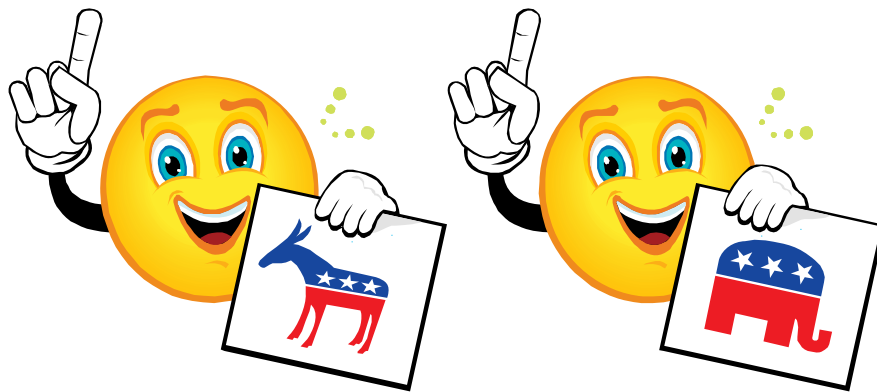


Political Sign Regulation and Other First Amendment Landmines

By Ryan Henry
Denton, Navarro, Rocha & Bernal, P.C.



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I. Introduction

Governmental entities, such as municipalities, are political creatures. As a result, politics are intricately related to how a city operates. That is by design.

However, even though politics are expected in the operation of a city, municipalities are bound by the restrictions placed upon them by the United States and Texas Constitutions as well as federal and state laws. Political speech and political affiliation are afforded the greatest protection under the First Amendment. See generally, *Elrod v Burns* 427 U.S. 347 (1976). The protection of political speech pops up not simply in the First Amendment but in a variety of other statutes as well. Knowledge of political speech protections is important to understand when attempting to operate within a city government.

II. Political Signs

Municipalities have the power to regulate signage within their municipal limits. Most council members understand that protections increase on sign regulation when the “content” of the sign regulation is at issue. City sign regulations typically attempt to avoid any Free Speech challenges by simply regulating time, place, and manner restrictions such as the dimensions of the signs, the location of the signs, whether the sign has any moving parts or has any illumination. The regulations typically avoid references to any sign content. This is an acceptable method of sign regulation which can survive most First Amendment challenges.

However, when sign regulation ventures into regulating a form of content, the regulation must be more narrowly

tailored and jump through numerous other legal hoops in order to survive. Under the First Amendment, regulation of political signs was possible, such as in requiring only truthful advertising for office or the designation of a treasurer, but was subject to a more limited scope. Numerous Texas cities passed very specific sign regulations applicable only during elections, such as a prohibition on placing political signs out prior to thirty (30) days before an election and requiring any political signs removed within ten (10) days after an election. Unknown to many city officials, the Texas Legislature, in 2003, passed its own regulation which places a total ban on the regulation of political signs on private property.

Specifically, Texas Local Government Code §216.903 states:

- (b) A municipal charter provision or ordinance that regulates signs may not, for a sign that contains primarily a political message and that is located on private real property with the consent of the property owner:
- (1) prohibit the sign from being placed;
 - (2) require a permit or approval of the municipality or impose a fee for the sign to be placed;
 - (3) restrict the size of the sign;
- or
- (4) provide for a charge for the removal of a political sign that is greater than the charge for removal of other signs regulated by ordinance.

This equates to a near total ban of typically campaign signs on private

property. As such, it supersedes many municipal ordinances which attempt to regulate placement and the timing of such signs. This ban, however, does not apply to signs in the right-of-way, on public property, signs which are normally rented with changeable face, signs that have an effective area greater than thirty-six (36) feet, are more than eight (8) feet high, are illuminated, or have any moving elements.

So, even though the U.S. and Texas Constitutions may permit some limited regulations of political signs, the Texas Local Government Code prohibits such regulation on private property, with certain limitations.

III. Public Meetings

a. Citizen Comments

Even though meetings of a governing body, such as a city, are “open to the public” this does not give the public the right to speak at such meetings. See *Charlestown Homeowners Ass’n, Inc. v. LaCoke*, 507 S.W.2d 876, 883 (Tex. Civ. App.-Dallas 1974, writ ref’d n.r.e.); Tex. Att’y Gen. Op. Nos. JM-584 (1986) at 3. As a result, the governing body need not have a citizen comment section.

If a governmental body wishes to allow members of the public to speak at its public meetings, it may adopt reasonable rules consistent with relevant provisions of the law. See Tex. Att’y Gen. Op. No. H-188 (1973) at 2; Tex. Att’y Gen. LO-96-111, at 1. However, in such a case, the citizens have certain First Amendment rights regarding their comments.

So how are you to know what to regulate and what not to regulate? The best way, other than asking your City Attorney,

is to stay away from any regulation on the “content” of the speaker and it to focus on procedures.

It is permissible to limit the time a citizen can comment. A three minute time period is common. The governmental body can require all citizens wishing to speak to sign in beforehand, list their topic, and not to speak until recognized by the presiding officer. Citizens can be instructed not to solicit comments from the governing body or from the entity’s staff. The entity can limit any speech which is disruptive by the “manner” in which it is conveyed.

The governmental body can limit any comments to the topics already posted on the agenda. That is the extent to which a governing body should attempt to regulate content. Especially in an “open microphone” format (i.e., citizen comments which are not limited to topics on the agenda), allowing certain topics to be expressed and not others can infringe upon the citizen’s First Amendment rights.

b. *Rangra v. Brown* (the Alpine case)

Rangra and Monclova were city council members and public officials in the City of Alpine, Texas. Members of the City Council for the City of Alpine, Texas were indicted by the District Attorney in Brewster County for violations of the Texas Open Meetings Act. The indictments were based solely on an exchange of emails between a quorum of council members regarding a contract to an engineering firm to design and implement water improvements.¹

The charges were later dismissed. In response, Rangra and Monclova sued the

¹ You may ask why only two council members were indicted. Well, the others were provided immunity if they testified against the indicted members.

Texas Attorney General to prevent the enforcement of the criminal provisions of the Texas Open Meetings Act, citing their First Amendment rights to political speech and that the Act was vague and unclear in letting public officials know their conduct could be in violation.

When someone challenges a law or ordinance on constitutional grounds, depending on the constitutional rights involved, the law will have to jump through several hoops in order to be considered a valid exercise of governmental power. Rangra and Monclova argued that since their political speech rights were involved, the Texas Open Meetings Act must satisfy a “strict scrutiny” challenge. In such a challenge, the government (i.e., the State of Texas) would have to establish the Act is (1) narrowly tailored to serve (2) a compelling state interest; and that in order to show the speech regulation is narrowly tailored, the State must demonstrate that the Act does not unnecessarily circumscribe protected expression.

The trial court determined that as elected officials, Rangra and Monclova did not have any First Amendment rights and dismissed their challenge. The officials appealed.

On April 24, 2009, the U.S. Fifth Circuit Court of Appeals determined that Rangra and Monclova DID have rights protected by the First Amendment. Further, the Court determined that “strict scrutiny” was the property standard to examine the Texas Open Meetings Act. However, the Court stated that given the stage at which the trial court dismissed the lawsuit, the Court of Appeals was not in a position to rule on the constitutionality of the Act. Instead, it sent the case back to the trial court to consider the constitutionality based on the

Court’s directions. As a result, the case is still undecided and is pending.

Many believe the Act will not survive a strict scrutiny analysis. However, the Court of Appeals expressly cautioned:

The fact that strict scrutiny applies says nothing about the ultimate validity of any particular law. . . . We emphasize that we remand this matter for the district court to conduct a strict scrutiny review in the first instance because that inquiry might well require development of the record beyond its present state, as the state has not yet been afforded an opportunity to prove that TOMA [§ 551.144](#) is narrowly tailored to further a compelling state interest. *TOMA § 551.144 may indeed survive this strict scrutiny inquiry. Numerous states apparently employ similarly tailored provisions in their **open meetings** acts. . . .*

As a result, the dispute is far from over. As it stands now, the Texas Open Meetings Act is presumed valid and is still the law in Texas. Caution should be utilized when treading on potential violations.

IV. Employees

Unlike private company workers, employees of governmental entities possess a constitutional right to criticize and disagree with their managers and supervisors. Managers and supervisors almost never appreciate such criticism. However, the First Amendment demands a tolerance of “verbal tumult, discord, and even offensive utterance,” as “necessary side effects of ... the process of open debate,” *Waters v. Churchill*, 511 U.S. 661, 672, 114 S.Ct. 1878, 128 L.Ed.2d 686, (1994)(citing *Cohen v. California*, 403 U.S. 15, 24-25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971)).

The First Amendment to the United States Constitution guarantees a person's right to freedom of speech. U.S. Const. Amend. I. Employees of governmental entities do not lose their First Amendment protection simply by accepting employment with the entity. *Moore v. City of Kilgore*, 877 F.2d 364, 370 (5th Cir. 1989). As a result, a governmental employer cannot restrict an employee's protected speech through its power as an employer. However, an employee's right to speak is not absolute. *Waters v. Churchill*, 511 U.S. 661, 672, 114 S.Ct. 1878, 128 L.Ed.2d 686, (1994).

The different tests to consider in identifying and dealing with a freedom of speech retaliation claim are complex. Each claim will be very fact specific. As a result, it is extremely important to consult with your City Attorney to discuss any legal consequences of terminating or disciplining an employee when political speech is implicated.

One of the most common areas of focus in any freedom of speech retaliation claim is whether or not the "speech" at issue focuses on a matter of public concern. If the speech does not touch on a matter of public concern, then the speech is not protected and no violation can occur. The First Amendment was not designed to protect every manner of speech uttered. As a result, in the employment context, only speech that is of public importance is protected. However, do not let this restriction fool you. The determination of the public or private character of the speech is very fact specific and requires an analysis of the entire situation. Speech in one situation may not be protected; however, the same words uttered in a completely different situation may qualify as protected. Whether or not any particular speech qualifies as touching on a matter of public concern is a legal

question for the court to decide. *Kennedy v. Tangipahoa Parish Library Bd. Of Control*, 224 F.3d 359, 366 (5th Cir. 2000).

Remember the First Amendment was designed to allow citizens to criticize the government and its officials without fear of retribution. As a result, opinions and criticism by an employee of the manner in which the governmental entity is being managed can be appropriately designated as public. However, the opinion and criticism must still be geared towards public issues. If an employee criticizes his supervisor by claiming the supervisor often comes into work intoxicated and mismanages public affairs because of his intoxicated state, the content will lean towards the public realm. However, if an employee personally dislikes his supervisor and simply comments that he is a "jerk" or a "rotten human being" the content will lean towards the private realm.

However, different standards apply depending on the job position of the particular employee. If the employee is a low level worker the protection weighs heavily in the employee's favor. Given the importance and protection given to political speech and affiliation, minor disruptions in the office may not be sufficient to overcome the employee's right to speak on issues. *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 993-94 (5th Cir.1992) (en banc) (citing *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014 (5th Cir.1984)). Government interests generally asserted in support of patronage fail typically. See *Elrod*, 427 U.S. at 372-373, (plurality opinion) and 375 (Stewart, J., concurring in judgment).

However, policymaking and confidential employees can potentially be dismissed specifically on the basis of their political views. *Elrod* at 367, 96 S.Ct., at 2686-2687 (plurality opinion) and 375, 96

S.Ct., at 2690 (Stewart, J., concurring in judgment); further refined in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Certain First Amendment rights may legitimately be restrained where it could lead to an inability of elected officials to get their jobs done on behalf of the public. See *Branti*, 445 U.S. at 517-18, 100 S.Ct. 1287.

This exception only applies to high-level public employees who have policymaking powers, such as the City Manager and the Police and Fire Chiefs. In order to promote the effective operation of government, certain employees must have a loyalty to the political views of the controlling body of the governmental entity. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64, 110 S.Ct. 2729, 111 L.Ed.2d 52, (1990) (citing *Elrod*, *supra* and *Branti*, *supra*)

Practically, this means that high-level employees who have the ability to shape or dramatically implement policy must share the overall views of the governing body. In such a case, political loyalty is an essential job function. Imagine a situation where a City Council is predominately conservative and implements conservative policies. However, the City Manager has drastically different political views in the manner in which the City should be run. The City Manager, who is responsible for implementing all policies, can interpret and implement the conservative policies in a liberal manner that undermines their purpose. In order for the government to run effectively, the employment positions that can drastically impact the effective operation of the City are required to have a similar work mindset to the governmental body.

For example, if a majority of the City Council campaigned on an issue such as zero tolerance on drug use and alcohol abuse by employees, that political view becomes part of the operation of the governmental entity. Once elected, the new City Council enacts tough disciplinary policies and expects the discipline to apply to all employees equally, whether the drug use or alcohol abuse is proven during working hours or not. However, the City Council only creates the policy and must rely on management to implement the policy. The City Manager begins implementing the policy, but is far more lenient to employees who have been cited for alcohol problems outside the office as opposed to while at work. He openly states that since the matters are within his discretion, and he disagrees with the tough political view taken by the Council, he is implementing the policy in the manner he believes is best.

The difference in political views and lack of political loyalty is damaging to the effective operation of the government. Why would citizens want to elect councilmembers who cannot implement policy changes because a City Manager disagrees with their political views? The City Council makes the policies and it must have faith and confidence in the City Manager that he will carry out the policies correctly. As a result, the lack of political loyalty and similar views can justify termination.