

Third Circuit Upholds Preliminary Injunction in Government Employee First Amendment Masking Case

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On June 29, 2022, the United States Court of Appeals for the Third Circuit upheld the preliminary injunction of the United States District Court rescinding discipline placed on Port Authority employees who wore “Black Lives Matter” masks in violation of Port Authority policy.

Around April 2020, early in the COVID-19 pandemic, Port Authority of Allegheny County (“Port Authority”) required all uniformed employees to wear face masks to work. Some of the masks worn by the employees included social and political messages, and in July 2020, Port Authority prohibited face masks inscribed with social and political messages, including statements supporting the Black Lives Matter protests, statements supporting the police, or statements opposing the then-ongoing mask mandates. Decision at p. 4. When several employees continued to wear masks expressing support for Black Lives Matter, Port Authority disciplined the employees for violating policy and, in September 2020, imposed additional mask restrictions, limiting the types of masks that employees were required to wear. *Id.*

The employees, together with their union, Amalgamated Transit Union Local 85, sued Port Authority, arguing that the policy violated the employees First Amendment rights. The United States District Court for the Western District of Pennsylvania then entered a preliminary injunction, rescinding Port Authority’s discipline of the employees and stopping Port Authority from enforcing the policy against Black Lives Matter masks. Port Authority appealed to the United States Court of Appeals for the Third Circuit, asking for the appellate court to reverse the District Court’s granting of a preliminary injunction.

In a unanimous decision, the U.S. Court of Appeals upheld the District Court’s preliminary injunction, determining that, at this early stage of the litigation, Port Authority was unlikely to succeed on the argument that it did not violate their employee’s First Amendment rights.

Government Employee Speech

It is true that government employees receive less First Amendment protection than private citizens. As the U.S. Court of Appeals noted in its decision, public employees historically “had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights.” Decision at pg. 8 (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)). However, with the risk that the restrictions of public employment may “chill” the speech of government employees due to the fear of being fired, courts have since adopted a balancing test, weighing “an employee’s interest in speaking” against “a government employer’s interest in quelling that speech.” *Id.* A “chilling effect” occurs where a policy punishes protected speech before it is actually spoken. This has the effect of “chilling” individuals from making their constitutionally protected speech due to fear of repercussions.

That said, a government employee’s speech, however, must meet two threshold criteria in order to qualify for the interest balancing analysis: (1) an employee must speak as a private citizen rather than as someone exercising their official duties and (2) the employees must be speaking on a matter of public concern, rather than on their personal interests. *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 168 (3d Cir.

2008).

Upon review, the U.S. Court of Appeals determined that the employees' speech met these criteria. Their speech was not pursuant to their official duties and their speech was certainly on matters of public concern.

Employee Discipline

The Court considered two issues related to the expressive speech: (1) Port Authority's discipline of the employees, and (2) whether Port Authority's mask policy had a "chilling effect" on employee speech. These two issues are decided on different standards.

The first issue, the employee discipline, applies the analysis in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, a court considering a restriction of employee speech must "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." *Pickering*, 391 U.S. at 568.

In this analysis, the Court determined that the employees had a strong interest in making the speech, citing precedent which found that "speech involving government impropriety occupies the highest rung of First Amendment protection". Decision at pg. 11 (citing *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3rd Cir. 2015)). On the other hand, the Court determined that Port Authority could only demonstrate a "minimal risk" that the speech would cause workplace disruptions, only citing one employee complaint, electronic messages expressing differing opinions on the Black Lives Matter movement, and three race-related incidents which all preceded, and were unrelated to, the mask policy. Decision at pg. 11. The Court also noted that Port Authority itself expressed support of the Black Lives Matter movement after the July policy was put into place, it had previously expressed support for African American heritage celebrations, and has, in the past, allowed employees to wear political buttons and hats despite these buttons and hats being a violation of uniform policy. *Id.*

Thus, applying the balancing analysis, the Court determined that Port Authority was not likely to succeed on the merits given its minimal showing of risk.

The Masking Policy

When considering whether a policy is likely to have a "chilling effect," courts apply the standard laid out in *United States v. National Treasury Employees Union* ("NTEU"), 513 U.S. 454 (1995).

Under this standard, when a policy "chills potential speech before it happens The Government's burden is greater ... than with respect to an isolated disciplinary action." *NTEU*, 513 U.S. at 468. This analysis does not only require a court to examine a specific speech in question, but the "broad range of present and future expression" that the rule chills and the "interests of present and future speakers and audiences." Decision at pg. 10 (citing *NTEU*, 513 U.S. at 468).

This standard requires that the government, and in this case, Port Authority, bear the burden of showing that the impact that the employee speech has on the "actual operation" of the government outweighs the employee's interest in the speech. Decision at pg. 12. In order to make this showing, the government must show (1) that there is a real, and not merely conjectural harm, and (2) its policy was narrowly tailored to address these "real" harms. *Id.* (citing *NTEU*, 513 U.S. at 475).

Upon review, the Court determined that Port Authority had shown a real harm, as the views expressed on the masks led to employees engaging in heated arguments, with management becoming involved because of an employee complaint of a "Black Lives Matter" mask. Decision at pg. 12. The protests and riots that followed the Black Lives Matter demonstrations made Port Authority concerned that "severe disruption would likely follow mask-related controversy." *Id.*

Further, Port Authority also noted that other political speech had disrupted Port Authority's operations in the past. *Id* at pg. 13. However, the Court also noted that employees have worn political buttons in the past which were not disruptive to Port Authority operations. Further, the court also noted that employee dissension due to the expressive speech made by Port Authority did not disrupt Port Authority operations in the past. *Id*. Thus, while the Court determined that the disruption posed by controversial masks was more than merely conjectural, it also found that Port Authority could not show that the broad range of expressions that the mask policy banned was meant to stop actual harm. *Id*.

Second, the Court determined that Port Authority did not meet its burden of showing that the policy was "narrowly tailored" to the preventing the disruption to their operations. *Id* at pgs. 16-17. Specifically, the Court determined that the policy was "overbroad," in that it banned a wide variety of expressive social-issue and political speech that "employees have long engaged without causing disruption." *Id* at 14. The Court also determined that the policy was "underinclusive," in that it forbade expressive political speech on masks, but did not restrict verbal or written speech, which the court notes, also has the potential for disruption. *Id*. at 15.

The Court, therefore, determined that Port Authority did not meet its burden showing that its policy was narrowly tailored to the harm that it identified. "The facts," the Court wrote, "suggest that prevailing political conditions, rather than employees' mode of speech, dictates how contentious employees' workplace political debates will be. Port Authority makes no showing that preventing mask-related disputes will redress the disruption it fees." *Id*. Even balancing this with the factors in Port Authority's favor still weighed against Port Authority.

Thus, the Court determined that Port Authority was unlikely to prevail on the merits as both the discipline of the employees and the policy's chilling effect on the speech were likely in violation of the First Amendment. The Court of Appeals went on to review the other factors necessary to decide a preliminary injunction and affirmed the District Court's order.

It is important to note that the Court of Appeals' decision was narrow to the facts at hand, leaving open the door that "[a]nother policy, another message, a uniform requirement, or another set of interests may be different." Decision at pg. 22. Nevertheless, the decision of the Court of Appeals reiterates the importance of public employees' First Amendment rights and the standards that government employers must meet in order to craft policies necessary for their operation while also recognizing employee rights.

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