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Free Speech Not Limited By Time, Place Or Protocol

Teacher's lawsuit offers lesson to employers terminating workers

By JARAD M. LUCAN

Employment law practitioners in Connecticut should take interest in a recent decision handed down by the 2nd Circuit Court of Appeals. The case, Nagle v. Marron, was decided Dec. 12, 2011, and involved a non-tenured teacher's First Amendment retaliation claim against the school district and its officials.

Prior to accepting employment with the Mamaroneck Union Free School District in Westchester County, N.Y., in 2004, Nagle was a special education teacher in Henrico County, Va. While teaching in Virginia during the 2002-03 school year, Nagle apparently violated protocol when she reported to authorities within her school, the Virginia Department of Child Protective Services, and the state police that a fellow teacher was abusive to a student. The circumstances surrounding the incident and Nagle's involvement were subsequently reported to the newspapers in Virginia and eventually found their way online.

Jarad M. Lucan

On March 2, 2007, four years after the events in Virginia and while she was employed by the Mamaroneck school district, Nagle was informed that the superintendent decided not to recommend her for tenure and therefore her probationary employment with the school district would terminate at the end of the 2006-07 school year. Prior to Nagle being informed that she would not be recommended for tenure, however, two significant acts occurred that formed the basis of Nagle's First Amendment retaliation claim.

First, in January 2007, the assistant principal at Nagle's school presented Nagle with a copy of a teacher observation report. The report bore Nagle's signature, notwithstanding the fact that she had previously refused to sign the report. After Nagle complained to her union and the school district, an investigation was initiated.

As a result of the investigation, two handwriting experts concluded that the assistant principal had forged Nagle's signature! Second, during the time that the decision not to recommend Nagle for tenure was being discussed, the superintendent became aware of the events in Virginia following a Google search.

Once Nagle was informed that she would not be recommended for tenure, she filed suit alleging that the Mamaroneck school district and its officials retaliated against her for exercising her rights under the First Amendment. Despite her allegations, the District Court held that the speech upon which Nagle based her claim (the forgery incident and the events in Virginia) was not protected under the First Amendment.

In addition, the District Court held that, in the alternative, summary judgment would have been appropriate even if the speech was protected because Nagle would not have been recommended for tenure in the absence of the speech.

On appeal, the 2nd Circuit first addressed the forgery incident and held

Jarad Lucan, an associate with Shipman & Goodwin LLP, practices labor and employment law on behalf of both public and private sector clients. He represents employers on retaliation and discrimination claims and a variety of labor relations matters. He can be reached at jlucan@goodwin.com.

that Nagle's complaint was not protected by the First Amendment because it "had no practical significance on the general public" and thus, did not implicate a matter of public concern, which is a threshold issue in an employment-based First Amendment case. The 2nd Circuit's holding in that regard is not surprising as it emanates from the court's own precedent concluding that an employee's speech is not protected if it is "part and parcel of his concerns about his ability to properly execute his duties." See, e.g., Weintraub v. Board of Education, 593 F.3d 196, 203 (2d Cir. 2010).

2nd Circuit's Take

Although Nagle did not prevail on her claim based on the forgery incident, the 2nd Circuit vacated the District Court's decision with respect to the events in Virginia. According to the District Court, the speech that occurred in 2003 was "old news" and although it might have been protected in Virginia when it was first made, it was no longer a matter of public concern four years later in New York.

However, the 2nd Circuit took issue with this proposition because while speech uttered years prior to an adverse employment action may have bearing on an analysis of causation, "[w]hether the speech pertained to a matter of public concern and whether it was uttered in the speaker's capacity as a private person are not facts that change over time. A teacher's expressive conduct made in the course of working for a candidate's political campaign, for instance, would constitute protected speech even if the candidate lost his candidacy therefore ceasing to be a matter of immediate public concern. And the speech would remain protected if the teacher moved to an area where the candidate had not been on the ballot. The First Amendment protects precisely such public participation, both at the time it occurs and ever after." In short, under Nagle v. Marron, speech does not go stale over time or when it takes place in another geographic region.

In addition to the foregoing, the 2nd Circuit took issue with the District Court's determination that Nagle's reporting of abuse in Virginia lost its protection because she "undisputedly violated reasonable protocols." Again, while that argument may have some validity during an analysis of causation, failure to abide by reporting rules does not deprive the speech of First Amendment protection.

For employers and their attorneys, the 2nd Circuit's holding with respect to the decision-making process itself should be of particular interest. Indeed, a common position taken by employers in cases such as this one is that the decision to terminate was made before learning about the employee's free speech.

The 2nd Circuit made clear, however, that "[e]vents leading up to a formal decision will, in many situations, be relevant to the analysis of causation. An employer cannot insulate itself from liability at the summary judgment stage simply by asserting that an adverse employment decision has in fact already been made, without being memorialized or conveyed to anyone, before the employer learned of the protected conduct."

In Nagle v. Marron, the 2nd Circuit determined that the adverse action occurred on March 2, 2007, when Nagle was informed of the decision that she would not be recommended for tenure. Because the record indicated that the superintendent had merely been thinking about letting Nagle go when he learned about the events in Virginia, the 2nd Circuit concluded that a reasonable jury could find that those events convinced the superintendent to follow his inclinations, and thereby played a part in the decision.

Based on the 2nd Circuit's decision, Nagle will get her day in court on her First Amendment retaliation claim grounded in the events that occurred in Virginia, despite the timing of those events, the location of those events, and her failure to follow proper protocols in reporting those events. •