

Public Employees' Speech on Social Media

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Different Methodologies in FA Jurisprudence

- Categorization (determine if speech in protected or unprotected category)
- Content discrimination analysis (determine if law content-based or content-neutral)
- Context/status of the speaker (public school students, military, prisoners and public employees)

McAuliffe v. New Bedford (1892)

- John J. McAuliffe was dismissed from his job as a policeman for “talking politics.” Town officials alleged that McAuliffe had engaged in political canvassing and had solicited votes.
- The mayor fired McAuliffe for violating a police regulation that provided in part: “No member of the department will be permitted to be a delegate to or **member of any political or partisan club** ... No member of the department shall be allowed to solicit money or any aid, on any pretence, for any political purpose whatsoever.”

McAuliffe v. New Bedford (cont.)

- “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.”
- The author of this opinion --- Justice Oliver Wendell Holmes when he was member of the Massachusetts high court.

Loyalty Oath Cases of 50s and 60s

- *Keyishian v. Board of Regents* (1967) - "the theory that public employment may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

Pickering v. Board of Education (1968)

- High school teacher writes a letter to the editor of local newspaper, criticizing school board's allocation of funds for athletic programs. For example, he wrote: "To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse."
- Board of education fires the teacher, finding that letter had a detrimental impact on the efficient operation of the school."

Pickering (cont.)

- “The problem in any case is to arrive at a balance between the interests of the teacher, 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 (cont.)

- Court notes that there is no impact on the teacher's working relationships: "The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here."

Pickering (cont.)

- Justice Thurgood Marshall in his opinion notes that the position of Marvin Pickering makes him uniquely qualified to contribute to important public debate:
- “Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent.”

Views of Marvin Pickering years later

- David Hudson, "Teacher looks back at letter that led to firing - and Supreme Court victory,"
- <http://www.firstamendmentcenter.org//analysis.aspx?id=4828>

Connick v. Myers (1983)

- Sheila Myers, an assistant district attorney, upset over transfer, circulates questionnaire in office. One of the questions asks: “Do you feel pressured to work in political campaigns on behalf of office-supported candidates?”
- The district attorney – Harry Connick Sr. – believes that Myers is creating a “mini-insurrection” in the office and undermining office morale. He terminates her.

"As a Citizen"

- The repeated emphasis in Pickering on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. ...reflects both the historical evolution of the rights of public employees, and the common-sense realization that **government offices could not function if every employment decision became a constitutional matter.**"

Connick (cont.)

- Court did find that one question (related to political campaigns) did involve a matter of public concern.
- But, the Court determined that the assistant DA's free-speech rights were trumped by the employer's interests in an efficient, disruptive-free workplace.

Connick (cont.)

- Question regarding political campaigns did address a matter of public concern ---
- “We believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.”

What if employee speech really important?

- “Furthermore, we do not see the necessity for an employer 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. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.”

Balancing prong in *Connick*

- The assistant D.A. distributed the questionnaire at the office. The court also found that the questionnaire arose out of an employment dispute about office policy - a fact that weighs in favor of the employer's fear of a threat to its authority.

Pickering-Connick test

- Threshold question - Employees must show that their speech addresses a matter of *public concern*.
- Balancing prong - employees' free-speech interests balanced against the employer's efficiency interests.

Public Concern

- How do courts determine if speech addresses a matter of public concern?
- Speech “relating to any matter of political, social, or other concern to the community.”

Examples of speech on a matter of public concern

- a protest against racial discrimination - some courts hold that this is "inherently a matter of public concern"
- Security lapses in a prison
- Comments about a Presidential assassination attempt

Balancing test – employers' interests

- Does the employee's speech:
 - Impair discipline or harmony among co-workers?
 - Detrimentally impact close working relationships for which personal loyalty and confidence are necessary?
 - Interfere with the normal operation of the employer's business?

Garcetti v. Ceballos (2006)

- Richard Ceballos, an assistant district attorney with supervisory duties, becomes suspicious of a sheriff deputy's testimony supporting a search-warrant affidavit. He later writes a memorandum to his superiors, urging dismissal of the case.
- He later is demoted and transferred to a less desirable location. He alleges unlawful retaliation based on his speech about possible perjured law enforcement testimony.

Garcetti v. Ceballos (2006)

- Is the speech completely job-related? If so, you do not even have to apply the full *Pickering-Connick* analysis. The Court creates a threshold requirement ---
- “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

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Rationale

- “restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”

Not constitutionalize every dispute in the workplace ...

Criticisms from Dissenting Justices

- John Paul Stevens: “perverse to fashion new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.”
- David Souter: Majority drew a “strange line” ... why create a “categorical exclusion”

Stevens: Can't Person be Speaking as Citizen and Employee

- "Public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."

How Apply “Official Job Duty” Test

- The inquiry is a “practical” one;
- Should focus on “the duties an employee actually is expected to perform.”
- Some lower courts have focused on the “core functions” of the employee’s job.

Liverman v. City of St. Petersburg

- Police officer makes the following post:
 - “Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in today's world of instant gratification and political correctness we have rookies in specialty units, working as field training officer's [sic] and even as instructors. Becoming a master of your trade is essential, not only does your life depend on it but more importantly the lives of others. Leadership is first learning, knowing and then doing.”

Liverman (cont.)

- The officer made another post:
 - “There used to be a time when you had to earn a promotion or a spot in a specialty unit . . . but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been ‘devalued . . . and when something has no value, well it is worthless.”

Liverman (cont.)

- This officer and another who made similar posts were disciplined for violating a provision of the social media policy, which read: “Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public[']s perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.”

Liverman (cont.)

- Federal district court first determines that the officer's post about quality of officers and unearned promotions does relate to matters of public concern.
- The court writes: "Rather, the speech implicated issues of public safety by noting concerns of 'officer safety and questions of liability,' and was something of general interest to the public."

Liverman (cont.)

- Court also notes that public has strong interest in hearing the officer's speech because of his experience.
- "his speech is valuable to the public because he was speaking from his experience as a member of the department."

Liverman (cont.)

- Court then inquires whether the officer's speech on a matter of public concern is outweighed by the department's efficiency interests.
- Factors relevant to this inquiry include whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the [agency]; (6) undermined the mission of the [agency]; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the [agency]; and (9) abused the authority and public accountability that the employee's role entailed.

Liverman (cont.)

- "This Court agrees that the Department has a strong interest in promoting internal harmony, trust, and camaraderie amongst its officers. But it is not enough that there is some disruption; the amount of disruption has to outweigh the importance of the speech and its concern to the public."

Liverman (cont.)

- However, the court granted qualified immunity to the police chief who disciplined the public employee.

Liverman --- 4th Circuit

- The 4th Circuit ruled that the police department's social media policy was overbroad. <http://caselaw.findlaw.com/us-4th-circuit/1757698.html>
- "We hold that the Department's social networking policy was unconstitutional and that the disciplinary measures taken against plaintiffs pursuant to that policy were likewise impermissible. The patent overbreadth of the policy negates Chief Dixon's qualified immunity defense."

Buker v. Howard County – firefighter case

- Fire Department had the following Social Media Guidelines:
 - 3.4 Personnel are prohibited from posting or publishing any statements, endorsements, or other speech, information, images or personnel matters that could reasonably be interpreted to represent or undermine the view or positions of the Department, Howard County, or officials acting on behalf of the Department or the County
 - 3.6 Personnel shall refrain from posting or publishing statements, opinions or information that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent when such statements, opinions or information, may place the Department in disrepute or negatively impact the ability of the Department in carrying out its mission.
 - 3.8 Personnel are prohibited from posting on any social media site or electronically transmitting messages, images, comments or cartoons displaying threatening or sexually-explicit material, epithets or slurs based on race, ethnic or national origins, gender, religious affiliation, disability, sexual orientation, or harassing, offensive, discriminatory, or defamatory conduct.

Buker (cont.)

- A battalion chief (paid firefighter) makes the following post:
 - My aide had an outstanding idea . . . lets (sic) all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its (sic) almost poetic . . .

Buker (cont.)

- The department terminated the firefighter. In subsequent litigation, he argued his First Amendment free-speech rights were violated.
- The court determined that his speech touched on a matter of public concern, namely gun control.

Buker (cont.)

- Another employee, an unpaid volunteer firefighter, makes the following response:
 - But . . . was it an "assault liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh . . . pick a black one, those are more "scary". Sorry had to perfect on a cool idea!

Buker (cont.)

- Both are punished and file First Amendment claims.
- The court rules against the paid firefighter and for the unpaid volunteer?
- Why the difference?

Buker (cont.)

- "it was reasonable, based on the contents of the January 20 posts and the comments from other firefighters, for the Fire Department to think that [the paid firefighter with supervisory authority] posts could negatively impact the public's perception of the Department and interfere with its ability to protect the public safety."

Munroe v. Central Bucks Sch. Dist. (2015)

- A public school elementary school teacher posts derogatory comments about some of her pupils. For example, she blogged:
 - Concerned your kid is automaton, as she just sits there emotionless for an entire 90 minutes, staring into the abyss, never volunteering to speak or do anything.
 - Seems smarter than she actually is.
 - Has a massive chip on her shoulder.
 - Too smart for her own good and refuses to play the school 'game' such that she'll never live up to her true potential here.
 - Has no business being in Honors.
 - A complete and utter jerk in all ways. Although academically ok, your child has no other redeeming qualities.
 - Lazy.
 - Shy isn't cute in 11th grade; it's annoying. Must learn to advocate for himself instead of having Mommy do it.
 - One of the few students I can abide this semester!
 - Two words come to mind: brown AND nose.
 - Dunderhead.
 - Complainer.

Munroe (cont.)

- Another post read:
 - “Kids! I don't know what's wrong with these kids today! Kids! Who can understand anything they say? They are disobedient, disrespectful oafs. Noisy, crazy, sloppy, lazy LOAFERS (and while we're on the subject) Kids! You can talk and talk till your face is blue. Kids! But they still do just what they want to do. Why can't they be like we were? (Perfect in every way!!!) What's the matter with kids today????? My students are out of control. They are rude, disengaged, lazy whiners. They curse, discuss drugs, talk back, argue for grades, complain about everything, fancy themselves entitled to whatever they desire, and are just generally annoying.”

Munroe (cont.)

- After the posts went viral, numerous parents called the school and complained. Many did not want their kids in the teacher's class.
- The teacher ultimately was discharged.

Munroe (cont.)

- The court questioned whether the teacher spoke on a matter of public concern, but said - assuming that she did - the balancing test weighed in favor of school officials.
- Why?

Munroe (cont.)

- “The position of public school teacher requires a degree of public trust not found in many other positions of public employment.”
- “We find that [the teacher’s] various expressions of hostility and disgust against her students would disrupt her duties as a high school teacher and the functioning of the School District.”