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First Amendment - Government Employees - The Tenth Circuit Determines that Speaking Spanish is Not an Issue of Public Concern and Misapplies the Mount Healthy Test to a Prior Restraint Claim

Leah Bhimani

FIRST AMENDMENT—GOVERNMENT EMPLOYEES—THE TENTH CIRCUIT DETERMINES THAT SPEAKING SPANISH IS NOT AN ISSUE OF PUBLIC CONCERN AND MISAPPLIES THE *MOUNT HEALTHY* TEST TO A PRIOR RESTRAINT CLAIM

*Leah Bhimani**

IN the past year, a startling number of small towns throughout the United States have enacted English-only ordinances that prohibit the choice of language that government employees may use in the workplace.[1] Many other city councils, state legislatures, and the Senate are considering enacting similar English-only legislation.[2] These laws serve as a prior restraint on government employee speech and implicate the First Amendment rights of bilingual employees. In *Maldonado v. City of Altus*, the Tenth Circuit held that a municipality's implementation of an English-only policy did not violate the First Amendment rights of bilingual city employees.[3] The court erred by incorrectly determining that the speech involved did not constitute an issue of public concern as a matter of law, and then used the wrong test to analyze the speech. The English-only policy placed an *ex-ante* restriction[4] on government employee speech, therefore the court should have utilized the *National Treasury Employees Union* test.[5] This misapplication could have serious implications for challenges of other English-only laws limiting government employee speech.

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* J.D. Candidate 2008, SMU Dedman School of Law; B.A. and B.B.A., 2003, University of Oklahoma. Special thanks to Michael, for all his love and support. Also, many thanks to Rose Cuisorn Villazor for her guidance and encouragement.

1. *See, e.g.*, Hazleton, Pa., Ordinance 2006-19 (Sept. 8, 2006); Valley Park, Mo., Ordinance 1708 (July 17, 2006); Borough of Bridgeport, Pa., Borough of Bridgeport Official English Ordinance (Oct. 2006); Farmers Branch, Tex., Resolution No. 2006-130 (Nov. 13, 2006); Taneytown, Md., Resolution 2006-28 (Nov. 13, 2006).

2. *See* Wendy Koch, *Efforts to Make English 'Official' Language Heat Up*, USA TODAY, Oct. 9, 2006, at A8.

3. Maldonado v. City of Altus, 433 F.3d 1294, 1310 (10th Cir. 2006).

4. "*Ex ante*" is used to refer to prior restraints on employee speech; "*ex post*" is used to describe retaliatory actions taken by government employers in response to speech that has already taken place.

5. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 481 (1995) (O'Connor, J., concurring).

Employees of the City of Altus, Oklahoma ("the City") claimed that in early 2002, the City's Street Commissioner told his bilingual subordinates that they could no longer speak Spanish at work, and that the City would soon be implementing a formal English-only policy.[6] A group of the affected employees ("the employees") sent a letter to the city administrator expressing opposition to the policy and formally filing a discrimination complaint.[7] They emphasized their pride in their heritage, their feelings that an ability to communicate in a bilingual manner did not hinder their work, and asserted that speaking Spanish had never affected their performance of job duties.[8] Nonetheless, in July 2002 the City promulgated an official policy requiring that all employees speak only English while conducting city business, unless speaking to a person with limited English skills.[9] The policy provided exceptions for lunch breaks and personal phone calls, but at trial the employees offered evidence that the City ignored these exceptions in practice.[10] Although the City had not disciplined anyone for violation of the policy, the employees brought suit.[11]

The City offered three primary reasons for adopting the policy: (1) to assure that all employees could understand what was being said over the City's radios; (2) some employees felt uncomfortable when co-workers spoke a language that they could not understand; and (3) safety concerns about a non-common language being used around machinery.[12] The City, however, could provide no written record of any communication, morale or safety problems resulting from the use of languages other than English prior to the implementation of the policy.[13] The testimony of city officials indicated that "at least one" employee had complained to supervisors about co-workers speaking Spanish, but the use of a language other than English had never caused a safety incident.[14]

The employees brought claims against the City for disparate-impact, disparate-treatment, discrimination on the basis of race and national origin, intentional discrimination, and deprivation of equal protection and freedom of speech rights.[15] The district court granted summary judgment on all counts and the employees appealed to the Tenth Circuit.[16]

The Tenth Circuit affirmed summary judgment for the City on the First Amendment claim based on its conclusion that the employees could not satisfy the first, or likely the third, prong of the *Pickering-Mount Healthy* test.[17] These prongs require that the prohibited speech touch on matters

6. *Maldonado*, 433 F.3d at 1298.
7. *Id.* at 1299.
8. *Id.*
9. *Id.*
10. *Id.* at 1300.
11. *Id.*
12. *Id.*
13. *Id.* (quoting Dist. Ct. Order at 6, R. Vol. III at 875).
14. *Id.*
15. *Id.* at 1298.
16. *Id.*
17. *Id.* at 1309.

of public concern and that prohibited expression was a motivating factor in a detrimental employment decision.[18]

In *Pickering v. Board of Education*, a public school board fired a teacher for writing a letter to the editor of the local paper criticizing the school board's handling of budgeting.[19] The Supreme Court balanced the interest of the teacher in commenting upon matters of public concern and the school's interest in promoting the efficiency of the public services it performs.[20] The Court concluded that the teacher's exercise of his right to speak on issues of public importance could not be the basis of his dismissal from public employment.[21] In *Mount Healthy City School District Board of Education v. Doyle*, a public school declined to renew a teacher's employment contract after he relayed to a radio station the contents of a memo to teachers addressing teacher dress and appearance.[22] The *Mount Healthy* court added to the *Pickering* test a requirement that the employee demonstrate that constitutionally protected speech was a motivating factor in the school's decision not to rehire him. The school then had the opportunity to prove that it would have reached the same employment decision in the absence of the constitutionally protected speech.[23]

The Tenth Circuit applied the *Pickering-Mount Healthy* test to the case at bar based on its precedent in *Schalk v. Gallemore*.[24] The four-prong test requires that:

> (1) The court determine whether the speech touches on a matter of public concern.[25]
> (2) If it does, the court must balance the interest of the employee in making the statement and the public employer's interest in effectively providing public services.[26]
> (3) If the preceding requirements are met, the employee must show that the protected speech was a motivating factor in the detrimental

18. *Id.* at 1309-10.
19. Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).
20. *Id.* at 568.
21. *Id.* at 574.
22. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 282 (1977).
23. *Id.* at 287. Both *Pickering* and *Mount Healthy* were cases of retaliatory action based on employee speech.
24. Schalk v. Gallemore, 906 F.2d 491, 494 (10th Cir. 1990). The two cases establishing the *Pickering-Mount Healthy* test in the Tenth Circuit were *Schalk v. Gallemore* and *Melton v. City of Oklahoma City*, 879 F.2d 706, 713 (10th Cir. 1989) *reh'g granted on other grounds*, 888 F.2d 724 (10th Cir. 1989). Both were *ex-post* cases of retaliatory action taken against a government employee due to her speech. In *Schalk*, a municipal hospital employee was reprimanded by her supervisor for writing a letter to the hospital board criticizing the hospital's administration. *Schalk*, 906 F.2d at 493. She was later terminated for talking to a hospital board member about her concerns. *Id.* The *Schalk* court applied the *Pickering-Mount Healthy* test in its analysis, and concluded that the employee's speech was protected under the First Amendment. *Id.* at 494-96, 499. In *Melton*, a police officer was dismissed from his job because he testified on behalf of a criminal defendant. *Melton*, 879 F.2d at 711-12. The Tenth Circuit analyzed the case under the *Mount Healthy-Pickering* test and held that the officer's speech received First Amendment protection. *Id.* at 713-17.
25. Connick v. Myers, 461 U.S. 138, 146 (1983).
26. *Pickering*, 391 U.S. at 568.

employment decision.[27]
(4) The employer then has the opportunity to demonstrate that it would have made the same employment decision in the absence of the protected speech.[28]

The court's analysis focused on the first and third prongs of the test in the present case.[29] Under the first prong, speech touches on a matter of public concern when it communicates a message that informs the debate on an issue of public interest.[30] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record."[31] The majority held that no evidence supported the employees' assertion that their choice of language expressed ethnic pride, or even communicated any message whatsoever, because their conversations in Spanish while at work concerned mundane subjects. The dissent pointed out that the court failed to examine the form and context of the speech in making its determination.[32] A person's choice of language, or the form of the speech, can convey a powerful message.[33] The dissent also indicated that the record showed that the speech took place in the context of intense debate about the English-only policy in Altus, tensions between Hispanic and non-Hispanic employees ran high in the City offices, and race relations had become an issue of public debate.[34]

The majority then addressed the third prong of the test, observing that "[h]ow to translate this prong to the context of an ex ante prohibition, as opposed to imposition of an ex post sanction, is not obvious."[35] To solve the problem, the court created a new rule, purportedly deduced from the *Mount Healthy* standard, that a restriction on speech does not violate the First Amendment if those imposing the restriction lack the intent to preclude communications on matters of public concern.[36] The majority then held that the City did not violate the First Amendment because it could find no evidence of any intent by the City to quash such communications.[37]

The dissent correctly identified the majority's failure to apply the appropriate test, set forth in *United States v. National Treasury Employees Union* ("*NTEU*").[38] In *NTEU*, the Supreme Court held that a law prohibiting any federal employee from receiving honoraria for speeches,

27. *Mount Healthy*, 429 U.S. at 287.
28. *Id.*
29. Maldonado v. City of Altus, 433 F.3d 1294, 1310 (10th Cir. 2006).
30. *Id.* at 1310.
31. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).
32. *Id.* at 1320 (Seymour, J., concurring in part and dissenting in part).
33. *Id.* at 1319.
34. *Id.* at 1318-21.
35. *Id.* at 1313.
36. *Id.*
37. *Id.*
38. *Id.* at 1316-17 (Seymour, J., concurring in part and dissenting in part); United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) ("*NTEU*").

articles or public appearances violated the First Amendment.[39] At the time the employees filed the claim, the government had not taken action against any employee under the new law. In its analysis, the *NTEU* Court first determined that respondents' expressive activities fell within the protected category of comment on matters of public concern.[40] It then applied a modified form of the *Pickering* balancing test.[41] The Court distinguished *NTEU* from *Pickering* because of the *ex ante* restriction on speech—"unlike *Pickering* and its progeny, this case does not involve a *post hoc* analysis of one employee's speech. . . ."[42] It differentiated the two types of cases because "unlike an adverse action taken in response to actual speech, [an *ex ante*] ban chills potential speech before it happens . . . . [Therefore,] the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action."[43]

The majority in *Maldonado v. City of Altus* erred at every level of its analysis of the employees' First Amendment claim. It disregarded crucial evidence when it incorrectly determined that the speech did not constitute an issue of public concern, applied the wrong test for analyzing the claim, and should not have reached consideration of the third prong of the *Mount Healthy* test. In deciding the threshold issue—whether the restricted speech touched on a matter of public concern—the court only analyzed the content of the employee's speech before concluding that no evidence supported the proposition that employees spoke on a matter of public concern.[44] It failed to consider the form (Spanish) or context (the race relations tension in Altus and the public debate over the English-only policy) of the speech, as required by *Connick v. Myers*.[45] As the dissent points out, the majority completely ignored the record's evidence that choice of language was a heavily debated issue in Altus.[46] Additionally, the majority inexplicably dismissed the employees' letter to the City prior to filing suit by holding that employees provided no evidence that conversations in Spanish communicated ethnic pride or commented on City policies.[47]

Once the Tenth Circuit reached the conclusion that the employees' speech did not touch on an issue of public concern, it should have ended

39. *NTEU*, 513 U.S. at 457.
40. *Id.* at 466.
41. *Id.* at 467. The Court in *NTEU* combined elements from *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1963), resulting in a test that balances the employee's interest to speak on matters of public concern with the state's interest in efficient employment. *NTEU*, 513 U.S. at 467.
42. *Id.* at 466-67.
43. *Id.* at 468.
44. *Maldonado*, 433 F.3d at 1313-14.
45. *Connick*, 461 U.S. at 147-48.
46. *Maldonado*, 433 F.3d at 1316 (Seymour, J., concurring in part and dissenting in part). *See also*, Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990) (establishing that the court should consider outside sources reflected in the record, such as local news articles, to determine whether an issue is a local topic of public concern).
47. *Maldonado*, 433 F.3d at 1311.

its examination of the First Amendment claim.[48] Instead, the court again erred by misapplying the *ex-post Mount Healthy* test to *Maldonado's ex-ante* facts.

It was difficult for the court to apply the *Mount Healthy* test to the facts of the case because it applied the wrong test; the *NTEU* test was the appropriate test.[49] As evident from the language of the test, the *Mount Healthy* prongs only apply to cases in which a public employer has taken retaliatory action against an employee.[50] In all previous decisions, the Tenth Circuit[51]—and every other Circuit in the country—has only applied the *Mount Healthy* test to cases where a public employer has taken some retaliatory action against an employee.[52] As recently as 2003, the Tenth Circuit stated that "[i]mplicit in the Pickering [*Mount Healthy*] test is a requirement that the public employer have taken some adverse employment action against the employee."[53] In the present case, no such retaliatory action had been taken by the city; *Maldonado* presents a prior restraint case, which should be analyzed under the *NTEU* test.[54]

Rather than apply the correct test, *NTEU*, the court altered the *Mount Healthy* test to require a showing of the public employer's intent to quash protected speech.[55] By creating this new intent requirement for *ex ante* restrictions on speech, the court dramatically increased the burden for any government employee who believes her First Amendment rights have been violated. This outcome directly contradicts the Supreme Court's stated purpose in *NTEU*: "the Government's burden is greater with respect to [a] statutory restriction on expression than with respect to an isolated disciplinary action"[56] because a prior restraint "constitutes a wholesale deterrent to a broad category of expression,"[57] "gives rise to

48. *See* Melton v. City of Oklahoma City, 879 F.2d 706, 713 (stating that the court only arrives at analyzing the *Mount Healthy* prongs once both previous elements—the *Connick* and *Pickering* elements—have been found in favor of the plaintiff).

49. *Maldonado*, 433 F.3d at 1316 (Seymour, J., concurring in part and dissenting in part).

50. *See id.* at 1309 (citing Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977)).

51. *See, e.g.*, Belcher v. City of McAlester, 324 F.3d 1203, 1207 (10th Cir. 2003); Hulen v. Yates, 322 F.3d 1229, 1237 (10th Cir. 2003); Clinger v. N.M. Highlands Univ., 215 F.3d 1162, 1165-66 (10th Cir. 2000); Gardetto v. Mason, 100 F.3d 803, 811 (10th Cir. 2000).

52. *See Maldonado*, 433 F.3d at 1318 n.1 (Seymour, J., concurring in part and dissenting in part).

53. *Belcher*, 324 F.3d at 1207 n.4.

54. *See*, Margaret Robertson, *Abridging the Freedom of Non-English Speech: English-Only Legislation and the Free Speech Rights of Government Employees*, 2001 BYU L. REV. 1641, 1649 (2001)

> ("NTEU . . . dealt with an ex ante general prohibition on a certain category of speech, where the precise content of the deterred speech was unknown and, because the speech had not yet been made, the adverse impact of the prohibited speech on efficient and effective employment had not been observed. The Court therefore reworked the Pickering test for application to an "ex ante prohibition" on speech, a category into which English-only statutes would fall.").

55. *Maldonado*, 433 F.3d at 1313.

56. NTEU, 513 U.S. 454, 468 (1995).

57. *Id.* at 454.

far more serious concerns than could any single supervisory decision" and "chill[s] potential speech before it happens."[58] In the great number of cases in which the Supreme Court has addressed the First Amendment rights of government employees, it has never considered the intent of the government to curtail protected speech. The Tenth Circuit seems to draw this standard out of thin air, unable to cite to any authority or precedent.[59]

The court rationalized applying the *Pickering-Mount Healthy* to this case by stating that it could not apply *NTEU* because the speech did not deal with matters of public concern.[60] But under both the *Pickering-Mount Healthy* test and the *NTEU* test, determination that the speech was a matter of public concern is a prerequisite to further analysis. The court also bases its application of the *Pickering-Mount Healthy* test on Justice O'Connor's concurring opinion in *NTEU*.[61] In her concurrence, however, O'Connor says only that no distinction should be made between *ex-ante* and *ex-post* limitations on speech in the application of the *Pickering* balancing test[62]—which is also encompassed in both the *Pickering-Mount Healthy* test and the *NTEU* test.

In *Maldonado v. City of Altus*, the Tenth Circuit incorrectly determined that the employee speech did not constitute an issue of public concern as a matter of law. It then misapplied the *Mount Healthy* test, splitting with its own previous decisions and the precedent of every other circuit in the country. Through its misapplication, the court has created a new test that directly contradicts the stated policy determinations of the Supreme Court, and provides a significant obstacle for government employees seeking to challenge a regulation limiting their speech. This unprecedented burden comes at a time when an increasing number of cities are passing English-only restraints on government employee speech. The Tenth Circuit, instead, should have adopted the dissent's well-reasoned opinion reversing summary judgment, and thus allowed the employees their chance to be heard.

58. *Id.* at 468.
59. *See Maldonado*, 433 F.3d at 1313.
60. *Id.*
61. *Id.*
62. *NTEU*, 513 U.S. at 481) (O'Connor, J., concurring in the judgment in part, dissenting in part).