Public Sector Employment

Personnel Policies

In those counties which have adopted the "County Unit" form of local government, and are required to operate on a Countywide system of road administration, the Board of Supervisors is required to adopt and maintain "a system of Countywide personnel administration for all County employees" other than those employees of other elected officials. Section 9 of the County Government Reorganization Act of 1988, Miss. Code Ann. §19-2-9(1)(Supp. 1989) provides in part:

> The personnel system shall be implemented and administered by the County Administrator. Such personnel system may include, but not be limited to, policies which address the following: hiring and termination of employees, appeal and grievance procedures, leave and holidays, compensation, job classification, training, performance evaluation and maintenance of records. All employees of the County shall be employees of the County as a whole and not of any particular supervisor district. However, any employee which the County Administrator is authorized to employ shall be terminated at the will and pleasure of the administrator without requiring approval by the Board of Supervisors. The Board of Supervisors of each County shall spread upon its minutes all its actions on personnel matters relating to hiring or termination and such other personnel matters deemed appropriate by the Board.

With regard to employees of elected officials of the County other than members of the Board of Supervisors, such officials who are authorized by law to employ "shall adopt and maintain a system of personnel administration for their respective employees or shall adopt a system of personnel administration adopted by the Board of Supervisors. The personnel system adopted and any amendments thereto shall be filed with the Board of Supervisors." Miss. Code Ann. §19-2-9(2) (Supp. 1989).

Hiring and Termination of Employees

A specific chain of command should exist in all decisions to hire, discipline or fire County employees. If multiple avenues of authority are allowed to exist in making decisions to hire or fire County employees, such a lack of uniformity may be seized upon in a court of law as evidence that there are no objective criteria for such hiring and firing decisions, and may tend to establish the lack of objectivity and neutrality of such decisions.

At-Will Doctrine

Up until June 17, 1992, it appeared that Mississippi still recognized the "at will" termination rule, followed since 1858, which states essentially that absent an employment contract expressly providing to the contrary, an employee may discharged at the will of his employer for good reason, bad reason or no reason at all, except for reasons independently declared legally impermissible. ***Shaw v. Burchfield***, 481 So. 2d 247, 254 (Miss. 1985). As explained below, the at-will doctrine is on the verge of collapse.

Legally impermissible reasons would include (but are not limited to) race, sex or age discrimination, as

well as discriminatory conduct violative of such federal laws as the Americans with Disabilities Act, discussed in more detail in the chapter on Personnel Administration.

On June 17, 1992, the Mississippi Supreme Court held in ***Bobbitt v. The Orchard, Ltd.***, 603 So. 2d 356 (Miss. 1992), that an employee's manual

> did create an obligation on the part of (the employer) to follow its provisions in reprimanding, suspending or discharging an employee for infractions specifically covered therein.

With regard to the continuing viability of the at-will doctrine, the Mississippi Supreme Court in ***Bobbitt***, speaking through presiding Justice Armis Hawkins, undercut the doctrine even further:

> Neither ***Shaw v. Burchfield*** nor this case presents a precise terminable at will question, but ***Shaw*** warns employers that this Court will be looking for a wiser and more humane alternative to the terminable at-will rule in an employment contract. *Id.* at 361.

Public Policy Exception

In ***McCarn v. Allied Bruce-Terminix Co.***, 626 So. 2d 603 (Miss. 1993), an employee was allegedly discharged for refusing to commit deceptive, fraudulent or illegal actions against the clients of his employer or for reporting same, under a set of facts which prompted the Mississippi Supreme Court to create a public policy exception to the at-will doctrine:

> We are of the opinion that there should be in at least two circumstances, a narrow public policy exception to the employment-at-will doctrine and this should be so whether there is a written contract or not:
>
> (1) An employee who refuses to participate in an illegal act...shall not be barred by the common law rule of employment-at-will from bringing an action in tort for damages against his employer;
>
> (2) An employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment-at-will doctrine from bringing an action in tort for damages against his employer. To this limited extent, this Court declares these public policy exceptions to the age old common law rule of employment-at-law. These exceptions apply even where there is "privately made law" governing the employment relationship, where the illegal activity either declined by the employee or reported by him affects third parties among the general public, through they are not parties to the lawsuit.

Discharge Without Reference to Manual

In ***Coleman v. Chevron Pascagoula Federal Credit Union***, 616 So. 2d 310 (Miss. 1993), a

credit union employee was discharged without reference to the policy and procedure manual which was given to her at the time she was employed. The manual provided for a six month probationary period, during or at the end of which employees performing unsatisfactorily may be terminated, and also provided a procedure for disciplinary action. Holding that the employer at the time of discharge had in effect an employment manual from which, in the present posture of the case, it could not be determined whether it was followed or violated in discharging the employee, the Mississippi Supreme Court reversed for further proceedings.

Effect of Listing Reasons for Discharge

In ***Hartle v. Packard Electric***, 626 So. 2d 106 (Miss. 1993), the Court held that at-will employment relationships are not governed by an implied covenant of good faith and fair dealing. *Id.* at 110. In ***Hartle***, the employer distributed handbooks to employees, including the Plaintiff, setting forth employment conditions, policies, practices, responsibilities, rules of conduct and benefits for employees. It also contained a warning that the policies and procedures contained in the handbook did not constitute a legal contract and also preserved the employer's right to terminate the employee at will. The employee argued that the handbook's listing of reasons for discharge limited the employee's discretion to discharge him only for just cause. The Mississippi Supreme Court rejected this argument, reasoning that the listing in an employment handbook of causes that may result in termination did not give a basis for saying the employee was employed under a "for cause" contract, and in this case "the handbook did not alter the at-will status of the employment relationship." *Id.*

Effective Disclaimer

The Court in ***Bobbitt*** made it clear that a different result might obtain if the employer published an "express disclaimer or contractual provision that the manual did not affect the employer's right to terminate the employee at will...." *Id.* at 362. Accordingly, in ***McDaniel v. Mississippi Baptist Medical Center***, 869 F. Supp. 446 (S.D. Miss. 1994), the Court found without merit certain state law claims for breach of employment contract or wrongful discharge. In granting summary judgment in favor of the Defendant employer, the Court noted the rule in ***Bobbitt*** that where an employer distributes an employee manual containing procedures to all its employees the employer is bound to follow its provisions in reprimanding, suspending or discharging an employee for violations of its policies, even in a situation where the employment relationship is one which is at-will, but that this holding was expressly qualified and the rule did not apply where there is something in the employment contract to the contrary, citing ***Bobbitt v. The Orchard, Ltd.***, *supra* at 357. The Court concluded in ***McDaniel***:

> Since the language quoted from the Handbook expressly preserved the at-will nature of Plaintiff's employment relationship and preserved the right of Defendant to terminate its employees with or without cause, nothing in the Handbook gave Plaintiff a right to be disciplined or terminated in accordance with the policies expressed therein.

Accord, ***Mann v. City of Tupelo***, 1:93cv107-B-D (N.D. Miss. 1995)("The City retained its right to discharge an employee without cause through the express disclaimer in the applicant's statement signed by all employees, including the Plaintiff, as a matter of standard operating procedure. Therefore, the Plaintiff has no

breach of contract cause of action.”).

Retaliation for Reporting Illegal Conduct

In ***Willard v. Paracelsus Healthcare Corp.***, 681 So. 2d 539 (Miss. 1996), two former employees of a hospital sued for wrongful discharge, alleging that they were subjected to retaliatory discharge. The evidence at trial showed that the employees had been fired in retaliation for their reporting forgery and financial irregularities on the part of their employer. The Mississippi Supreme Court, citing ***McArn v. Allied Bruce-Terminix, Inc.***, reaffirmed the public policy exceptions to the at-will doctrine, where an employee refuses to participate in an illegal act or an employee is discharged for reporting illegal acts of the employer to the employer or anyone else. Concluding that the jury should have been provided an instruction on retaliatory discharge, the Court noted that the public policy exception for reporting illegal acts as an exception to the employment-at-will doctrine sounds in tort, and that “a party is entitled to pursue all remedies available in tort, including punitive damages.”

> Today, we answer in the affirmative the question of whether such conduct, if found, is an independent tort giving rise to punitive damages. The public has a legitimate interest in seeing that people are not discharged for reporting illegal acts or not participating in illegal acts which may result in harm to the public interest. Anyone who terminates an employee for such reasons should be allowed a jury instruction on the issue of punitive damages in order to deter similar future conduct. Discharge in retaliation for an employee’s good faith effort to protect the employer from wrongdoing constitutes an independent tort and may support punitive damages.
> Noting that the two employees had “outstanding” and “impeccable” personnel records, the Court found that they had been terminated on questionable grounds, the policies of the employer’s handbook had not been followed in the process, and an evidentiary basis existed for a jury to find an intentional wrong necessitating the imposition of punitive damages.

The case was remanded for a new trial, and in the second appeal, the Mississippi Supreme Court affirmed a judgment on a jury verdict awarding punitive damages of $1,500,000.00 each to the two employees. ***Paracelsus Healthcare Corp. v. Willard***, 754 So. 2d 437 (Miss. 1999). In the jury trial on remand, a punitive damages instruction was submitted along with jury instructions on retaliatory discharge and tortious breach of an oral contract, and on the basis of the evidence, the jury returned . In affirming the jury verdicts, the Mississippi Supreme Court cited the common law factors for assessing punitive damage awards, including whether the amount serves to punish the wrongdoer and as a deterrence from similar future conduct, whether the amount serves as an example to deter others from similar offenses, and whether the amount accounts for the pecuniary ability and net worth of the Defendant. See ***Dixie Ins. Co. v. Mooneyhan***, 684 So. 2d 574, 585 (Miss. 1996). The Court also considered the guidelines set out in ***BMW of North America, Inc. v. Gore***, 517 U.S. 559 (1996), wherein the United States Supreme Court held that state courts, when faced with challenges that a punitive damage award is excessive and exceeds the constitutional limits, should consider the degree of reprehensibility of the defendant’s conduct, the ratio between the plaintiff’s compensatory damages and the amount of punitive damages, and the difference between the punitive damages and the civil or criminal sanctions that could be imposed for comparable misconduct. *Id.* at 575-76. The Mississippi Supreme Court concluded that the punitive damages awarded to the two former employees of the hospital were not excessive

under the BMW guidelines, stating:

> The appellees, however, were terminated in violation of their contracts. There was testimony that back-up copies of the vouchers and checks, which appellees argue was proof of the forged checks, could not be found although there is testimony that it did exist. There was also testimony that much of the back-up documentation had been housed at a storage facility, which was later burglarized. ***Paracelsus*** offered this as reason why some documentation related to the forged checks was missing. The jury was entitled to infer from the evidence presented whether there was any concealment of documentation by ***Paracelsus***.

Appeal and Grievance Procedures

A County can be exposed to significant liability if it fails to maintain adequate and complete documentation of infractions and other disciplinary matters involving County employees. In drafting a personnel policy, as alluded to above, care must be taken to avoid creating in an employee a property interest in his or her employment, since an employee who enjoys a property interest in employment or who enjoys a reasonable expectation of continued employment on the basis of statements inadvertently inserted in a personnel policy, will be entitled under the United States Constitution to a meaningful hearing concerning any disciplinary action, including an evidentiary hearing prior to discharge, complete with court reporter, transcript of testimony, attorneys and witnesses. See ***Conley v. Board of Trustees of Grenada County Hospital***, 707 F.2d 175 (5th Cir. 1983). To avoid this inadvertent creation of a "property interest" in employment, the personnel policy provisions applicable to appeal and grievance procedures should clearly state that the County/employer or the County Administrator with respect to employees he or she is authorized to employ, reserves the authority to terminate the employment relationship at any time as is deemed in the best interest of the County, and that any benefits, including appeal rights and grievance procedures, are voluntarily extended on the part of the County and are not construed to be a contract or guaranty of employment or the continuation of any benefit, and that the employer reserves the right to change its policies or eliminate benefits at any time with or without notice.

As noted above, in ***Hartle v. Packard Electric Division***, *supra*, a disclaimer in the policies and procedures booklet that it did not "constitute a legal contract" and did not "modify the month-to-month employment relationship" was found to be a sufficient disclaimer to defeat an employee's claim of employment contract obligation. Similarly, the employment handbook in ***McDaniel v. Mississippi Baptist Medical Center***, *supra*, specified that it was "not a contract of employment, either express or implied; confers no property interest in one's job," and that either employer or employee were "privileged to terminate employment at-will, without notice and without cause," and that the contents of the handbook were guidelines and not a guarantee of continued employment, was also held to be a sufficient disclaimer to defeat such a claim.

Without such disclaimers, public as well as private employers may face needless liability exposure under ***Bobbitt v. The Orchard, Ltd.***, *supra* at 361, in which the Court held that a manual given to all employees becomes a part of the contract, and while it did not give the employees tenure or create a right to employment for any definite length of time, it did create an obligation on the part of the employer to follow its own provisions with regard to the reprimand, suspension or discharge of employees for infractions specifically covered in the manual.

Annual Leave, Sick Leave and Retirement

Miss. Code Ann. §19-3-63 (Supp. 1990) provides the following for vacations and sick leave for County employees:

(1) The Board of Supervisors of each County by resolution adopted and placed on its minutes may establish a policy of sick leave and vacation time for employees of the County not inconsistent with the state laws regarding office hours and holidays.

(2) Notwithstanding the provisions of subsection 1 of this section, each elected official of the County, other than a member of the Board of Supervisors, who is authorized by law to employ, may, by written policy filed with the Clerk of the Board of Supervisors, establish a policy of sick leave and vacation time for his employees which may be inconsistent with the policy established by the Board of Supervisors but which shall not be inconsistent with the state laws regarding office hours and holidays. If such elected official fails to adopt and file such a policy with the clerk of the Board of Supervisors, the policy adopted by the Board of Supervisors for sick leave and vacation time for County employees shall apply to employees of such elected official.

The state laws regarding compensatory leave [Miss. Code Ann. §25-3-92 (Supp. 1999)], vacation rights and annual leave [Miss. Code Ann. §25-3-93 (Supp. 2003)] and sick leave [Miss. Code Ann. §25-3-95 (Supp. 2003)] apply to most employees of state departments, agencies and institutions, and similar leave provisions may be adopted on a modified basis as a part of a system of Countywide personnel administration for County employees. The Attorney General has issued a number of opinions construing these statutes and their predecessors, and a number of inconsistencies and conflicts between state and local governments in Mississippi have arisen, particularly relating to the applicability of §§25-3-91 et seq. to cities and counties.

In AG Op. #96-0017 to Keating, January 19, 1996, the Attorney General opined that under 25-3-92, the legislature did not intend for any accumulated unused compensatory leave to be counted as creditable service for purposes of the Public Employees Retirement System. In AG Op. #92-0698 to Dyson, Sept. 2, 1992, the Attorney General opined that when an employee is no longer performing any work for the agency and has no plan or intention to return to work but is merely exhausting his or her personal leave before formally resigning the position, termination of employment has effectively occurred as of the date the employee last worked, and the employee would be entitled to receive payment for not more than 30 days accumulated leave, and all other leave is to be counted as creditable service. In AG Op. #93-0824 to Head, Nov. 29, 1993, the Attorney General opined that the limitation placed on the granting of earned and accumulated personal leave to an employee is that the employer can grant no more personal leave than that which has been accumulated or earned by the employee.

In light of the above interpretations of the leave statutes, which make it clear that a county has the authority to afford more leave benefits to its employees than those afforded state employees, the Attorney General has made a distinction with respect to the enlargement of benefits under PERS. In AG Op. #2001-

0102 to Yancey, March 23, 2001, the Attorney General acknowledged the "many different opinions of this office" concerning the applicability of §§25-3-92 et seq. to counties and cities, and clarified the application of §§25-3-91 et seq.

County authority to tailor local employee leave policies now includes authority to adopt vacation leave, sick leave, and compensatory time policies.[47] The legislative amendment to 25-11-103(h)[subsequently (I)] extended the authority of counties and cities to offer more or less to their employees compared to state employees. AG Op. #2001-0102 to Yancey, March 23, 2001. "Any prior opinions of this office were prospectively superseded by the passage of the amendment. Thus, there is a more recent line of opinions of this office which clearly recognize that a political subdivision could enlarge upon the vacation or sick leave allowed for state employees." *Id.*

Up until the 2001 legislative amendment to §25-11-103(h), the Attorney General's office had taken the position that the board of supervisors may not establish a personal and sick leave policy which would enlarge upon the benefits afforded employees under the state system. .AG Op. to Griffith, May 1, 1987. In that same opinion, the Attorney General opined that the discretionary authority provided under §19-3-63, which provides that implementation of a policy of sick leave and vacation time for county employees is optional, does not contemplate or authorize payment in lieu of personal or sick leave. Consistent with this opinion, the Attorney General has recently opined that the board of supervisors does not have the authority to compensate a county employee upon retirement or termination for unused leave. AG Op. #2002-0482 to Trapp, Sept. 6, 2002. In AG Op. #2002-0767 to Fortier, Jan. 10, 2003, however, the Attorney General opined that "No additional compensation in the form of overtime pay or comp time may be paid to employees unless there was a policy authorizing such payment spread upon the governing authority minutes and in effect when the extra work was done."

The Board of Trustees of the Public Employee Retirement System of Mississippi has now formally adopted Regulation 51 concerning accumulated leave and under what circumstances it may be counted toward creditable service upon retirement. The new regulation was adopted December16, 2003, and is attached as Appendix D. It not only confirms but "reaffirms prior construction of law, practice and procedure in the administration of service credit for lawfully accumulated unused leave and for the payment of unused leave for retirement purposes." It is hoped that Regulation 51 will bring clarity to what has been a recurring issue affecting state and local government employees.

FMLA

Although a detailed discussion of the Family and Medical Leave Act of 1993 is beyond the scope of this chapter, it should be noted that the FMLA, 29 U.S.C. §2601, provides for up to twelve weeks of unpaid leave with health insurance coverage once an employee exhausts his or her paid leave.[48] County employees

[47]Miss. Code Ann. §25-11-103(I)(Supp. 2001), construed in AG Op. #2001-0102 to Yancey, March 23, 2001.

[48]See generally ***Manuel v. Westlake Polymers Corp.***, 66 F.3d 758 (5th Cir. 1995)(Neither the interim regulations, 29 C.F.R. §§825.302, et seq., nor the FMLA's statutory language requires an employee to invoke the language of the statute to gain its protection when notifying an employer of the need

must meet all the requirements for eligibility, including the requirement that the County employ at least 50 employees at or within 75 miles of the workplace, and the leave must be for certain family and medical reasons covered by the Act. The employee must also have been employed by a state agency for at least 12 months and must have worked a minimum of 1250 hours during the 12 prior months.

Balancing Needs of Families and Interests of Employers

The FMLA allows eligible employees working for covered employers to take temporary leave for medical reasons, for the birth or adoption of a child, and for the care of a spouse, child, or parent who has a serious health condition, without the risk of losing employment.[49] 29 U.S.C. § 2601(b)(1) and (2). The FMLA has two distinct sets of provisions, which together seek to meet the needs of families and employees and to accommodate the legitimate interests of employers. See ***Nero v. Indus. Molding Corp.***, 167 F.3d 921, 927 (5th Cir. 1999); ***Bocalbos v. Nat'l W. Life Ins. Co.***, 162 F.3d 379, 383 (5th Cir. 1998).

Right to Reinstatement

When an eligible employee returns from leave taken under the FMLA, the employer must restore the employee to the same position or to "an equivalent position[50] with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1); see ***Nero***, 167 F.3d at 925. The FMLA also contains proscriptions against penalizing an employee for the exercise of FMLA rights. 29 U.S.C.§ 2615(a)(1)-(2); see ***Chaffin***, 179 F.3d at 319.

If an employee fails to return to work on or before the date that FMLA leave expires, the right to reinstatement also expires. See ***Brown v. Trans World Airlines***, 127 F.3d 337, 342-43 (4th Cir. 1997); ***Barnett v. Southern Foods Group***, 1997 U.S. Dist. LEXIS 23625 (N.D. Tex. July 1, 1997); ***Beckendorf v. Schwegmann Giant Supermarkets, Inc.***, 134 F.3d 369, 1997 WL 191504 at *3 (1997); ***Nunes v.***

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for leave for a serious health condition).

[49]The FMLA provides a series of substantive rights, requiring a covered employer to allow an eligible employee up to twelve weeks of unpaid leave if the employee suffers from "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). See ***Chaffin v. John H. Carter Co., Inc.***, 179 F.3d 316, 319 (5th Cir. 1999).

[50]An equivalent position is "virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status." 29 C.F.R. § 825.215(a) (2001). The Department of Labor regulations provide that an "employee is ordinarily entitled to return to the same shift or an equivalent work schedule." 29 C.F.R. § 825.215(e)(2) (2001). A necessary exception is provided if the position has been eliminated, but if the position has simply been filled by another employee, the leave-taking employee is "entitled to return to the same shift on which employed before taking FMLA leave." 29 C.F.R. § 825.216(a)(2) (2001).
"Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. § 825.220(d). FMLA § 2611(3) defines "employee" by reference to the FLSA, 29 U.S.C.§203(e), which provides that "the term 'employee' means any individual employed by an employer."

Wal-Mart Stores, Inc., 980 F. Supp. 1336, 1340-41 (N.D. Cal. 1997), rev'd on other grounds, 164 F.3d 1243 (9th Cir. 1999); ***Stopka v. Alliance of Am. Insurers***, 1996 U.S. Dist. LEXIS 18329 (N.D. Ill. Dec. 9, 1996), aff'd on other grounds, 141 F.3d 681 (7th Cir. 1998).

"Employee" as Ambiguous Term as used in FMLA

In ***Nationwide Mut. Ins. Co. v. Darden***, 503 U.S. 318, 323, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992), the Court stated that this definition of "employee" is "completely circular and explains nothing." The term "employee" may have different meanings in different acts, or even in different provisions of the same act. In ***Robinson v. Shell Oil Co.***, 519 U.S. 337, 341-44, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997), the Court noted that although some sections of Title VII unambiguously refer to only current or past employees, those examples demonstrate only that the term "employees" may have a plain meaning in the context of a particular section--not that the term has the same meaning in all other sections and in all other contexts. Once it is established that the term "employees" includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute.

Similarly, several circuits also have determined that "employee" is ambiguous in the FMLA context, because in various contexts it refers to only current employees, but in other situations it refers to former employees. See ***Smith v. BellSouth Telecomms., Inc.***, 273 F.3d 1303, 1307-13 (11th Cir. 2001) (finding "employee" ambiguous and deferring to Department of Labor's interpretation that the term includes prospective employees for purposes of discrimination claims); ***Duckworth v. Pratt & Whitney, Inc.***, 152 F.3d 1, 9-11 (1st Cir. 1998) (same).

Several opinions have also been issued by the Attorney General's office on the subject of personal and sick leave for County employees, and the interrelationship of such leave with FMLA.

•AG Op. No. 95-0117 to Gamble, April 6, 1995, stated that a County may continue to pay health insurance premiums as part of its benefits package for an employee who had exhausted his annual leave and sick leave unless that person's employment is terminated with the County, and that a County is authorized by state law to pay health and life insurance premiums for an employee who has exhausted all of his personal and sick leave and who is on extended leave without pay if the County's personnel policy and benefits package so provide.

•AG Op. No. 2002-0735 to Williams, Feb. 14, 2003, addressed prior opinions that had stated no "additional" compensation or compensatory time may be given to employees whose normal day off falls on a holiday, AG Op. to Green, July 27, 1995, and AG. Op. To Carter, August 30, 2002. Clarifying its position, the AG opined that "a [governing authority] may adopt leave policies which allow extra ... leave to an employee whose regular day off falls on a holiday, " AG Op. to Stockton, December 13, 2002. Further, "in addition to any rights an employee may have under the Federal Family Medical Leave Act, we have previously opined that a governing authority may pay an employee's portion of the employee's health insurance premiums during the period the employee is receiving worker's compensation." AG Op. to Primeaux, November 15, 1996, citing AG Op., to Gamble, April 6, 1995.

•AG Op. No. 2002-0492 to Fortier, Sept. 6, 2002, noted that the FMLA provides for a minimum period of protected leave that must be granted to employees. 29 U.S.C.A. Section 2651(b) of the FMLA states that "[n]othing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." Thus, if a municipal policy provides for unpaid protected medical leave in excess of that which is required by the FMLA, the municipality would be in compliance with the FMLA.

•AG Op. No. 95-0321 to Logan, May 10, 1995, stated that a County Board of Supervisors has the authority to pay health insurance premiums on behalf of a County employee who has exhausted all of his personal and sick leave and who is on a leave of absence status due to an extended illness, if the County's personnel policy and benefits package so provides.

Legal Holidays

The subject of legal holidays is statutorily prescribed by Miss. Code Ann. §3-3-7 (Supp. 1994). It is suggested that these legal holidays be clearly set forth in the County's written personnel policy:

1. First day of January (New Year's Day)
2. Third Monday of January (Robert E. Lee's birthday and Dr. Martin Luther King, Jr.'s birthday)
3. Third Monday of February (Washington's birthday)
4. Last Monday of April (Confederate Memorial Day)
5. Last Monday of May (National Memorial Day and Jefferson Davis' birthday)
6. Fourth day of July (Independence Day)
7. First Monday of September (Labor Day)
8. Eleventh day of November (Armistice or Veterans' Day)
9. Thanksgiving, which is the day fixed by proclamation by the Governor of Mississippi to correspond to the date proclaimed by the President of the United States
10. The 25th day of December (Christmas Day)

The statute also provides that in the event any holiday declared legal shall fall on Sunday, then the next following day shall be a legal holiday.

Courthouse Closure

The courthouse is required to be closed on all state holidays set forth in §3-3-7. See Miss. Code Ann. §25-1-99 (1988). When any state holiday set forth in §3-3-7 falls on a Saturday

> the courthouse may be closed on the Friday immediately preceding such Saturday and when such holiday falls on a Sunday, the courthouse may be closed on the Monday immediately succeeding such Sunday. The Board of Supervisors, in its discretion, may close the County offices on those holidays created by Executive Order of the Governor.

The Court has noted that the state and federal statutes relating to legal holidays generally effectuate a "long weekend" by placing many of the holidays arbitrarily on a Monday, and as to some federal statutes, in some instances on a preceding Friday. See ***Parkman v. Mississippi State Highway Commission***, 250 So. 2d 637 (Miss. 1971).

Several official opinions have also been issued by the Attorney General's Office on the subject of legal holidays.

•AG Op. No. 86-48 to Smith, February 26, 1986, stated that, based on the statutory language in §3-3-7 and §25-1-99, the offices of Circuit and Chancery Clerks and Sheriffs must be open for business on all business days, except such offices may be closed pursuant to Order of the Board of Supervisors as provided in §25-1-99. Further, the Clerks of the Circuit and Chancery Courts, the County Superintendents of Education, the County Tax Assessors and the Sheriffs are required under §25-1-99 to close their offices on the legal holidays of the state, and that "the Board of Supervisors do not have the authority to change, reschedule or rearrange the date of any of the state's legal holidays."

•AG Op. No. 92-0091 to Sullivan, February 12, 1992, stated that in view of the conflict between Rule 77 of the Mississippi Rules of Civil Procedure ("The Clerk's office with the Clerk or a Deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and legal holidays") and §25-1-99, insofar as the statute allows the Clerk, as Clerk of the Court, to maintain lesser office hours than those provided for in Rule 77, and since Rule 77 controls over any conflicting statutes, the Clerk or his Deputy, as Clerk of the Court, could not, pursuant to an Order passed under §25-1-99, be absent from the office during this time. "[T]he Board ... is still free to set different office hours, in accordance with §25-1-99, for the Clerks in their non-judicial roles."

Political Activities of County Personnel

Where a person employed by a County is involved in a job financed in whole or in part by loans or grants made by the federal government, the employee's political activity may be restricted under the Hatch Act, 5 U.S.C. §1502(a), providing in part that a state or local employee may not

•Use his official authority or influence for the purpose of interfering with or effectuating the result of an election or a nomination for office;

•Directly or indirectly coerce, attempt to coerce, command or advise a state or local officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes; or

•Be a candidate for elective office.

The above restrictions do not apply to an individual holding elective office. 5 U.S.C. §1502(c). In AG Op. No. 83-312 to Greer, February 2, 1983, the Attorney General's office, while declining to render an opinion on the Hatch Act or its applicability to state personnel, noted that 5 U.S.C. §§1501-1508 prohibit

employees of a federally funded agency from being a candidate for a public elective office in a partisan election, and that active participation, such as serving as a treasurer or campaign manager for a candidate seeking elected office, would seem to be covered also.

Similarly, state law authorizes the State Personnel Board to administer a state personnel system in accordance with principles which include the assurance that:

> Employees are free from coercion from partisan or political purposes and to prohibit employees from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

Miss. Code Ann. §25-9-103(f) (Supp. 1981).

As to requiring local government employees to take a mandatory leave of absence during a political campaign, the Mississippi Supreme Court has held that a County Board of Education had the authority to require a teacher to take a leave of absence without pay during the time the teacher was engaged in a political campaign. The Court noted that the Board had applied the requirement to another teacher who became a candidate and that there was no charge that the Board did not apply this regulation fairly or that it abused its discretion in taking this action. ***Chatham v. Johnson***, 195 So. 2d 62 (Miss. 1967). In that case the Court stated:

> It will be conceded that he has the same privilege as any other citizen to become a candidate for public office. Such candidacy should not be and is not ground for cancellation of his contract as a permanent teacher. But anyone who has been a candidate recognizes that political activity is apt to interfere with one's usual avocation and this fact, independent of any possible involvement of the school system in political controversies, affords a sound reason for a temporary severance of the candidate's connection with the schools. *Id.* at 65-66.

See generally ***Callahan v. Leake County Democratic Exec. Comm.***, 773 So. 2d 938, 941 (Miss. 2000)("Clearly, we have no general policy against law enforcement officers engaging in political activity. Our sheriffs, constables, and, in some instances, town marshals are elected. There is no prohibition against political activity by them, or their deputies."); Annotation, Validity, Construction and Effect of State Statutes Restricting Political Activities of Public Officers or Employees, 51 A.L.R. 4th 702 (1987).

The extent to which a local government body can regulate political activities has been the subject of several Official Attorney General's Opinions, both of which cited citing the landmark decision of ***Daugherty County, Georgia, Board of Education v. White***, 439 U.S. 32 (1978). In Daugherty County, a black employee of the county board of education announced his candidacy for the state legislature, and shortly thereafter the board adopted a rule requiring its employees to take unpaid leaves of absence while they campaigned for elective office. After the employee was compelled to take leaves of absence during three election campaigns, he successfully challenged the board's rule as a "standard, practice or procedure with respect to voting" adopted by an entity covered by the preclearance requirement of Section 5 of the Voting Rights Act of 1965. A three-judge court held that the board's unpaid leave rule should have been submitted for

federal preclearance and enjoined its enforcement pending compliance with the Section 5 preclearance requirement. The United States Supreme Court affirmed, in an opinion by Justice Thurgood Marshall, whose characterization of the unpaid leave rule made it clear that this was not simply a neutral personnel practice governing absenteeism. Justice Marshall emphasized that the rule

> is not a neutral personnel practice governing all forms of absenteeism. Rather, it specifically addresses the electoral process, singling out candidacy for elective office as a disabling activity. Although not in form a filing fee, the Rule operates in precisely the same fashion. By imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to Dougherty County voters. Given the potential loss of thousands of dollars by employees subject to Rule 58, the Board's policy could operate as a more substantial inhibition on entry into the elective process than many of the filing-fee changes involving only hundreds of dollars to which the Attorney General has successfully interposed objections. *Id.* at 40.

In holding that the unpaid leave rule was not enforceable by reason of lack of Section 5 preclearance, the Court in Daugherty County also noted that it was not suggesting "that all constraints on employee political activity affecting voter choice violate § 5. Presumably, most regulation of political involvement by public employees would not be found to have an invidious purpose or effect. Yet the same could be said of almost all changes subject to § 5." *Id.* at 42. In this case, however, the Court concluded that the

> circumstances surrounding its adoption and its effect on the political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance. Appellee was the first Negro in recent years to seek election to the General Assembly from Dougherty County, an area with a long history of racial discrimination in voting. Less than a month after appellee announced his candidacy, the Board adopted Rule 58, concededly without any prior experience of absenteeism among employees seeking office. That the Board made its mandatory leave-of-absence requirement contingent on candidacy rather than on absence during working hours underscores the Rule's potential for inhibiting participation in the electoral process. *Id.*

In AG Op. No. 79-0812 to Jones, April 11, 1979, the Attorney General opined that if a city or its agencies attempted to enforce a requirement that an employee take a leave of absence when engaged in running for political office, and if such requirement was made subsequent to 1965, then the requirement should be submitted to the Office of the Attorney General of the United States for preclearance under §5 of the Voting Rights Act, consistent with Daugherty County, *supra*. In short, if a County does not have a past practice or policy requiring mandatory leave of absence for a County employee who runs for elective office, adopting a new requirement for County employees to take such a leave of absence without pay in the event they run for office would probably be considered a "procedure with respect to voting" which would trigger the preclearance requirements under §5 of the Voting Rights Act of 1965, as amended and extended. In response to an opinion request (AG Op . to Burrell, 1983 Miss. AG LEXIS 220, August 31, 1983), the Attorney General's office has interpreted ***Daugherty County, Georgia, Board of Education v. White*** to apply to similar leave rules adopted by county Boards of Supervisors:

> In summary, that case states that a County Board of Education in a state covered by the Voting Rights Act of 1965 must seek federal approval under §5 of said Act of a rule requiring its employees to take unpaid leaves of absence while they campaigned for elective office and that such a rule may not be enforced unless federal approval is first obtained. While the above decision speaks directly to school employees, this office is of the opinion that the legal principles involved would also be applicable to similar rules adopted by Boards of Supervisors.

Election Code Restrictions

Mississippi's Election Code also contains a provision that places severe restraints upon political activities of County Commissioners of Election. These provisions were construed by the ***Mississippi Supreme Court in Meeks v. Tallahatchie County***, 513 So. 2d 563 (Miss. 1987). At issue in ***Meeks*** was whether an Election Commissioner may resign and seek another office during the term for which he was elected Commissioner, or whether the law disqualifies an Election Commissioners from such candidacy. The Court held that once a person assumes the office of Election Commissioner,

> he becomes obligated to stay out of any other electoral endeavor of the term of his office period. If this seem harsh, it is certainly less so than the adverse impact upon the public interest if our people come to doubt the integrity of the system.

The Attorney General's office has also issued a number of opinions on the subject of political activities by County employees.

•AG Op. No. 91-0517 to Walters, July 10, 1991, opined that County employees who are not subject to civil service prohibitions against political activities or formerly adopted personnel regulations prohibiting same, may be candidates for public office without having to resign their positions with the County. "We emphasize that County employees who seek public office must be careful not to campaign while being paid to perform duties for the County or use any County automobiles or other equipment or supplies for campaign purposes."

•AG Op. No. 93-0422 to Shepard, August 26, 1993, stated that there was no statute or rule known to the Attorney General that would require an employee of the County Civil Defense to resign in order to be a candidate for the County School Board of Education, provided the employee carries out the duties of his or her job and does not engage in any political activities during working hours. The County Civil Defense employee should be cautioned that should she decide to become a candidate for the school Board, she should avoid campaigning in any official capacity relating to her job with the Civil Defense.

•AG Op. to Davies, January 9, 1991, discusses the enforceability of a municipal personnel regulation prohibiting political activities of his employees, and that opinion, according to the Attorney General, would also apply to a County. See AG Op. No. 91-0517, *supra*.

Protected Speech in the Public Workplace

"Congress shall make no law ... abridging the freedom of speech... ."

The First Amendment is a simple statement of a fundamental right. So how come we have conflicts and lawsuits over its meaning and how, why, when, and to whom it applies? That question gets even more complicated when we move into the public workplace.

Employees in the public sector stand on a somewhat different footing from employees in the private sector when it comes to freedom of speech and the First Amendment. These words from the Supreme Court's landmark Pickering decision 30 years ago sum up the difference:

> [T]he state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], 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.

In ***Pickering v. Board of Education***, 391 U.S. 563, 568 (1968), the Supreme Court held that a school Board could not constitutionally dismiss a teacher for writing a letter to the newspaper criticizing the Board's handling of a bond proposal and its allocation of funds between academic and athletic programs. Its ruling was based on a balancing of the relative importance of the teacher's interests as a citizen in commenting publicly on matters of public concern and the Board's interests in promoting the efficiency of the public services it performs through its employees.

Basic First Amendment Principles

A government cannot limit or prohibit free speech just because the ideas expressed rub it the wrong way, but there are situations when a citizen's right to free speech has to give way to greater societal interests. A classic example: nobody has an absolute constitutional right to yell "FIRE!" in a crowded theater. The risk of injuries resulting from a panic-stricken crowd rushing for the exit outweighs the individual's right to speak without any restraint.

When the government becomes the employer, it takes on the dual role of sovereign and boss, and it still has to allow employees to enjoy freedom of individual expression while also carrying out its duty to provide efficient public services. As the Court said in ***Waters v. Churchill***, 114 S.Ct. 1878, 1886 (1994), "the government as employer...has far broader powers than does the government as sovereign."

Low Value Speech

Regardless of whether the speaker is a private employee or government employee, some types of speech are considered low value speech, like obscenity, fighting words, defamation, incitement to engage in unlawful action through speech that presents a clear and present danger of imminent lawless action, and seditious teaching of the forceful overthrow of government coupled with specific directions regarding illegal

action to be taken in the future.

High Value Speech

Other types of speech are considered high value speech which, because of the nature and historical underpinnings of our democracy and society's recognition of the need to protect the free flow of ideas, receives the broadest protection under the First Amendment from government restriction. Examples include speaking on matters of important public debate, speech concerning the political process, and similar speech by those who wish to enter the "marketplace of ideas."

"Marketplace of Ideas"

When the government seeks to place restrictions on high value speech in a way that has a harmful or negative impact on this "marketplace of ideas," courts will subject that governmental action to the highest level of scrutiny, known as strict scrutiny, and will require the government to prove that the restriction it is trying to place on this type of speech is narrowly tailored to serve a compelling governmental interest. There are still other examples of high value speech, including speech expressed in a public forum and symbolic or expressive conduct that seek to communicate an idea. Consider the difference between a person claiming that he has a right to sleep on a sidewalk and a person who sleeps on the sidewalk as a protest against the lack of shelters for the homeless. The First Amendment generally will not protect the first person, but the expressive conduct of the second person will probably implicate First Amendment concerns and protection.

Controversial Expressive Conduct

All this sounds pretty straightforward until we get to the truly controversial examples of expressive conduct that the Supreme Court has recognized and held entitled to First Amendment protection: flag-burning, mass demonstrations, desegregation sit-ins, cross-burning, displaying signs in one's window or yard, picketing and strikes.

While the First Amendment protects expressive conduct, that protection is not absolute. Moreover, while government may not constitutionally regulate the message conveyed or aim its regulatory power at the content of the expressive conduct, government does have more leeway to regulate the time, place and manner of conduct in public places. For example, justifiable restrictions on speech have been found to be supported by a significant governmental interest in traffic safety, orderly crowds, noise control and personal privacy. These and similar restrictions will usually be upheld so long as the regulation or restriction is subject-matter neutral, narrowly tailored to serve a significant governmental interest, and provides alternative avenues of communication. ***Frisby v. Schultz***, 487 U.S. 474 (1988). See generally ***M. Edwards, et al.***, Freedom of Speech in the Public Workplace 2-12(ABA Section of State and Local Government Law 1998), which is the source for the bulk of the case material and analysis that follows.

Prior Restraints in Public Employment

A prior restraint is a governmental restriction or regulation that seeks to prevent a certain type of

communication from reaching the public. Prior restraints are particularly disfavored, as shown by decades of the Supreme Court's First Amendment jurisprudence, and the Court has long said that it is better for speech to be allowed to reach the public than to muzzle the speaker and the speech at the outset, because if the speech is slanderous, defamatory or otherwise unprotected, the courts and legal system can punish the speaker. Prior restraints have been upheld on the basis of such strong justifications as national security, the need to preserve a fair trial, and prevention of the dissemination of obscenity. More than theoretical harm must be shown even in these compelling situations.

Public employment presents a unique context for prior restraints. Government employers at times seek to impose "prepublication review" on public speech by employees about internal governmental operations. For example, in ***Firefighters' Association v. Barry***, 742 F. Supp.1182 (D.C. Cir. 1990), a D.C. regulation required fire department employees to get prior approval from the public affairs officer before they could take part in media interviews. The regulation did not provide an objective standard to guide the public affairs officer's decision to grant or deny a request, and this vesting of unbridled discretion in one fire department official, without guiding standards, created an unconstitutional prior restraint. Similar media-muzzle policies have been declared unconstitutional prior restraints in the context of such governmental employers as police departments, child welfare agencies and federal agencies, usually because of the unbridled discretion placed in one individual.

Overbroad Regulations

The First Amendment's central purpose is to encourage the free, robust and uninhibited flow of ideas. For this reason, governmental restrictions that restrict much more speech than is necessary can be attacked at unconstitutionally overbroad, as where a regulation "sweeps within its ambit... activities that...constitute an exercise of freedom of speech." ***Thornhill v. Alabama***, 310 U.S. 88, 97 (1940). A good example of overbroad governmental employer regulations involving employee speech is found in ***Holland v. Dillon***, 531 N.Y.S. 2d 467 (N.Y.Sup.Ct. 1988), where the duty manual of the County sheriff's department prohibited employees from making public statements or granting interviews concerning the County without advance approval from a competent authority. Similarly, in ***Barrett v. Thomas***, 649 F. 2d 1193 (5th Cir. 1981), a sheriff's office regulation prohibiting "unauthorized public statements" and speaking to reporters on controversial topics was held unconstitutionally overbroad as an attempt to limit protected speech.

Discharge and Disciplinary Action in Retaliation for Protected Speech

A governmental employer cannot discharge an employee based on his or her constitutionally protected speech. ***Perry v. Sindermann***, 408 U.S. 593, 597 (1972), held that a college Board unconstitutionally refused to renew a teacher's employment contract based on his free speech activities when he testified before a legislative committee and publicly supported structural changes to the college that the Board opposed. The Court there recognized that the teacher may not have had a "right" to a valuable governmental benefit, i.e., renewal of his employment contract, and the government may even deny him the benefit for "any number of reasons," but it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his interest in freedom of speech. In ***McBee v. Jim Hogg County, Texas***, 730 F. 2d 1009, 1015 (5th Cir. 1984), a sheriff did not rehire certain employees who had actively supported his

opponent. The Fifth Circuit disagreed with the trial court's opinion that the sheriff's anticipated perceptions were sufficient, holding that "since plaintiffs were not rehired, there is no evidence that their previous political activity actually interfered with the effective performance of their jobs . . "

***Mount Healthy* Defense**

A governmental employer does not have to reinstate an employee, however, when the employee's constitutionally protected conduct played only a part in the discharge decision, according to the Supreme Court in ***Mount Healthy City School District v. Doyle***, 429 U.S. 274 (1977). The Court held that a Board's non-renewal of a teacher's contract and discharge of the teacher for "unprofessional conduct" did not violate the teacher's constitutional rights under the First Amendment where the teacher (1) made a telephone call to a local radio station to report the Board's proposed dress code for teachers, admittedly protected speech and conduct, but (2) also used obscene gestures in dealing with two female students.

The Court reasoned that if a public employer would have discharged an employee in the absence of his exercise of free speech, the mere fact that protected speech might have been an additional factor or consideration in the discharge decision did not justify a court stepping in and reversing the employer's decision, stating:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

The ***Mount Healthy*** defense enables a public employer to dismiss a public employee justifiably, even if the employee engages in protected speech, if the employer is able to prove that its dismissal was for reasons other that the exercise of protected speech.

A good example of a ***Mount Healthy*** evaluation is ***Reeves v. Claiborne County Bd. of Education***, 828 F.2d 1096 (5th Cir. 1987), where a school district employee was held to have met the Mount Healthy test because her acts were directed to matters of public concern and were constitutionally protected, and were the "motivating factor" in her transfer to a lesser job, which she alleged was in retaliation for having testified in anther lawsuit.

Private Conversations by Public Employees

Public speech by public employees was involved in ***Pickering***, ***Perry*** and ***Mount Healthy***. However, when a public employee expresses his or her speech privately to an employer, the speech is no less protected, as the Court held in ***Givhan v. Western Line Consolidated School District***, 439 U.S. 410 (1979):

> Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the

> public employee who arranges to communicate privately with his employer rather than to spread his views before the public.

Personal Employment Grievances

When Harry Connick, Jr. was barely out of grade school, his father, New Orleans District Attorney Harry Connick, fired an assistant D.A. on grounds of insubordination and failure to accept a transfer after she distributed a questionnaire to other employees in the office concerning working conditions, the office's transfer policy, office morale, the need for a grievance committee, the level of confidence employees had in supervisors, and whether employees felt pressured to work in political campaigns. ***Connick v. Myers***,461 U.S. 138 (1983).

Connick said this questionnaire being distributed by the assistant D.A. caused a "mini-insurrection," and his discharge decision was upheld by the Supreme Court. Concluding that a public employee's work-related speech is not protected by the First Amendment unless it involves a matter of public concern and does not disrupt the workplace, the Court said:

> When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Id.* at 147.

The ***Connick*** case tells us that in determining if an employee's statement is a matter of public concern, one should consider the content, form and context of the statement. Government officials as employers should be given wide latitude in managing their offices, without the intrusive oversight of the federal courts, "when an employee's expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community." *Id.* at 146. Given that there will be work environments in which close working relationships are essential to carrying out public responsibilities, "a wide degree of deference to the employer's judgment is appropriate," and, moreover, the employer is not required to "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 151-52.

Investigation Leading to Employee Discipline

The ***Pickering-Connick*** balancing test was applied in ***Waters v. Churchill***, 511 U.S. 661 (1994), to the facts that a government employer reasonably believed to exist at the time it decided to discipline an employee, as opposed to the facts a jury ultimately determines existed. A public hospital discharged a nurse allegedly because of statements she made to a fellow employee. The actual content of what the nurse said was sharply disputed. The nurse claimed the hospital discharged her because she had made non-disruptive statements that were critical of the hospital's cross-training program. The hospital claimed the discharge was the result of the nurse making disruptive statements critical of her department and supervisor. The nurse argued that whether her speech was protected or not must be determined on the basis of the jury's factual determination of the actual content of her speech.

The Supreme Court held that when a public employer conducts a reasonable investigation and reasonable concludes that its employee's speech is not protected, the conclusions of the employer as to the nature of the speech, not the trier of facts, will control. To allow the jury to determine what the content of the employee's speech actually was would force employers to adopt rules of evidence similar to those in a court of law before making employment decisions, the Court reasoned. If an employer's investigation, conclusions and actions were reasonable under the circumstances, the courts should not use 20-20 hindsight to determine the content of the employee's speech or the reasonableness of the employer's decision.

Waters applies when there is a dispute concerning whether an employee's speech addressed a matter of public concern, and it teaches us that an employer need only act reasonably in making its actual decision, and that its actions do not have to be defended based on information that surfaces later on during pretrial discovery. In other words, as long as an employer can base its employment decision on its reasonable conclusions as to an employee's speech, it should be able to avoid liability. But if an employer does not conduct an investigation before it discharges an employee, this may show that the employer acted unreasonably, and liability could result.

Grievances Involving Matters of Public vs. Private Concern

Sometimes public employees speak out on internal government agency operations, claiming the are speaking as concerned taxpayer and not as employees. Such efforts to characterize speech as flowing from one's status as a taxpayer or citizen are often used to mask what is nothing more than a personal employment dispute, and these efforts usually fail. For example, ***in Deremo v. Watkins***, 939 F.2d 908, 912 (11th Cir. 1991), an employee wrote a letter to a County clerk asking for compensation that had been promised to her and other victims of sexual harassment. This letter was held to be made in the employee's "personal interest, rather than speech implicating a public concern." Similarly, in ***Brenner v. Brown***, 36 F. 3d 18, 20 (7th Cir. 1994), an employee's letters to two congressmen and the V.A. office of General Counsel were held to address an "entirely private concern" where the letters contained complaints that the employee's supervisor was harassing her and giving her an excessive caseload, and also made false and defamatory statements about V.A. personnel.

At other times, however, employee speech that may at first blush appear to involve personal employment matter does in fact address issues of public concern. Indeed, speech relating to employment grievances is not always a personal matter, but may be protected speech that reveals a wider issue of concern to the general public, such as where black police officers picketed and demonstrated in protest against racially discriminatory policies, ***Leonard v. City of Columbus***, 705 F.2d 1299 (11th Cir. 1983), an employee's complaint about working 7 hours yet getting paid for 8 hours addressed a public concern over misuse of tax dollars, ***German v. City of Batavia***, 1995 WL 66361 (N.D. Ill. 1995), and a nurse in a state-operated nursing home reported an incident of suspected patient abuse, ***White v. Washington***, 929 P.2d 396 (Wash. 1997).

Employee speech that is critical of a direct supervisor will often be found to lack any appreciable public concern. In ***Voigt v. Savell***, 70 F.3d 1552 (9th Cir. 1995), for example, a state clerk of court gave a speech criticizing a state court judge's handling of internal personnel matters and referring to unfair discrimination

against nonresidents of the state. This speech did touch on a limited matter of public concern, but that concern was outweighed by the state's interest and thus was unprotected.

Allegations of Corruption and Waste

When a government employee speaks out on the misuse of public funds or takes the bold step forward to expose corruption in a governmental agency, the courts often find that such speech addresses matters of public concern. For example, where a County mechanic spoke at a public meeting on inefficiency and waste at the Motor Vehicles Division, his speech was held to have addressed an issue of significant public concern in ***Czurlanis v. Albanese***, 721 F.2d 98 (3d Cir. 1983), the court noting that "information concerning the functioning of a segment of the County government is of considerable public importance." *Id.* at 104. And where an employee alleged that the police chief had instructed police officers not to issue tickets to certain individuals, that speech was held to address a matter of the "utmost public concern" in ***O'Donnell v. Yanchulis***, 875 F. 2d 1059 (3d Cir. 1989).

Finally, in ***Williams v. Board or Regents***, 693 F.2d 993, 1103 (5th Cir. 1980), the U.S. Court of Appeals for the Fifth Circuit said these words of encouragement to those public employees who become whistle-blowers in order to put the spotlight on agency wrongdoing, fraud and misuse of public funds:

> The falsification of an official document by one official for the protection of another official is such a grave miscarriage of the public trust that such conduct must be disclosed to the public if the people are to remain the true sovereigns in this country.

The body of law that springs from the First Amendment continues to expand. As government employees become more aware of their constitutional rights and the courts continue the trend of opening more and more avenues for the redress of civil rights in the public workplace, you can rest assured that our democracy's "marketplace of ideas" will not just remain open - it will thrive.

Board Attorney as Public Figure

A "public figure" has been defined as an individual who is "intimately involved in the resolution of important public questions or, by reason of [his] fame, shape[s] events in areas of concern to society at large." ***Curtis Publishing Co. v. Butts***, 388 U.S. 130, 155 (1967)(Burger, C.J.). The Mississippi Court of Appeals in 2002 decided that a county board attorney can be classified as a "public figure" to whom the actual malice standard will apply in defamation cases. Griffin v. Delta Democrat Times, 815 So. 2d 1246 (Miss. 2002), provides a good illustration of New York Time's actual malice standard for public figures as applied to the attorney for a County Board of supervisors. In Griffin, a libel action was brought against the DDT, its editor and a staff writer based on an article regarding accusations of unethical conduct by a municipal judge. In that article, the editor had added the statement that "The Internal Affairs Division determined there was no evidence to conclude Wynn [sic] was a racist, as claimed by Moore, Councilman Larry Farmer and attorneys Eric Hawkins and Willie Griffin." In Griffin's subsequent lawsuit, the trial court granted summary judgment in favor of the defendants, even though they had refused to respond to Griffin's interrogatories and requests for depositions, holding that Griffin was a public official and subject to the higher standard for proving actual malice set forth in

New York Times Co. v. Sullivan, 376 U.S. 254 (1964). On appeal, the defendants argued that summary judgment was appropriate since Griffin fell squarely within the definition of a public official and failed to meet his burden of proof and to show by clear and convincing evidence that the statement regarding him in the DDT was published with actual malice as required by New York Times. Griffin, on the other hand, argued that he should not be considered a public official because he was a private attorney with a governmental client (the Washington County Board of Supervisors) and the statement attributed to him in the DDT failed to refer to his public capacity.

First, the Mississippi Court of Appeals, noting that Griffin at that time was attorney for the county board of supervisors, concluded that even if it did not classify Griffin as a public official,

> we determine that his involvement in this matter conforms to the definition of a "public figure." The issue of whether Judge Prewitt was unethical was a matter of public concern for Greenville, Mississippi residents, and Griffin voluntarily involved himself in the resolution of this matter.

The Court of Appeals then addressed the Defendants' assertion that the statement was not defamatory. The Court concluded that the statement printed by the DDT asserted that Griffin claimed Judge Prewitt was a racist.

> On its face, this is not a true reflection of what Griffin had stated, and the difference was not insubstantial. See ***Blake v. Gannett Co., Inc.***, 529 So. 2d 595, 602-03 (Miss. 1988). Nevertheless, at this point in this case, the difference does not equate with liability. It must first be determined whether Griffin can show with convincing clarity that the statement was made with actual malice. For reasons discussed below, the determination of whether there is a jury question regarding the defamatory nature of the statement will have to be revisited by the court below.

On the pivotal issue of whether Griffin unfairly denied full discovery, the Court of Appeals found that the trial court abused his discretion in prematurely granting the summary judgment motion. On the contrary, the trial court should have addressed the more introductory matter of whether summary judgment was premature because of the lack of discovery before examining the issue of whether the evidence would support a reasonable finding that Griffin had demonstrated actual malice with convincing clarity.

Judge Irving filed a vigorous dissent over that part of the majority opinion that held Griffin was a public figure for purposes of resolution of the libel issue, arguing that Griffin was but a private individual and was not automatically transformed into a public figure just by becoming involved in or associated with a matter that eventually attracted public attention. The dissent took the majority to task on the issue of Griffin's status, stating:

> Griffin, as the attorney for the Board of Supervisors of Washington County, would probably be considered a public figure as to his involvement in any matters before the Board of Supervisors of Washington County, or as to any matters which, though not before the board, could reasonably be expected to involve board action at some point. As to any other matters, it appears to me that Griffin could not be considered a public figure unless he had, in a very visible and public manner, played a prominent role in a matter of great public interest. This, in my opinion, is the core teaching of Butts and

Walker on the issue of non-elected persons who may be considered public figures in defamation actions....

We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.[51]

Vortex Public Figure

One of the fundamental concepts in First Amendment law is that of a "vortex public figure," defined as a person "who is otherwise a private citizen but who thrusts himself or becomes thrust into the vortex of a matter of legitimate public interest." ***Eason v. Federal Broad. Co.***, 697 So. 2d 435, 438 (Miss. 1997). If a person is deemed a vortex public figure and an allegedly defamatory statement concerns a matter of public interest, the plaintiff must prove that the defendant acted with actual malice. In ***Speed v. Scott*** 787 So. 2d 626 (Miss. 2001), the Mississippi Supreme Court addressed the general tort of defamation as applied to a vortex public figure. In this case, the defendant made what were found to be knowingly false statements about the plaintiff, calling him a liar and a thief. Such statements did include, however, any allegation of crimes involving moral turpitude or the prospect of infamous or disgraceful punishment,. In the absence of statements that were actionable per se, and in light of the fact that the plaintiff was resolute that no harm to his reputation occurred and no evidence of damage was offered, the allegedly slanderous words could only be actionable if special harm was shown. There was no such showing, and the judgment rendered in favor of the plaintiff was accordingly reversed.675

First Amendment & Emergencies, Safety and Crowd Control Measures

In "When the Ku Klux Klan Announces a Visit," the authors discussed the Sixth Circuit's decision in

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[51]The similar and related concept of "limited purpose public figure" was analyzed in ***Chafoulias v. Peterson***, 2003 Minn. LEXIS 508, at *22-23 (Minn. 2003)(Criteria used in analysis are suggested by ***Gertz***, 418 U.S. at 352, where the Supreme Court in determining whether Gertz was a limited purpose public figure looked to (1) whether a public controversy existed; (2) whether plaintiff played a meaningful role in the controversy; and (3) whether the allegedly defamatory statement related to the controversy. A public controversy is a dispute that "has received public attention because its ramifications will be felt by persons who are not direct participants." ***Trotter v. Jack Anderson Enterprises, Inc.***, 818 F. 2d 431, 433-34 (5th Cir. 1987). Private concerns are not public controversies simply because they attract attention. ***Time, Inc. v. Firestone***, 424 U.S. 448, 454-55 (1976). In isolating the public controversy, the courts will look to those controversies that are already the subject of debate in the public arena at the time the alleged defamation took place. ***Bruno & Stillman, Inc. v. Globe Newspaper***, 633 F. 2d 583, 591 (1st Cir, 1980)).

Grider v. Abrahamson, 180 F.3d 739 (6th Cir. 1999), pet. for cert. filed, No. 99-490 (U.S. September 16, 1999), wherein the Court upheld an emergency crowd control plan implemented by the City of Louisville and Jefferson County, Kentucky, officials during a Ku Klux Klan rally and a counter-demonstration organized by KKK opponents. The emergency crowd control plan, entitled "KKK Rally Detail," was attacked by the Klan as allegedly violative of their First Amendment guarantees of free speech, assembly and association, but the District Court refused to grant the Klan's Motion for a Restraining Order and Preliminary Injunction, and ultimately entered Summary Judgment for the governmental defendants. The Sixth Circuit affirmed, holding that no First Amendment violation resulted from subjecting the rally attendees to mandatory searches as a prerequisite to their admission to the rally, that separating the Klan rally from the counter-demonstration did not violate the attendees' free association rights, that no First Amendment violation resulted from excluding private citizens from a police-occupied buffer zone, that it was a valid content-mutual time, place and manner regulation for the City and County in the Emergency Crime Control Plan to disallow unscheduled oration in the restricted area.

See also ***Norwood v. Bain***, 143 F.3d 843, 854 (4th Cir. 1998), rehearing en banc granted, opinion vacated, 166 F.3d 243 (4th Cir. 1999)(en banc), cert. denied, 119 S. Ct. 2342 (1999), in which the Fourth Circuit suggested that unobtrusive mechanical screening would have provided individualized suspicion to search the saddlebags of attendees at a motorcycle rally.

The attorneys representing the City during the ***Grider*** litigation emphasize the need for a working knowledge of the First Amendment:

> As lawyers for a sizable urban police department, we have had the opportunity over the years to review safety and crowd-control measures from the First Amendment perspective. You need a comfort level with First Amendment jurisprudence when you are trying to tell city officials what they cannot legally do. They will have good questions and legitimate concerns, and you will need to be confident in your answers.

W. Stone, L. Fleming and P. Guagliardo, "When the Ku Klux Klan Announces a Visit," Municipal Lawyer at 15 (International Municipal Lawyers Association, November/December 1999).