fine amounts will increase by 5% for the 2012 League Year, and each League Year thereafter during the term of this Agreement. Where circumstances warrant, including, but not limited to, infractions that were flagrant and gratuitous, larger fines, suspension or other discipline may be imposed. On appeal, a player may assert, among other defenses, that any fine should be reduced because it is excessive when compared to the player's expected earnings for the season in question. However, a fine may be reduced on this basis only if it exceeds 25 percent of one week of a player's salary for a first offense, and 50 percent of one week of a player's salary for a second offense. A player may also argue on appeal that the circumstances do not warrant his receiving a fine above the amount stated in the schedule of fines.

Section 2. Hearings:

(a) Hearing Officers. For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers. For appeals under Section 1(b) above, the parties shall, on an annual basis, jointly select two (2) or more designees to serve as hearing officers. The salary and reasonable expenses for the designees' services shall be

shared equally by the NFL and the NFLPA. Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.

(b) Representation. In any hearing provided for in this Article, a player may be accompanied by counsel of his choice. The NFLPA and NFL have the right to attend all hearings provided for in this Article and to present, by testimony or otherwise, any evidence relevant to the hearing.

(c) Telephone Hearings. Upon agreement of the parties, hearings under this Article may be conducted by telephone conference call or videoconference.

(d) Decision. As soon as practicable following the conclusion of the hearing, the hearing officer will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s), Club(s) and the parties to this Agreement with respect to that dispute. Any discipline imposed pursuant to Section 1(b) may only be affirmed, reduced, or vacated by the hearing officer, and may not be increased.

(e) Costs. Unless the Commissioner determines otherwise, each party will bear the cost of its own witnesses, counsel and other expenses associated with the appeal.

(f) Additional Procedures for Appeals Under Section 1(a).
(i) Scheduling. Appeal hearings under Section 1(a) will be scheduled to commence within ten (10) days following receipt of the notice of appeal, except that hearings on suspensions issued during the playing season (defined for this Section as the first preseason game through the Super Bowl) will be scheduled for the second Tuesday following the receipt of the notice of appeal, with the intent that the appeal shall be heard no fewer than eight (8) days and no more than thirteen (13) days following the suspension, absent mutual agreement of the parties or a finding by the hearing officer of extenuating circumstances. If unavailability of counsel is the basis for a continuance, a new hearing shall be scheduled on or before the Tuesday following the orignal hearing date, without exception.
(ii) Discovery. In appeals under Section 1(a), the parties shall exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing. Failure to timely provide any intended exhibit shall preclude its introduction at the hearing.
(iii) Record; Posthearing Briefs. Unless the parties agree otherwise, all hearings conducted under Section 1(a) of this Article shall be transcribed. Posthearing briefs will not be permitted absent agreement of the NFL and NFLPA or the request of the hearing officer. If permitted, such briefs shall be limited to five pages (single-spaced) and must be filed no later than three (3) business days following the conclusion of the hearing.

Section 3. Time Limits: Each of the time limits set forth in this Article may be extended by mutual agreement of the parties or by the hearing officer upon appropriate motion.
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Section 4. One Penalty: The Commissioner and a Club will not both discipline a player for the same act or conduct. The Commissioner's disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct.
Section 5. Fine Money:
(a) Fines will be deducted at the rate of no more than $2,500 from each pay period, if sufficient pay periods remain; or, if less than sufficient pay periods remain, the fine will be deducted in equal installments over the number of remaining pay periods. For the 2016–2020 League Years, the amount will increase from a rate of $2,500 to $3,500 from each pay period.
(b) For any fine imposed upon a player under Section 1(b), no amount of the fine will be withheld from the player's pay pending the outcome of the appeal, except that if: (i) the fine is imposed on or after the thirteenth (13th) week of the regular season; (ii) the player or the NFLPA does not timely appeal; or (iii) the hearing on a fine imposed for conduct occurring through the thirteenth (13th) week of the regular season is delayed by the player or the NFLPA for any reason beyond the time provided for in Section 2(b) of this Article, the full amount of the fine shall be promptly collected.
(c) Unless otherwise agreed by the parties., fine money collected pursuant to this Article shall be allocated as follows: 50% to the Players Assistance Trust and 50% to charitable organizations jointly determined by the NFL and the NFLPA. In the absence of said joint determination, the NFL and the NFLPA shall each determine a charitable organization or organizations to which half of the second 50% shall be allocated.

It is important to note that NFL Commissioner Roger Goodell and the 49ers both declined to fine or discipline Kaepernick for his anthem protest, each, most likely for their own differing reasons, rather than a recognition of free speech rights. Goodell whose relationship with NFL players after the Deflategate case can only be described as, troubled, likely didn't want to call greater attention to Kaepernick or possibly trigger

greater player sympathy for the protest. Goodell instead said "we believe in patriotism," and moved on.

http://www.usatoday.com/story/sports/nfl/2016/09/07/goodell-doesnt-agree-with-kaepernicks-actions/89958636/

The 49ers who play in the more liberal Bay Area, likely opted to avoid discord in their own locker room or to alienate their fan base, one perhaps more sympathetic to Kaepernick's position than most. Still other NFL owners let it be known they would were less supportive of one of their players. Indianapolis Colts owner Jim Irsay and Houston Texans owner Robert McNair who has publicly supported conservative causes each were critical of Kaepernick making it less likely players on their teams would join the cause.

http://profootballtalk.nbcsports.com/2016/10/19/jim-irsay-on-protests-there-are-other-places-to-express-yourself/

B. NBA Rules

The NBA, which is the league with the highest percentage of African-American players and a cadre of owners who are perhaps younger and less traditional than the NFL's ownership group, has been the most progressive on protecting the rights of players to speak out politically.

The NBA CBA maintains in the disciplinary sphere external review on actions of the Commissioner with regard to player discipline.

> Section 12. On-Court Conduct.
> In addition to its authority under paragraph 5 of the Uniform Player Contract, the NBA is entitled to promulgate and enforce reasonable rules governing the conduct of players on the playing court (as that term is defined in Article XXXI, Section 9(c)) that do not violate the provisions of this Agreement. Prior to the date on which any new rule promulgated by the NBA becomes effective, the NBA shall provide notice of such new rule to the Players Association and consult with the Players Association with respect thereto.

https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/2011NBA_NBPA_CBA(final%20version).pdf

The WNBA did fine a number of players who knelt during the National Anthem, in solidarity with Kaepernick, during games. Commissioner Lisa Borders ultimately vacated these fines, calling them unfortunate. Making it even murkier what the rights of players are to engage in political speech. Especially after players were previously fined for wearing black t-shirts in warm-ups to show sympathy for the Black Lives Matter movement after police shootings.

http://fortune.com/2016/09/22/national-anthem-protest-wnba-colin-kaepernick/

Suffice it to say that in the present moment athletes might be allowed to engage in some measure of political speech as long as it doesn't affect the team's uniform or a sponsor's product.

There may be a certain irony to note the NBA which has been the most progressive league with regard to protecting player's rights hasn't nearly so protective with regard to speech rights of owners. Commissioner Adam Silver banned Los Angeles Clippers owner Donald Sterling from the league for life after being recorded, by his erstwhile mistress, in horrifically prejudiced tirade that became public. Silver used provisions from the league's constitution that have never been used against an owner for anything but a financial default or act of misrepresentation to ban Sterling from the league. Silver's ultimate authority was never truly tested and the team was sold for more than $2 billion dollars in 2014.

III. Athletes Outside of Unionized Setting

A. Professionalized Settings

We have seen a number of situations recently outside of the major professional sports where the rights of athletes to speak may be either limited or expanded depending on the setting. In these professionalized settings we see a different set of rules than CBA concerns dictating the relationship and by extension the rights of the athlete.

B. Northwestern University

One of the more fascinating situations in modern sports labor history has been the application of scholarship football players at Northwestern University to unionize. The National Labor Relations Board (NLRB) declined to take action on a prior decision form its regional director in Chicago declaring Northwestern scholarship football players to be employees and thus eligible unionize. The rationale behind the NLRB's decision in this case was based on an inability to provide complete resolution of the issue since so many similar players are at state universities beyond the NLRB's authority.

https://www.nlrb.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case

However in a recent advisory opinion regarding the university's policies on social media comments by team members issued by the NLRB reminded Northwestern that despite no resolution having been obtained to the player's right to unionize, these rules might violate the federal labor law in two significant dimensions- first that denying employees the right to speak to third parties was a violation of the labor law; second, that punishing or retaliating against players was also a violation.

http://www.splc.org/blog/splc/2016/11/nlrb-college-gag-orders

C. Public vs. Private Settings: Team USA & the Stevens Act

Two of the more polarizing situations emerging out of the Kaepernick protest involved athletes in Olympic sports. Each amounted to a threat and no actual punishment but each raised a question as to whether a player wearing USA on their jersey is in a public setting and team officials actually state actors.

The treatment of women's soccer star Megan Rapinoe, who also knelt in protest after Kaepernick did, for matches of the U.S. Women's National Team and was threatened with fines and punishment was the first of these. Rapinoe, a hero of the World Cup Champion Women's National Team and a lesbian who articulated that she at times felt the anthem did not represent her as fully as she would like was ultimately not fined.
http://www.si.com/planet-futbol/2016/09/18/insider-notes-megan-rapinoe-protest-national-anthem-fifa

Similarly the U.S. team coach John Tortorella, warned players in the NHL created event the World Cup of Hockey to either stand for the anthem or sit for the tournament. http://www.nydailynews.com/sports/hockey/u-s-coach-john-tortorella-stand-anthem-sit-world-cup-article-1.2780406

So what are the rights of players wearing the jersey of their country and are the administrators of the various national governing bodies of sport in the U.S. state actors? The Supreme Court seemingly has resolved this issue in a 1985 case, ***San Francisco Arts & Athletics, Inc. v. United States Olympic Committee***, 483 U.S. 522 (1987). Better known as "the Gay Olympics" case, a majority of the Court found that the USOC, despite having a Congressionally sanctioned exclusive trademark over words and images associated with the Olympic movement based on the passage of the Stevens Act, was a private enterprise and not a state actor. However a blistering dissent from the famed justice, William J. Brennan, found *"[t]he statute is overbroad on its face, because it is susceptible of application to a substantial amount of noncommercial speech, and vests the USOC with unguided discretion to approve and disapprove others' noncommercial use of 'Olympic'."*

Whether a court today might be moved by Brennan's thinking is an open question and one for the next conflict.

SPEECH RIGHTS OF PUBLIC EMPLOYEES – AN OVERVIEW

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Speech Rights of Public Employees—an Overview

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I. The Basic Framework

Oliver Wendell Holmes, as Chief Judge of the Supreme Judicial Court of Massachusetts once famously dismissed a public employee's claim that he had been unlawfully fired for expressing political opinions. Holmes wrote that "[a] policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). For the first half of the Twentieth Century, that expressed the state of the law.

However, during the 1950s, the Supreme Court began to expand the rights of public employees, especially those in the education field. In 1968, the basic standard was set in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty*., 391 U.S. 563 (1968).

In *Pickering*, the Court created a two prong inquiry:

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1. **Does the speech involve matters of public concern?**

In *Pickering*, the court determined that petitioners' "'speech' regarding collective bargaining issues indisputably addressed matters of public concern.'"

In *Snyder v. Phelps*, 562 U.S. 443 (2011), the Court explained that:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, 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.

[quoting *San Diego v. Roe*, 543 U.S. 77 (2004), and *Connick v Myers*, 461 U.S. at 146; editing marks omitted.]

2. **Balancing of Interests**: If the speech is of public concern, the court must balance between the interests of the teacher, as a citizen, 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. The balancing is a fact-specific, contextual one; the public employer need only **"make a substantial showing that the speech is ... likely to be disruptive"** to satisfy the balancing test and meet its burden under

Pickering (*See Waters v. Churchill*, 511 U.S. at 674 [plurality opinion]; [giving "substantial weight to government employers' reasonable predictions of disruption"]; *Pappas v Giuliani*, 290 F.3d at 151 ["The employee's speech must be of such nature that the government employer reasonably believes that it is likely to interfere with the performance of the employer's mission"].

II. Pitching the Balance

In *Lewis v. Cowen,* 165 F.3d 154 (2d Cir 1999), the Court explained that "[t]he more the employee's speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown." *See Connick v. Myers*, 461 U.S. at 152; *Jeffries v. Harleston*, 52 F.3d at 13; *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir.1993).

Furthermore, the *Pickering* balance is affected by the nature of the disciplined employee's responsibilities. "[T]he more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d

Cir.1997) (internal quotation marks omitted). *See also Rankin*, 483 U.S. at 390-91, 107 S.Ct. 2891.

"[T]he policymaking status of the discharged or demoted employee is very significant in the *Pickering* balance, but not conclusive." *McEvoy*, 124 F.3d at 103. As the *Pickering* Court itself noted, "[i]t is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." 391 U.S. at 570 n. 3, 88 S.Ct. 1731.

III. Current Developments

Over the years, the Courts have tightened the test in two ways. First, the Court has, in emphasizing the contextual nature of the balancing test, required that the speaker show that her speech is in the capacity of a private speaker and not as a public employee. *See Garcetti v Ceballos*, 547 U.S. 410 (2006).

Ceballos in his capacity as a supervising deputy district attorney, was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was inaccurate. Concluding after the review that the affidavit

made serious misrepresentations, Ceballos relayed his findings to his supervisors, and followed up with a disposition memorandum recommending dismissal. When Ceballos suffered a reassignment that he deemed an adverse employment action, he claimed his First Amendment rights had been violated. The Supreme Court found that had not been:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'"). That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
>
> Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

547 U.S. at 421-422.

EXAMPLE: In *Berlyavsky v. NYC Dept of Env. Protection*, ___ Fed.Appx.___, 2016 WL 7402667 (2d Cir, Dec. 20 2016), the plaintiff reported ongoing [water] sampling violations to the Office of Environmental Health and Safety in August 12, 2006 and that he suffered adverse employment actions in 2006, 2009, and 2013. The Second Circuit ruled that "[i]n so doing, the Berlyavsky was speaking in his role as a public employee, and not as a public citizen: his job was to collect water samples, test the water quality's compliance with state and federal law and report the results."

Result: Complaint dismissed, as no tenable claim under the First Amendment.

(B) A second, related factor is that the extent to which the speaker is employed as the "face" of the employer may affect the balance. Thus, in *Lewis v. Cowen*, 165 F.3d 154 (2d Cir 1999), J. Blaine Lewis, the person in charge of Connecticut's lottery, was fired by his supervisors for refusing to publicly support a change in the lottery.

The Court found the termination appropriate, based on the balance, and noting Lewis's role as "Mr. Lottery": "**A well-respected senior policymaking employee with public speaking responsibilities who objects to a position held by his superior frequently may be forced to choose between speaking out in favor of his supervisor's program and keeping his job, or voicing his personal opinion and perhaps losing his job. That is what has happened here**."

IV. Applications: Recent Cases 2014-2016:

1. *Matter of Santer v. Bd. Of Educ. East Meadow Union Free Sch Dist*., 23 NY3d 251 (2014). During a labor dispute between the school district and the East Meadow Teachers Assn, the EMTA decided to pre-work day job informational picketing in several locations. On one cold and rainy morning, union members including Santer picketed by parking in legally designated parking spots (at that time) located across the street from one of the district schools. The participants parked in legal parking spots off of school property and, as planned, did not block any of the curb cuts. Santer testified that the participants placed picketing signs in their car windows facing the street "so parents going by would see them."

   Santer among others were disciplined in a grievance arbitration, the grievance was upheld against an Article 75 challenge by Supreme Court, reversed by the App Div 2d Dept, and then the grievance findings were reinstated by a divided Court of Appeals.

   The majority opinion rejected the notion that the parking protest was conduct not speech, finding that even the arbitral finding that the parkers intended to cause a disruption "deprive petitioners' picketing activity of its status as "speech." Accordingly, we conclude that petitioners' demonstration constituted "speech."

   The Court also found that "[t]he ongoing labor dispute between the EMTA and the District, although of personal concern to petitioners and other teachers, is a political and social issue of broad public import," and thus a matter of public concern. Additionally, the picketing demonstration was conducted outside the workplace on a public street and was addressed to a public audience: parents dropping their children off for school. And thus not done in the course of their duties.

In balancing the interest of the parties, the Court of Appeals found that the evidence, viewed as a whole, led the arbitrators to determine that petitioners created a health and safety hazard, and we now conclude that it demonstrated a potential risk to student safety that outweighed the First Amendment value of petitioners' speech about collective bargaining.

The dissent (Rivera and Lippman) opposed on the ground that (1) the majority disregarded the App Div's findings of facts, in its discretion reviewing the arbitration award; and (2) "reasonable potential for disruption" only applies to prospective policies limiting speech—the question here was whether sufficient risk of harm was proven, despite facts found by AD.

2. *Heller v Bedford Central School District*, 144 F.Supp.3d 596 (SDNY 2015), affd, ___ F Appx. ___, 2016 WL 6561491 (2d Cir. Nov. 20, 2016). Heller, a school teacher, purchased two firearms, received a third from a friend, and was shopping for a fourth. At the same time, he had a month-long online conversation with a friend. During the course of that conversation, Heller told her that he believed aliens controlled the government; that the Sandy Hook school shooting (which had recently happened) was fake; and that he "want[s] to kill people." The FBI received an anonymous tip about Heller in January and began monitoring his online communications. They coordinated with the local police department, which stopped Heller on January 18 as he drove home from a gun store.

   After he was psychologically evaluated, Heller was disciplined under Education Law § 3020-a for failure to cooperate/incompetence due to mental illness.

   HELD: The complaint does not contain any plausible, non-conclusory allegation to support plaintiff's claim that he purchased firearms with a communicative intent or that any observer would have reasonably

understood his purchase of firearms to convey a particularized message.

As to plaintiff's online conversations, the District Court concludes that, based on the overall factual allegations of the complaint and the materials incorporated therein, plaintiff's speech amounts to a "true threat" not entitled to First Amendment protection, citing *Virginia v. Black*, 538 U.S. at 359 ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat." (citations omitted));[2] *see also United States v. Turner*, 720 F.3d 411, 420 (2d Cir.2013) (stating that test for whether conduct amounts to a true threat "is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the communication would interpret it as a threat of injury" (quotation marks and alterations omitted)).

3. *Matthews v. City of New York*, 779 F3d 167 (2d Cir. 2015): Police officer filed § 1983 action against city, its police commissioner, and his supervisors alleging that city retaliated against him for speaking to his commanding officers about arrest quota policy at his precinct.

   The Court found that the police officer spoke as citizen, rather than as public employee, when he spoke to his commanding officers about arrest quota policy at his precinct, and thus his speech was protected by First Amendment, even though city's patrol guide required all

[2] *Virginia v. Black*, cited by the District Court in *Heller*, resuscitates a discredited line of cases, stemming from *Chaplinsky v. New Hampshire*, 368 U.S. 568 (1942), which stated that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."

As that doctrine began to wither, the categorical approach to finding some classes of speech to be outside the definition of "speech" under the First Amendment, the Supreme Court reasserted the doctrine: "The First Amendment, however, "permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Virginia v. Black*, 538 U.S. 343, 358–59 (2003).

members of service to report any corruption or other misconduct, where (1) officer's comments on precinct policy did not fall within his official duties, (2) officer was not flagging specific violations of law, and (3) officer chose path that was available to ordinary citizens who were regularly provided opportunity to raise issues with precinct commanders.

IV. Union-Related Speech and the First Amendment.

The First Amendment is so central to our understanding of free speech that it often obscures other protections under federal and state statutes. To take but one example, both state and federal law have statutory protection for speech made in the context of labor relations that might apply even where the First Amendment does not. So in *Montero v. City of Yonkers*, 2016 WL 7410720 (SDNY Dec. 20, 2016), the District Court found that:

> Because Plaintiff's speech lacked any civilian analogue, and because Plaintiff's speech, made behind closed doors outside the presence of both the public and Commissioner Hartnett, was at least tangentially related to his official duties, the Court is persuaded that no First Amendment protection attached to Plaintiff's comments at the two Yonkers PBA meetings. Plaintiff spoke at a closed forum, unavailable to ordinary citizens and made available to him only by virtue of his status as a police officer.

However, the District Court noted, If Plaintiff is facing retaliation by a union leader because of comments made at a union meeting, Congress has already offered protection for such speech. *See* 29 U.S.C. § 411(a)(2) (

"Every member of any labor organization shall have the right ... to express at meetings of the labor organization his views...."); *see also Maddalone v. Local 17, United Bhd. of Carpenters*, 152 F.3d 178, 183 (2d Cir. 1998) ("The Labor Management Reporting and Disclosure Act protects a member from being fined, suspended, expelled or 'otherwise disciplined' for exercising any right guaranteed by [29 U.S.C. § 411]....").

Likewise, the Public Employees' Fair Employment Act (Civil Service Law, Art. 14), more commonly known as the "Taylor Law," provides substantive protection for speech that is related to collective bargaining and union activities. As the Board explained in a case arising out of the same union informational picketing at issue in the Court of Appeals' *Santer* decision:

> It is well established that state law "can offer broader protections for its citizens than is afforded by the Federal Constitution, which sets the floor rather than the ceiling for an individual's rights." Consonant with this principle, we have long held that the scope of expressive activity protected under the Act is broader than that protected under the First Amendment. Thus, in *Sachem Central School District Board of Education*, we rejected the employer's claim that because the First Amendment did not proscribe the employer's prohibiting a non-certified union's access to employer-provided teacher mailboxes, the limitation did not violate the Act. As we explained:
>
> The right to organize granted to public employees by §202 of the Taylor Law exceeds those rights that are protected

> by the First Amendment of the Constitution so long as this statutory right or its exercise does not infringe upon constitutional guarantees.

East Meadow Union Free School District, 48 PERB ¶ 3006, 3019 (2015).