III. EMPLOYEE PERSPECTIVE

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Freedom of speech is one of the most precious of human rights. The United States enshrined freedom of speech in its Constitution as the first element of the Bill of Rights and America has fought wars to preserve these rights. Political dissidents in countries without freedom of speech risk imprisonment and death to achieve it.

Freedom of speech is far too important to be left behind when we go to work. Most of us spend more time at work than anywhere else—more time than we spend with even our families. Human rights do not truly exist if they disappear during the majority of our lives. We are not truly free if we are not free at work.

The tragic shortcoming of American constitutional law is its failure to protect human rights in the workplace. Under the state action doctrine, the Constitution applies to the actions of only the government. A private corporation, no matter how large or powerful, is completely free to take actions that would be illegal if taken by the government.

Fortunately, arbitrators are in a position to correct this injustice due to the fact that virtually every collective bargaining agreement contains a clause requiring just cause for termination. What this means (or even what this ought to mean) in practice when an employer disapproves of an employee's speech is anything but clear. But what *is* clear is that it means something. Unless an employee's speech harms the employer in a manner that meets the just cause standard, the employer cannot fire the employee.

But where is an arbitrator to find specific standards to use in deciding real cases? One place they will not find the right standard is in U.S. constitutional law for public employees.

The federal courts have long held that the government is bound by the Constitution when it acts as an employer, and that this creates a constitutional right of free speech for government employees.[1] The protection given to free speech, however, is woefully inadequate. The principal problem is the requirement that the employee's speech relate to a matter of "public concern."[2] An

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[1]*Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

[2]*Connick v. Meyers*, 461 U.S. 138 (1983).

employee whose speech relates to a matter of internal operations or organizational policy has absolutely no protection. Thus, an employee who complains about being passed over for a promotion in favor of a less qualified person could be fired without recourse, even if the complaint is made through authorized channels. A complaint about safety conditions that affect workers but not the public would not be protected, even if it involved a violation of federal statutes. The standard is obviously inadequate. Whatever "just cause" means, it does not encompass firing workers who raise legitimate complaints about serious workplace issues.

Although no one yet has created a completely satisfactory set of guidelines for determining when an employee's speech creates just cause for discharge, let me suggest a few basic principles:

1. *Employee Free Speech Is Not Absolute.* Nothing in the world, including free speech, is absolute. Even the government can punish speech under limited circumstances, such as threats of violence or disclosing classified information. The circumstances under which employers can limit speech are obviously much greater. No business could possibly function if every supervisor's instruction were subject to endless debate or if employees spent their time debating politics.

2. *Off-Duty Speech Cannot Be Regulated.* Although an employer must control employees' behavior during the work day in order for the company's product to be produced efficiently, the same is not true of off-duty conduct. The risk to individual rights is much greater when the employer controls off-duty speech.

The most difficult situation in this context is the case of an employee who makes disparaging comments about his or her employer. Some have argued that such comments can be properly punished because employees owe their employers a duty of loyalty. This idea, however, does not withstand scrutiny. The fundamental bargain between employer and employee is that the employee sells his or her labor to the employer. An employee who provides a good day's work does not breach the duty of loyalty because he or she expresses a negative opinion about the company. The only exception to this is where an employee has misappropriated confidential information or made bad-faith statements that injure the employer.

Another problem is that there is no reciprocal duty on the employer's part. The company owes its employees no duty of loyalty. It has every right to reduce pay or benefits, transfer work to third world subcontractors, or take any other action it deems

will improve the bottom line, regardless of the impact on its employees.

In essence, the doctrine of employee loyalty is a thinly disguised version of "the king can do no wrong," which has no place in a truly democratic society.

3. *Workplace Speech Should Be Judged By Its Impact on Work.* Employees are generally entitled to be judged by the quality and quantity of their work. Although employees legitimately may be disciplined because their speech affects their work, or the work of other employees, they should not otherwise be penalized. When speech does have a negative impact on work, it should not be judged more harshly than other behavior having the same impact. While an employee who wastes the entire day talking about politics can be disciplined for not getting the job done, an employee who spends 10 minutes talking politics should not be treated any differently than one who spends the same amount of time at the coffee machine.

The most difficult area here is insubordination. While an employee who refuses to follow instructions can be disciplined for not doing his or her job, the concept of insubordination is often improperly extended to situations where the employee carries out the instructions but expresses an uncomplimentary opinion of the boss. Many employees do not think highly of bosses, and many bosses are aware of this. This does not prevent work from being completed properly. The fact that an employee expresses an opinion, standing alone, does not necessarily interfere with work. While no one, employer or employee, ought to be subjected to verbal abuse, the idea that a manager is entitled to dress down employees in harsh terms, without recourse, but an employee who tells the boss what he or she really thinks can be fired, is a relic of the plantation mentality. It has no place in a modern company, especially a unionized one.

Another difficult situation is created when an employee makes statements that other employees find offensive. The furor created by controversial statements can significantly interfere with work. Many employers would respond by banning the expression of unpopular points of view. While one can sympathize with the employer who has no desire to be a censor but just wants to avoid disruptive arguments, allowing this course creates the "heckler's veto." This is the kiss of death for free speech, and it has been uniformly rejected by the courts in constitutional cases.

A better approach would be to inform employees that they are not required to listen to messages they find offensive and to allow employees to communicate their views to those whom they believe might be interested. Employees who are the recipient of an offensive message need only inform the speaker that they do not wish to hear it. If the speaker does not respect this instruction, then he or she can be disciplined.

Although these few principles do not provide answers to the many and varied free speech disputes faced by arbitrators, they may provide a fresh perspective that allows employees a greater degree of freedom at work without compromising the legitimate needs of employers.

IV. UNION PERSPECTIVE

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I must confess a sense of disappointment that this Academy continues to see the preservation of First Amendment speech rights in the workplace as an open issue. But, then again, if the U.S. Supreme Court finds itself compelled to periodically address the limits of speech within society as a whole, we must expect that arbitrators will periodically be asked to perform a similar task with respect to disputes arising in the workplace. Furthermore, we should expect that the workplace, like society as a whole, will find it difficult to draw a bright line between acceptable and unacceptable speech.

As Professor Alleyne notes, arbitrators have had little difficulty in rejecting claims that speech is protected absolutely in the workplace. Neither public nor private sector workplaces present suitable forums for open debates.[1] Supervisors and workers are not expected to haggle over assignments as though they are dealing in some industrial bazaar. Rather, debates are to be moved off the floor and resolved through the grievance procedure. The oft-invoked statement of "obey now and grieve later" is shorthand for this limitation on shop-floor debate.[2]

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[1] *See Ford Motor Co.*, 3 LA 779 (Shulman 1944).

[2] *See generally* Zack, *Just Cause and Progressive Discipline*, Labor and Employment Arbitration, Chapter 19, eds. Bornstein & Gosline (Matthew Bender 1991), 19-1–19-22.