THE PUBLIC SECTOR EMPLOYERS
“FREEDOM OF SPEECH” TOOLKIT

HOW EMPLOYERS CAN BETTER UNDERSTAND “FREEDOM OF SPEECH”
DEFENSES AND RELATED DISCIPLINING OF EMPLOYEES

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Freedom of Speech: The Employer’s Toolkit – Introduction

Public employers are frequently faced with employee misconduct that involves an employee invoking his or her “freedom of speech” rights after speaking out in a way that harms the organization through misinformation or malice. After all, this is America, not some totalitarian or repressive country where the government can squash our freedom of speech, right? We know that it is not that simple and many public sector human relations and labor relations representatives may be intimidated by the claims of “freedom of speech,” and be hesitant to take appropriate action in such situations. A better understanding of the limits and obligations of the right of freedom of speech and how it impacts the disciplinary and grievance process should enable us to tackle this sensitive issue with more confidence and success.

The purpose of this paper is to provide public employers with a basic toolkit that can be used to understand the concepts relating to freedom of speech defenses used by employees and unions during the discipline, grievance, and arbitration process. Your toolkit will include:

- Freedom of speech and the constitution--where it all began
- Public sector versus private sector freedom of speech protection
- Landmark cases and the standards they set
- How to prepare for the discipline, grievance, and arbitration process through investigation and following the seven tests of just cause.
- Understanding that technology and the Internet have become the newest challenge and frontier in the evolving issue of freedom of speech.

Your next logical question may be, “Do I need to understand this much regarding freedom of speech defenses if I am going to hire outside counsel for the arbitration?” My answer is unequivocally yes. The reason is that arbitration and litigation can be costly ventures. As the employer’s human resources and labor relations representative you will be responsible for two very crucial parts of this process prior to the arbitration stage.

Vital Roles for Human Resources and Labor Relations Representatives

As the human resources representative, it is likely that you will be designated to investigate this matter prior to any decision to discipline, which would require the employer to schedule a Loudermill or pre-disciplinary hearing. You need to follow due process. Starting your investigation with a working knowledge and history of freedom of speech and related cases, as well as the standards for just cause, will aid you in avoiding potential pitfalls in your investigation.

As the labor relations representative, you may be the third stop on the grievance express, when inevitably the department head will deny the grievance, either with or without the advice of the human resources department. The decision to discipline, suspend, or terminate this employee is usually the responsibility of the department head. In some cases these decisions will actually be made by boards or commissions. For example, many Police Departments and Fire Departments have Commissions who may make this type of decision. It will be your job to
understand the standards that are involved so that you can independently evaluate the merits of each side’s case. Believe me, if your ruling is to deny the grievance at your level, it will most likely be going to grievance arbitration.

As you can see, each of these two processes, the investigation/disciplinary process and the in-house grievance process, while different, are crucial. They will determine if it will be worth it for the employer to pursue this matter and ultimately attend grievance arbitration or court. Why are employers sometimes hesitant to go forth with discipline once an employee invokes their first amendment right of freedom of speech? Part of the reason may be a lack of understanding, or the burdensome task of weighing the inappropriate act against the individual’s constitutional rights or civil liberties. In order to best understand the origin of freedom of speech, let us take a look back over two hundred years of our constitutional history.

**Freedom of Speech History Before and After the 1960’s**

On December 15, 1791, the first ten amendments were enacted and added to the Constitution of the United States. At this point, our country was still in its infancy stage, having not yet reached its 5th birthday. The amendments are commonly referred to as the Bill of Rights. It is these first ten amendments that provide us with most of our individual rights under the Constitution. In order to find information regarding freedom of speech, there is no need to look any farther than the First Amendment. The entire amendment covers rights to freedom of religion, speech, the press, and the rights to assemble, and to petition. We will be focusing on just one: the freedom of speech. While it is true that the Constitution was created in order to protect individual rights, its protections are not endless or limitless. These limitations, as with most constitutional matters are defined and shaped through court decisions.

There are many cases that have involved freedom of speech. As a result, there have been standards historically set regarding these types of cases. Even the way that the Supreme Court itself has viewed this issue has changed or morphed throughout history. In 1892, Justice Oliver Wendell Holmes wrote, “There may be a constitutional right to talk politics, but there is no constitutional right to be a policeman.” This was in response to the question, “Does the First Amendment allow the government to use a public employee’s speech as the grounds for discharge or denying a promotion?” In other words, you don’t have a right to that job if your politics are wrong. It was not until the late 1960’s that the Supreme Court’s position changed regarding this issue. The court came up with a new premise: “that the government ought not to be able to do indirectly what it cannot do directly.” The Court began to take the position that public employment cannot be conditioned on a surrender of constitutional rights. The cases that we will review, as well as our description of the differences between public and private sector freedom of speech protections, all stem from this new position taken by the Supreme Court.

**Freedom of Speech Protection: Public vs. Private Sector Differences**

When it comes to public sector employment and private sector employment, freedom of speech protections are quite different. It is understood that employees of the government have a

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2 Ibid-Footnote 1
greater protection under the First Amendment. The Court has also ruled that, “if exercising these
democratic rights collides with the government’s rights as an employer and hinders the efficiency in the
work place and rises to the level of employee misconduct, it may constitute just cause for
termination.” A later discussion will provide more details on the public sector grievance and
arbitration process. So we will now discuss the private sector employment and freedom of
speech.

Private sector employees do not share the same constitutional protections as their public
sector counterparts. Most states are “at will” employment states. While some may have slightly
different clarifications of “at will,” they all follow the basic concept of at will. This means that
the employer, at their employer’s will, can terminate an individual’s employment at any time.
This, however, does not mean that private sector employers should fire without examining all the
facts first. Courts have ruled that, while private sector employees do not have constitutional
protections under the First Amendment, they still have some protections under other laws such as
Title VII-The Civil Rights Act of 1964.

For example, if a private sector employee files a complaint with his or her supervisor
regarding being harassed because of religious beliefs or sexual orientation and that employee is
fired the next day without any other triggering event or fact finding process, the employer may
have further discriminated against him as outlined by Title VII-The Civil Rights Act of 1964. If
proven, this could result in a wrongful termination lawsuit being filed, sighting Title VII
discrimination.

In addition, the individual would have other resources available to them, such as filing a
claim with the U.S. Equal Employment Opportunity Commission (EEOC) or a state human
rights organization. These organizations were created to protect both public and private sector
employees’ rights relating to equal opportunities as well as basic civil and human rights in
employment. Additional laws that offer some protections to both private and public sector
employees are those commonly referred to as the whistle blower laws. One example of this is the
Occupational Safety and Health Act, specifically Section 11, which protects employees from
retaliation and adverse employment action because they report a health or safety concern or
violation.

So it is fair to say that while private sector employees do not have constitutional protection
under the First Amendment, employers must still analyze the situation to determine if the speech
in question is protected under another law or act. Keep in mind that, while public sector
employees have constitutional protection under the First Amendment, they also have all the
protections under other a laws or acts that we have discussed regarding private sector employees.

If we are going to understand the conditions under which public sector employees can
legitimately claim freedom of speech protections under the First Amendment, and also how
human resources and labor relations professionals should approach potential discipline which
might lead to grievance or arbitration, we should look at several landmark cases and decisions
that form the foundation for decisions we make today and in the future.

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Freedom of Speech Case Law 1968 to 2006: Coming Full Circle

In 1968 the United States Supreme Court dealt a significant blow for the first time to public sector employers with its ruling on *Pickering v. Board of Education of Township of High School District 205, Will County, 391 U.S. 563*. This case involved a schoolteacher named Pickering, who had sent a letter to the local newspaper criticizing the manner in which the superintendent and the school board were allocating funding for the athletic and educational activities. Pickering further attacked the manner in which the administration and board’s informing the public of the effects this would have on further tax revenues. As a result of his actions, the Board of Education terminated Pickering.

Both the Circuit Court of Will County and the Supreme Court of Illinois upheld his termination based on the opinion that the best interest of the school system outweighed his rights under the First Amendment. In the spring of 1968 this case was argued before the United States Supreme Court. By early summer the Court had reached a decision. Justice Thurgood Marshall delivered the Court’s opinion. He stated that, “in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.”

The importance of this decision by the U.S. Supreme Court in June 1968 helped to develop two important standards for freedom of speech cases. First is the concept of “public concern.” This is a cornerstone issue in this type of case. If the speech is not in some way conceived to be a matter of “public concern,” it is unlikely that it will be protected speech. In the event that it is protected, then the balance between the employer’s obligation to the public and the individual’s rights must be weighed. A second important concept concerns false statements knowingly made by an individual. When someone’s spoken or written words are analyzed is the content false and, if so, did the person know it was false? If the answer is yes to these two questions, not only would the individual’s speech most likely not be protected, but they could also face the consequences of slander or libel.

In January 1978, Aaron Finkel and Alan Tabakman, two assistant public defenders in New York, started down the path toward the United States Supreme Court. Their case eventually became *Branti v. Finkel, et al. (1979) 445 U.S. 507*. In January of 1978, the District Court had filed an injunction to keep the two from being separated from employment. The reason for the planned separation was they were Republican and the newly appointed public defender was a Democrat. He had plans to then appoint nine new assistant public defenders, eight of whom, it was confirmed, were Democrats. Justice John Paul Stevens delivered the Court’s opinion. He

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5 Ibid-Footnote 4

stated that government benefits or employment, “while conditional on certain factors, could not be conditional based on constitutionally protected interests such as freedom of speech or interest.”

The practice of partisan patronage was commonplace in appointed non-civil service employment for many years before this ruling. The ruling on this case by the Supreme Court Justices marked a change in the thought process on what was protected under the First Amendment. Now, not just speech but the beliefs of individuals were protected. This decision countered the ruling from just a few years earlier in Elrod v. Burns, 427 U.S. 347 (1976) which had ruled that separation because of lack of political sponsorship was permissible.

In the fall of 1980, Sheila Myers was working as an Assistant District Attorney in New Orleans. She was notified that she would be transferred to another area. During a discussion with her supervisor she voiced her negative feelings about the transfer and other issues concerning the office. The end result was that Ms. Myers developed a survey and circulated it throughout the office for response. Stating that she would not accept the transfer, her employer fired her. She filed a lawsuit claiming that her freedom to speech had been violated. The District Court agreed with her because part of her survey related to matters of public concern.

Connick, the employer then appealed to the Fifth Circuit Court of Appeals who upheld the District Court’s earlier ruling. Connick then appealed to the Supreme Court, Connick, v. Myers 461 U.S. 138. Justice Byron White delivered the Court’s Opinion in 1983. Surprisingly, the Supreme Court overturned the lower court’s ruling. They agreed that only one of the fourteen questions on the questionnaire rose to the level of public concern. This meant that the other 13 questions that were surveyed could be the basis for termination. Based on this fact, the Supreme Court felt that the lower courts had not applied the “public concern” aspect of the “Pickering Ruling” as it was intended. This led to the concept of the “whole of the record.” Simply put, it was the obligation of the lower courts to evaluate each portion and not just rule that the entire questionnaire was protected speech. In the end, the Supreme Court ruled against Myers and reversed the ruling of the lower courts claiming that the majority of her questionnaire was in essence a personal grievance and not a matter of public concern. As a result of both the Pickering and the Connick Supreme Court cases the Court established the two part test known as the “Pickering-Connick test.” Accordingly, a public employee must first establish that his or her speech touches on a matter of public concern. Then the court balances the employee’s free-speech rights against the government employer’s interest in efficiency. This analysis is also referred to as the “Balancing Test.”

Our final case will discuss freedom of speech protections for public employees acting in the capacity as a public employee as opposed to a citizen in matters of public concern. In February 2000, Richard Ceballos, Deputy District Attorney in Los Angeles, was working in a supervisory

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7 Ibid-Footnote-7


capacity when he received information that a warrant was filed utilizing questionable information. After investigating the scene and talking to the officer who filed the warrant, he then spoke with his own supervisor, who then decided to still move forward with the warrant. Based on this fact, Ceballos wrote a memo in March 2000, documenting his disagreement with the final decision. Ceballos claimed that, as a result, he suffered several adverse employment actions, such as not being promoted. He then filed a suit in the United States District Court for the Central District of California citing violation of his First Amendment rights. The District Court ruled that Ceballos wrote the memo in the capacity of his employment; therefore, it shall not be protected. Ceballos appealed to The Court of Appeals for the Ninth Circuit. They then reversed the earlier ruling because they felt that the contents of the memo were a matter of public concern. Garcetti, the employer, then filed an appeal to the United States Supreme Court, Garcetti et al. v. Ceballos N547 U.S. 410 no. 04-473. (2006). Justice Anthony Kennedy delivered the opinion of the Court. They ruled that speech that is part of a person’s official public duties would not be considered protected speech under the First Amendment. They reversed the ruling of the lower court. Almost 40 years after Pickering v. Board of Education, the Supreme Court has created a semi-balanced arena for public sector employers and employees to determine if an individual’s First Amendment rights are being violating when they are disciplined for speech or written communication relating to the work place.

Our toolbox now has the following principles to guide us in evaluating the nature of freedom of speech defenses:

- If the speech involved matters of “public concern,” then it is probably protected speech, and, in and of itself, will not justify discipline.
- False statements, even if supposedly made out of “public concern,” are not likely to be protected speech, especially if the employee knew the statements were false.
- Terminations or discipline done for purely political reasons are not allowed. In other words, employee beliefs are protected.
- When considering the concept of “public concern,” the totality of the speech, or the “whole of the record” must be considered, not just a small or insignificant part.
- Speech that is part of an employee’s official duties is not protected under freedom of speech.
- The “Balancing Test” should be used to determine if a public employee’s right to free speech outweighs a public employer’s interest in effective and efficient operations.

The Discipline, Grievance, and Arbitration Process Meets Just Cause

As a human resources or labor relations representative, you are designated to conduct any one of the following steps in this process. Fully understanding each step will be paramount to understanding the role you are assigned.

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Stage One – Fact Finding Process.

It is always a good idea to collect facts pertinent to the situation in question before moving to disciplining an employee. In freedom of speech cases, either spoken or written words that had some alleged adverse impact on the work environment, must be examined. On its face, this process seems very basic; ask questions, receive answers. However, because this process is often the foundation for every step after this, it must be done correctly, and you must be aware of the following requirements.

Interview all available witnesses. This will include the claimant, the accused, and finally any co-claimants or witnesses to the events in question. Planning your interview questions ahead of time is crucial. Make sure that all of your questions relate only to the events in question. Remind employees that they should answer questions or they could be disciplined as a result of refusing to answer questions or provide statements. In the event that an employee does not want to answer questions for fear of self incrimination, it may be necessary for an employer to compel an employee to answer by utilizing a Garrity Warning. In this process, the employer would explain to the employee that the inquiry is administrative in nature, that they are compelled to answer questions and provide statements, and that these may not be used against them in criminal proceedings. *Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967).* Start each interview process by explaining to each person the reason you are conducting the interviews. Since most of the employees that you interview will be unionized, it is important to understand Weingarten Rights and Loudermill Rights. These are basic rights of employees. Both are based on United States Supreme Court rulings.

Weingarten Rights ensure a unionized employee the right to union representation during an investigative inquiry when the employee feels that the outcome may result in discipline. These rights were developed as a result of *NLRB v. Weingarten, Inc. 420 U.S. 251 (1975).* In order to have the union representative present, the employee must invoke that right. There is no obligation on the employer or the investigator to invoke it for the employee. This fact is sometimes misunderstood by Human Resource Professionals. Additionally, these rights do not guarantee the employee that they will have the representative of their choosing. If the person they request is not available, you may request another steward. Remember, the moment that the employee invokes his or her right to representation all questions must stop at that point until a steward arrives. The steward can take the following actions during the interview process:

- Be a witness to the interview.
- Subsequently disagree with false accounts of that interview.
- Not allow the member to be intimidated.
- Clarify confusing questions.
- Remind the member to stay in control of him or herself.

11 Interview Warnings (date Unknown) Retrieved February 12, 2011 from http://www.aele.org/law/warnings.html

Honoring an employee’s request for Weingarten Rights may help you to avoid having an arbitration panel rule against you for not adhering to this request. We will discuss Loudermill Rights during stage two of our process. Now that you have collected all the facts, it is time to determine if the accused will be disciplined based on the findings.

**Stage Two- Pre-disciplinary Hearing Process**

At this point, you have collected the facts and prepared a detailed report of your findings to be used in later stages of this process. You are confident that the employee’s actions and words have broken the policies set for your organization. In addition, you feel that this behavior shows a high level of insubordination for the affected supervisors. Before issuing the proper level of discipline for the behavior, it is important to notify the employee in writing that they will be attending a pre-disciplinary hearing. This is done to ensure the employee is provided their right to due process. As a result of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court ruled that, because public employees have a property right to their employment, they should be afforded the opportunity for Due Process.\(^{13}\) The main propose of this process is to ensure that the employee has an opportunity to respond to the allegations. It is understood that, because most employees will have an administrative process, such as grievance or arbitration, and possibly an appeal to a Civil Service Commission, this process will not be all encompassing. During the Loudermill hearing, the employee is provided with the following:

**Loudermill elements**

1. Oral or Written notice of charges.
2. An explanation of the employer’s evidence supporting the charges.
3. An opportunity to respond before a final decision is made.

It is best that no final decision on discipline be made until after the Loudermill hearing is complete and the employer has all available information. Once all the new information entered into evidence at the Loudermill hearing is reviewed and fully considered, then a letter can be issued providing discipline up to and including termination. In the majority of suspension and termination cases this will then trigger the filing of a grievance.

**Stage Three- The Grievance and Arbitration Process**

Most collective bargaining agreements have sections that address the grievance and arbitration process, to include applicable timelines to file as well as timelines for the employer to formally respond in steps one and two. Typically there will be at least three steps, including arbitration.

*Step 1- Grievance Process: Filing a grievance with the Department Head.*

The Union, on behalf of the disciplined employee, will file a formal grievance. The grievance should include the following:

- What provision of the contract that the union and the employee believe that the organization has violated. In freedom of speech defenses it is common that the union will cite the grievance article itself as well as citing lack of just cause. We will discuss just cause in detail during Step 2 of the Grievance process.

- A suggested remedy to “make whole” should also be included. The purpose is to indicate to the department and the organization what the union and the employee feel would rectify the situation if the department head, hearing officer, or arbitrators rule in their favor.

After this grievance is filed in writing with the department head, typically there will be a period of about 10 days for the department head to respond back to the union and employee in writing. Frequently, department heads will contact the hearing officer or the human resources representative when they are preparing their responses. In these cases the department heads are reviewing contract language as well as Civil Service Rules, Regulations, and Ordinances. It is not uncommon during this step for the department head to reconsider the offense and discipline and settle the grievance before it goes to the next step.

Step 2- Grievance Process Example: Filing a Grievance with the Organization’s Hearing Officer (Note: not all organizations will have this same process.)

This step becomes necessary when the department head responds back to the union and the employee in writing, denying their grievance, stating the reason(s) for the denial. Typically, within about 10 days of receiving the Step 1 denial the union will file a grievance with the hearing officer. Timelines become important at this point. Once the hearing officer receives the grievance they will usually check to ensure that the grievance has been filed in accordance with the timelines of the Collective Bargaining Agreement. In some isolated cases a grievance may be denied solely because of the lack of adherence to the timelines. Assuming that the timelines have been followed, the hearing officer will then schedule the grievance hearing.

As the grievance hearing begins, the hearing officer will introduce him or herself and then introduce the grievant. In addition, they will indicate to the parties present that all conversation should be directed through the hearing officer and not directed to the other parties, as this would create a hostile atmosphere and impede the collection of verbal and document evidence. Because First Amendment defenses are often used as a result of an employee being disciplined, the hearing officer should have the representative for the employer present their facts first. Any documents referenced during the verbal presentation should be requested and entered into evidence as a permanent part of the grievance file. Once the employer’s representative is finished and has rested, it is time for the union and grievant to make their argument.

The Step 2 grievance hearing is often the first time the union and employee will raise the issue of protected speech under the First Amendment as a reason that they feel that the employer did not have Just Cause. It is customary that after both sides have presented, each will be allowed to briefly rebut the other side’s statements. Often hearing officers mistakenly allow very long and dramatic rebuttals. The purpose of rebuttal should be clarification not reconciliation. If the
union and the employee argue at this stage that there is a lack of Just Cause due to protected speech under the First Amendment, the hearing officer should at this point ask the employee a series of questions that will allow him or her to analyze whether or not the employee’s spoken or written words or beliefs could possibly be protected. In some cases the employee and union may not even know the standards required for making this claim. Using the Supreme Court decisions and resulting standards that we discussed earlier as tools, you can nail down whether or not there is an impingement on their constitutional rights. In the event that the hearing officer feels that there is a strong indication that it is indeed protected speech he or she may weigh all the fact and rule in favor of the employee and overturn the discipline. If that is not the case, then the hearing officer must apply the Seven Tests of Just Cause in order to determine if the employer did indeed have Just Cause for the discipline.

The Seven Tests of Just Cause, credited to Arbitrator Carroll R. Daugherty, and first published in 1966 have become a very helpful tool. Similar to a set of wrenches, you need the whole set in order to complete the job. Missing one, not applying one, or finding that the answer is no to one of them can result in a weakened case that could be seen as arbitrary or capricious by arbitrators or judges. Below are the seven tests:

1. **Notice**—“Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee’s conduct?”

Most human resources departments provide a full day of new employee orientation. The purpose for this is, to make sure the new employee feels welcome and it gives the human relations department an opportunity to review all relevant work rules, policies, as well as the Human Resources and Civil Service Rules, Regulations, and Ordinances. Having the employees sign acknowledgement forms on orientation day is a great way to verify that proper notice was provided. If there are revisions to any Policies or Rules you must disburse these documents again and obtain new signed acknowledgement forms for the revised version.

2. **Reasonable Rules and Orders**—“Was the employer’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the employer’s business and the performance that the employer might properly expect from the employee?”

Most collective bargaining agreements will have a section that spells out management rights. Reviewing these as well as avoiding arbitrary or capricious work place rules will help you avoid any pitfalls on this one.

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15 Ibid- p 27

16 Ibid- p 86
3. **Investigation**- “Did the Employer, before administering the discipline to an employee, make an effort to discover whether or not the employee disobeyed a rule or order of management?” 17

We have discussed at an earlier stage the importance of a prompt and comprehensive investigation. But what do you do if the employee refuses to cooperate in the interview process? The best approach is to give the employee every opportunity to take an active and productive role in the process by being interviewed. Sometimes this may mean scheduling multiple interview sessions as well as allowing the union an opportunity to discuss with them in private the reasons why it would be in their benefits to give a statement. Make sure to document your repeated attempts to gain their cooperation. In the end, if an employee fails to cooperate they may be subject to discipline for refusing to answer. You may have to tell the employee that they could face discipline and you will reach a final determination without their statement to consider.

4. **Fair Investigation**- “Was the Employer’s investigation conducted fairly and objectively?” 18

It is important to have all parties believe that the investigation was conducted in a fair and objective manner. The investigator must first determine if there are any previous circumstances with the employee or history that would allow the employee to question the fairness of the investigation process. If there is any question in your mind, it may be best to ask for the investigation to be assigned to someone else. Being humble in these circumstances can be an additional tool.

5. **Proof**- “At the investigation did the Company obtain substantial proof that the employee was guilty of the misconduct that they were accused of?” 19

When you lay out all of the facts, do you have solid proof that a reasonable person would find that this employee is guilty of misconduct? Before you answer, remember it may be possible that this investigation will someday be reviewed in front of the United States Supreme Court. That thought will allow you to see your findings in a new light.

6. **Equal Treatment**- “Has the employer applied its rules, orders and penalties even handedly and without discrimination to all employees?” 20

Larger organizations often see this as their biggest challenge when it’s time to head for arbitration. There probably aren’t any employers who would go out of their way to treat employees differently and therefore make all future case vulnerable. Many public employers have thousands of employees and there are hundreds of disciplinary notices that are placed in employee personnel files each year. Many employers have found that an H.R.I.S. (Human Resources Information System)...

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17 Ibid- p159
18 Ibid- p 229
19 Ibid- p 237
20 Ibid- p 303
Resources Information System) can be your biggest e-tool in tracking all of these occurrences. If properly inputted into the system, one can generate reports that will help you in several ways:

- Help set similar discipline levels for similar violations.
- Help hearing officers determine if the employer had Just Cause.
- Provide evidence during arbitration or litigation that there was equal treatment.

7. **Penalty**- “Was the degree of discipline administered by employer in a particular case reasonably related to the seriousness of the offense, and the record of service with the employer?” 21

Discipline fairly, and consider the tenure of the employee as well as the employee’s work and disciplinary record.

*Step 3- Grievance Arbitration*

So you have found that the employee in question did not meet the standards for protected speech under the First Amendment of the Constitution because he or she did not raise an issue that rose to the level of public concern. Or, you feel that, even if the arbitrators were to disagree with you on this first step of the *Balancing Test,* you are confident that the employee’s right to free speech will not outweigh the organization interest in effectiveness and efficiency. In addition, you applied the Seven Tests of Just Cause and found that the Employer had Just Cause to discipline. At this point you write your grievance response denying the union’s grievance. As a result, you receive notification that the union has filed for grievance arbitration. Preparation is the key to doing well at arbitration. Once the organization has decided who will represent them, you and that individual should review all information and data available regarding the case. It may be six to eighteen months before you actually go to arbitration. Therefore, reviewing the file becomes important. In addition, you will want to meet prior to the arbitration to prepare the witnesses. This will ensure that they are as comfortable as they can be by the day of the arbitration. During the arbitration the union and the employer will both present their case as well as call witnesses to support their case. In many states this process is conducted in front of a three-person arbitration panel at a state department or commission. This arbitration panel is usually comprised of a neutral arbitrator, a labor arbitrator, and a management arbitrator. Whatever the outcome, both parties must live with it. In order to do well in defending your disciplining of this employee who is claiming a First Amendment protection, you must clearly demonstrate why this individual’s actions were not protected due to lack of accepted standards as well as proving that the employer had Just Cause for their discipline. Good Luck.

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21 Ibid- p 377
**Face book meets First Amendment**

In the United States, advancing technology and the Internet have become major factors in our everyday life. Social networking sites such as Facebook and Twitter have become a common way for people to interact both at work as well as during their off hours. In recent years, many public employers have been faced with dealing with investigations, grievances and arbitrations because employees were disciplined for their behavior on these websites relating to their employment. In many of these cases the employee claims First Amendment protections. It is typical that during the grievance hearings, some of the grievants state that they thought their comments and interactions were private; therefore they could not be disciplined for them. That is not entirely true. There is a prevailing thought that what I do or say on the Internet or email is private because employees are often alone when the original information is sent and they feel that it will remain private. Many of these cases arise from employees saying derogatory and damaging things about their workplaces, employers, or coworkers while off duty, but this is still a work related issue. Remember, understanding how these sites work and who has access to the information will help you determine if the behavior has adversely affected the workplace. A word of caution is in order when disciplining these cases. You must obtain the information through a legitimate source, other than using their password, or another less than direct method. How you obtain the information can become a factor in determining if you prevail at arbitration.

**Conclusion**

While our Constitution was written during the infancy of our Nation, it remains one of the greatest tools that we have for determining the human and civil liberties that we all share. The United States Supreme Court decisions regarding freedom of speech protections are also invaluable tools to be placed in your tool kit for future use. Like any other tools, they must be sharpened in order to remain effective. So it will be important that you sharpen the tools that this article has provided you by keeping up to date on related arbitrations, and court cases, including the ever-evolving issues related to technology and the Internet.