

Social Media and Public Employee Freedom of Speech

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Introduction

- ▶ “Social Media” describes a broad range of services that facilitate the easy sharing of information, pictures, videos, news articles, etc.
- ▶ Social media provides its users an outlet to express thoughts, ideals, feelings, and information. All examples of “speech.”

Overview of First Amendment and Public Employees

- ▶ The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of **public concern**.
- ▶ The United States Supreme Court has long held that public employees do not surrender all their First Amendment rights by reason of their employment.
- ▶ *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."*
 - ▶ Includes symbolic speech
 - ▶ Includes social media posts (both words and images)

Key Court Case - *Pickering*

- ▶ The Supreme Court has established a framework to balance the free speech rights of government employees with the government's (employer's) interest in avoiding disruption and maintaining workforce discipline. *Pickering v. Bd. Of Educ.*, 391, U.S. 563, 568 (1986).
- ▶ Under *Pickering* framework, the Plaintiff first must establish that:
 - ▶ (1) they spoke on a matter of public concern;
 - ▶ (2) they spoke as a private citizen rather than a public employee;
 - ▶ (3) their interests as a citizen in speaking on the matter outweighed the Defendant's interests as an employer, in promoting the efficiency of the public services it performs through its employees; and
 - ▶ (4) the relevant speech was a substantial or motivating factor in the adverse employment action

Balancing Interests

- ▶ Speech by government employees is less protected than speech by members of the public
 - ▶ *Amalgamated Transit Union Loc. 85 v. Port Auth Of Allegheny Cnty.*, 39 F.4th 95, 103 (3rd Cir. 2022)
- ▶ Courts give government employers wide discretion and control over the management of their personnel and internal affairs.
- ▶ *Pickering* identified three factors in balancing the public employee's statements against the employer's exercise of managerial efficiency:
 - ▶ (1) the parties' working relationship;
 - ▶ (2) the detrimental effect of the speech on the employer; and
 - ▶ (3) the nature of the issue upon which the employee spoke and the relationship of the employee to that issue.

Key Court Case - *Garcetti*

- ▶ When a public employee engages in speech pursuant to their official job duties, they are generally not speaking as private citizens.
 - ▶ *Garcetti v. Ceballos*, 547 U.S. 410 (2006)
- ▶ Now, the first question asked is not whether the speech addressed a matter of public concern, but **whether the speech was made pursuant to the public employee's job duties.**
- ▶ The scope of one's duties may not be limited by the specific enumeration in a job description.
 - ▶ *Phillips v. City of Dawsonville*, 499 F.3d 11239 (11th Cir. 2007).

Employee's Ability to Speak -

City of Madison, Joint School Dist. No. 8 v. Wisconsin Emp. Relations Comm. (1976), 429 U.S. 167

- ▶ The court recognized that "[c]onduct or speech that is disruptive of a public meeting, personally abusive or harassing, or so designed to irrevocably break down cooperation under a collective bargaining agreement may fall outside the bounds of [*Madison*]."
- ▶ The court concluded that the right of free speech exercised in the case before it did not go beyond the bounds of legitimate public commentary and, under *Madison*, was protected by the First Amendment.
- ▶ Further, the court noted that negotiation "is by definition a two way (or more) process of discussion or give and take on issues which hopefully leads the parties to a mutually beneficial resolution of those points."
- ▶ Thus, the court reversed SERB's decision to issue a cease and desist order as contrary to law

Types of Protected Speech

- ▶ Protected conduct, after *Garcetti*, has included allegations by:
 - ▶ a public records coordinator that public employees were taking absences but not recording the absences on the log resulting in the misuse of City Funds, *Handy-Clay v. City of Memphis*, 695 F.3d 531 (6th Cir. 2012);
 - ▶ a deputy court administrator that the Chief District just was interjecting personal religious beliefs into trial proceedings, *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752 (6th Cir. 2010);
 - ▶ a public works director that city council was violating open meeting law, *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007);
 - ▶ an engineer that his supervisors were illegally claiming inappropriate overtime and excess pay, *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007).

Speech not Protected for Public Employees

- ▶ Examples of conduct not protected under the *Garcetti* scope-of-duties rule:
 - ▶ comments by park ranger to third-party consultant about discipline, morale and performance problems in department, *Weisbarth v. Geauga Park*, 499 F.3d 538 (6th Cir. 2007);
 - ▶ firearms instructors' sending emails and writing report concerning the hazards of an indoor fire range, *Foraker v. Chaffinch*, 501 F.3d 231 (3rd Cir. 2007);
 - ▶ memo from athletic director/head football coach to office manager and principal criticizing financial management of sports program, *Williams v. Dallas Independent School District*, 480 f.3D 689 (5th Cir. 2007);
 - ▶ gathering data on sewage overflows that supervisors said exceeded the parameters of inspector's assignment to draft an ordinance for the city's water department and "ruffled feathers," but was nonetheless considered to be relevant to their employment in the Public Works department, *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1291 (11th Cir. 2009).

Off-Duty Conduct - *Bremerton*

- ▶ Speech is not the product of an official duty when the speech does not owe its existence to the responsibilities of a public employee.
 - ▶ *Kennedy v. Bremerton Sch. Dist.*, 132 S.Ct. 2407 (2022).
- ▶ An employee speaks as a private citizen or “off-duty” when:
 - ▶ the statements are made in the capacity as a citizen with no official duty to make the questioned statements; or
 - ▶ the speech was not the product of performing the tasks the employee was paid to perform.

On-Duty Conduct

- ▶ Speech is often considered unprotected by the First Amendment when the public employee is actively performing their job duties or representing their employer.
- ▶ *Holbrook v. Dumas*, 2016 WL 4376428 (6th Cir. 2016)
 - ▶ The court found that a fire chief's emails and Facebook posts warning his employees their jobs were in jeopardy were made in the fire chief's capacity as an employee, not private citizen.
 - ▶ The Court ruled that it was clear that his speech owed its existence to the chief's duties and responsibilities as fire chief

Pickering and Garcetti Blended *Marquardt v. Carlton*

No. 21-3832, 2023 WL395027 (6th Cir. 2022)

- ▶ In *Marquardt*, a city EMS employee was fired after it was discovered he used his personal Facebook account to make violent comments about Tamir Rice, a recently murdered child.
 - ▶ The 6th Circuit appeals court noted that Marquardt's First Amendment interests bear heavy weight, but in this case did not outweigh the interest of the City.
- ▶ In determining the City's interest, the court considered whether Marquardt's posts:
 - ▶ (1) impaired discipline by superiors or harmony among co-workers;
 - ▶ (2) had a detrimental impact on close working relationships for which confidence and personal loyalty were necessary;
 - ▶ (3) impeded the performance of Marquardt's duties or the regular operations of Cleveland EMS; or
 - ▶ (4) undermined the City's mission.

Kirkland v. City of Maryville, Tenn. 54 F.4th 901 (6th Cir. 2022)

- ▶ In *Kirkland*, a police officer was terminated for two negative Facebook posts about the county sheriff
 - ▶ The Sixth Circuit ruled that this action failed a First Amendment claim, affirming the district court granting summary judgment to the City.
- ▶ The Sixth Circuit ruled even though the Facebook posts were matters of public concern, the officer failed the *Pickering* test because the heightened need for order, loyalty, and efficiency in law enforcement agencies means they will often have ‘legitimate and powerful interests’ in regulating speech by their employees.”

Octavius Rowe v. Civil Service Commission, 22-P-928 (Mass. App. Ct. 2023)

- ▶ Mass. Appeals Court upheld the termination of a firefighter who authored numerous social media posts containing abusive, threatening, and offensive language
- ▶ The posts attacked others based on their religion, sexual orientation, and race
- ▶ The Court held that it was reasonable for the commission to find that the posts constituted conduct unbecoming of a firefighter, and prejudicial to good order, whether made on or off duty
- ▶ The Court rejected the firefighter's argument that his right to free speech was violated, instead following the precedent set in *Garcetti* that a public employee's rights are not absolute, and the employee must accept certain limitations on their freedom of speech

Hils v. Davis, 52 F.4th 997 (6th Cir. 2022)

- ▶ The Sixth Circuit upheld a policy which prohibited police officers from recording internal investigative meetings.
- ▶ The First Amendment argument failed because a “prohibition on recording speech is not a prohibition on speaking” during the meetings
 - ▶ The Court distinguished this case from cases in which courts have found that there is a constitutional right to film an encounter with a police officer, noting that internal investigations of police activity are totally different than a citizens’ encounter with a police officer
- ▶ The Fourteenth Amendment argument failed because the policy related to the legitimate government interest of keeping the investigations free from outside influence
- ▶ This rationale can be expanded to apply to grievance meetings

Marlow v. City of Clarendon, No. 22-2533 (8th Cir. Aug. 14, 2023)

- ▶ A terminated police officer filed a lawsuit against a city, its police chief, and mayor, alleging First Amendment retaliation and violation of the Arkansas Whistle-Blower Act (AWBA).
- ▶ The officer gave dashcam footage of a high-speed pursuit to a sheriff's deputy without authorization, stating it was to protect fellow officers. The district court granted summary judgment in favor of the city, police chief, and mayor, and the Eighth Circuit affirmed the decision.
- ▶ The court ruled that the officer's speech was not a matter of public concern, as he shared the video to give the deputy a "trophy," not for investigatory purposes.
- ▶ There was no evidence at summary judgment that he was attempting to report governmental misconduct to the city council by turning over the video.
 - ▶ Instead, the record showed he asserted the opposite. He told his fellow officers that he was trying to protect them and expressly denied any intent to give the video to the deputy for investigatory purposes. Thus, his free speech claim failed.
- ▶ The officer's conflicting statements and actions influenced the court's decision.

Turner v. Metro. Gov't of Nashville & Davidson Cnty., 3:21-cv-00042 (M.D. Tenn. Sep. 19, 2023)

- ▶ Plaintiff Tracy R. Turner, a captain with the Nashville Fire Department (NFD), posted opinions on Facebook from May to July 2020 on topics of national interest, including negative remarks about protestors, BLM, and the "Left agenda."
- ▶ Negative responses from news outlets, politicians, and citizens followed, expressing concerns about Turner's fitness for his role in a predominantly African American community.
- ▶ Turner faced disciplinary actions, including demotion, loss of bidding rights, sensitivity counseling, and relocation, based on a meeting with NFD officials.
- ▶ Plaintiff filed a claim under 42 U.S.C. § 1983, alleging First Amendment retaliation, claiming that his demotion was retaliatory for his protected free speech activity.

Turner cont.

- ▶ Both parties agreed that Turner's speech addressed a matter of public concern, and Pickering balancing applies.
- ▶ The court assessed four factors: (a) impairment of discipline or harmony, (b) detrimental impact on close working relationships, (c) impediment to the performance of duties or interference with regular operation, and (d) undermining the mission of the employer.
- ▶ Defendant failed to show no genuine dispute on factors (a) and (b), while factors (c) and (d) are disputed.
- ▶ The Defendant argued that NFD was inundated with messages and media inquiries, which wasted time that could have been used responding to emergencies.
 - ▶ Furthermore, because the Plaintiff's job included interfacing with the community, a negative public response to the speech may affect the Plaintiff's overall job performance.
- ▶ The court found after witness testimony that there lacked proof of discernable workplace disruption to the workflow of the department
- ▶ Despite concerns about reduced public trust, only factor (d) weighs in favor of the Defendant.
- ▶ The court emphasizes the subjective nature of the balancing test, with potential for judge-specific outcomes.

Social Media Phenomenon: First Amendment Audits

- ▶ **Purposeful Testing of First Amendment Rights:** First Amendment audits involve individuals intentionally testing and asserting their First Amendment rights, especially freedom of speech and the right to record in public spaces.
- ▶ **Recording Public Officials:** Participants, often referred to as auditors, use cameras or smartphones to record interactions with public officials, such as law enforcement officers, government employees, or security personnel, to assess the officials' reactions to constitutionally protected activities.
- ▶ **Focus on Public Accountability:** The primary goal is to promote transparency and accountability by documenting how public officials respond to individuals exercising their constitutional rights, revealing instances of either respect for or infringement upon those rights.
- ▶ **Legal and Ethical Considerations:** First Amendment audits often involve auditors deliberately pushing the boundaries of their rights to test the legality and ethics of public officials' reactions, highlighting any potential violations or abuse of power.
- ▶ **Online Presence and Community Engagement:** Audits are commonly shared on social media platforms, fostering online communities that discuss, critique, and support individuals engaged in these audits. This phenomenon has gained attention for sparking conversations around civil liberties, government transparency, and accountability

Best Practices for Public Employers

- ▶ Implement a Social Media Policy
 - ▶ The purpose of a social media policy is to set expectations for appropriate behavior
- ▶ Update Social Media Policy Regularly
 - ▶ Reviewing a policy on a quarterly / semi-annual basic allows the policy to reflect the continuously evolving nature of social media and platforms
- ▶ Avoid vague / overbroad Policies
 - ▶ A policy may be impermissibly vague if it either fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or if it authorizes / encourages arbitrary and discriminatory enforcement

Summary

- ▶ As can be seen from the case law cited herein, any analysis of a First Amendment speech claim is a highly fact-driven analysis.
- ▶ Speech must be:
 - ▶ (1) analyzed on an individual basis,
 - ▶ (2) attention must be given to the audience/recipient, specific allegations,
 - ▶ (3) whether the speech was made internally or externally
 - ▶ (4) whether the individual identifies himself as an agency employee or as a concerned citizen, and
 - ▶ (5) whether his speech has an impact on agency operations.

Q & A