

The First Amendment, Public Employees, and Social Media

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1

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3

3

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Would the First Amendment protect this player if the Panthers fired him for kneeling during the National Anthem?

Yes

No

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4

4



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Would the First Amendment protect Mack Brown if UNC fired him for kneeling during the National Anthem?

Yes

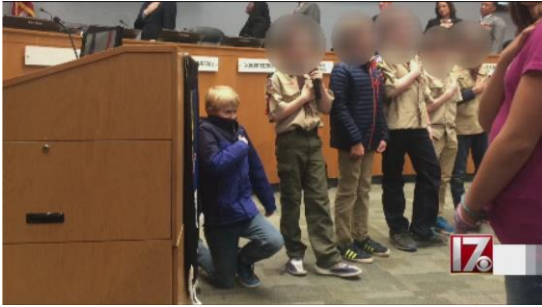
No

Only if they lose to Duke again this year.

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6

6



7

Would the First Amendment protect the city attorney if the city fired her for kneeling during the Pledge?

Yes

No

8

**Traditional View:
No 1st Amendment Protection
for Public Employees**

“A man serving as a policeman may have a constitutional right to talk politics, but he has no constitutional right to continue serving as a policeman.”

– Oliver Wendell Holmes, 1892

9

Current View: Government Employees Do Not (Entirely) Waive Their FA Rights

- Pickering v. Bd of Ed (1968)
 - Teacher's criticism of school funding process
 - Must balance employee rights with state's interest in "promoting the efficiency of the public services it performs through its employees"

10

Connick & Garcetti

- Two foundational SCOTUS cases involved **government attorneys** as plaintiffs
 - Connick v. Myers (1983)
 - Garcetti v. Ceballos (2006)

11

Connick & Garcetti

- Government employees receive First Amendment protection only for:
 - Speech on matters of **public concern**
 - Connick
 - That is **not made as part of job duties**
 - Garcetti
- Balancing test
 - Connick

12

The Big Three Questions

1. Was speech a matter of public concern?
2. Was speech outside of job duties?
3. Did employee suffer adverse action?

If the answer to all 3 questions is yes, then . . .



13

13

The Balancing Test



14

14

The Balancing Test



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The Balancing Test



16

The Big Three Questions

1. Was speech a matter of public concern?
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If the answer to all 3 questions is yes, then apply the **balancing test**

17

Matters of Public Concern

- “any matter of political, social, or other concern to the community”
- “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”

Snyder v. Phelps, 131 S.Ct. 1207 (2011)

18

Matters of Public Concern

- **Connick v. Myers**, 461 U.S. 138 (1983)
 - New Orleans ADA circulated internal office survey
 - Complaints about **working conditions** generally not matter of public concern
 - Pressure to work on political campaign was matter of public concern

19

Matters of Public Concern

- Objections to new work policies, if those policies affect **public safety**
- Complaints about supervisor's conduct, if that conduct affects **public finances**
- Allegations of **discrimination**, even if raised in context of individual personnel dispute

20

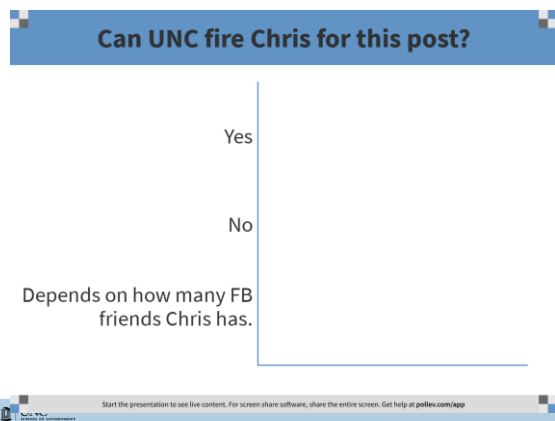
What is NOT a "public concern"?

- Complaints of abuse/mistreatment by supervisor
- Gossip about elected officials

21



22



23

2. Made as Part of Job Duties?

- Garcetti v. Ceballos, 547 U.S. 410 (2006)
 - ADA writes memo questioning veracity of affidavit from deputy sheriff
 - Recommends dismissal of case
 - Called as witness by defense
 - Transferred & denied promotion
- *When public employees make statements pursuant to their official duties, they are not speaking as citizens and the 1st Amendment does not protect them from employer discipline.*



24

Speaking as a Citizen or a Public Employee?

- Political sign on my front lawn?
- Political bumper sticker on my car?
- Political sign in my office door?
- Political button on my suit jacket while teaching?



25

25

What speech is considered part of an employee's job duties?

- Complaints to college president by junior employee
- Comments to TV reporter by fire chief at scene of fire



26

26

What speech is **not** considered part of the employee's job duties?

- Complaints to federal officials made by state employees
- Comments to media (unless job involves regular contact with media)
- Testimony at trial or deposition



27

27



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3. "Adverse Employment Action"

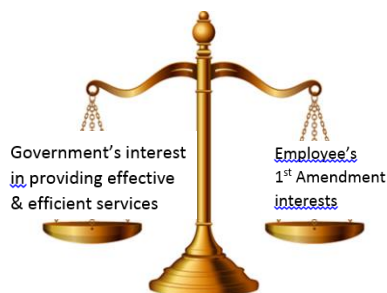
- Refusal to hire
- Suspension or termination
- Demotion in pay or job title
- Transfer to less desirable position or schedule
- Reduction in authority or responsibility

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28

The Balancing Test



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29

The Balancing Test

- Employee's role
 - More senior, more public, then less FA protection
- How speech was communicated
 - Did it interfere with office operations?
 - *Connick v. Myers*
 - Shared in confidence or very publicly?
- Did speech undermine agency's mission?

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30

30



"I hope they get him next time!"

- TX county clerical worker to colleague



31

31



"Perot thinks everyone is trying to assassinate him. Too bad he's still alive!"

-Utah asst. city attorney on local TV show



32

32



Andrew Shirvell (left), with a defaced image of gay college student Chris Armstrong that Shirvell posted on his blog in 2010.
Photo: Fox



33

33

The Big Three Questions

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34

34

Can we fire this county EMT?

- “I’m back working at this God-forsaken place. Nothing has changed except for the worse. I can’t take any more of the hospital folks.”



35

35

Can we fire this county EMT?

- “If you want good quality care, go to [another county’s] hospital where the good folks will help you! We had great service there. Not like [our county] hospital where you lay for hours and never get treated!”

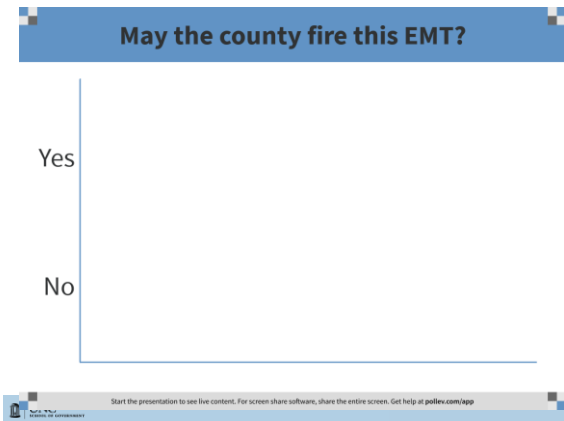


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36



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37

Recent Federal Case Highlights Different Protections for “Work” Speech and Social Media Speech



38



Thelma Barone
former Community Service Officer, Springfield (OR) PD
Barone v. City of Springfield (9th Cir. 2018)



39

Two First Amendment Claims

1. Retaliation for comments at a community event concerning racial profiling
2. Prior restraint of free speech by requiring a promise not to criticize the town or PD

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40

Retaliation Claim

- "Meet the SPD" community event
- Barone attended and spoke in uniform
- Stated that she had heard of increasing complaints of racial profiling
- Suspended 4 weeks w/out pay, allegedly for unrelated incidents

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41

Were Barone's comments at the community event protected by the First Amendment?

Yes

No

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42

Prior Restraint Claim

- If Barone wanted to return to her job, SPD required her to sign agreement stating:

“Employee will not speak or write anything of a disparaging or negative manner related to the Department, City of Springfield, or its employees.”

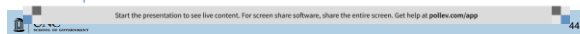


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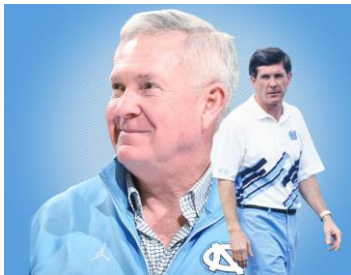
Does this agreement violate Barone's First Amendment rights?

Yes

No



44





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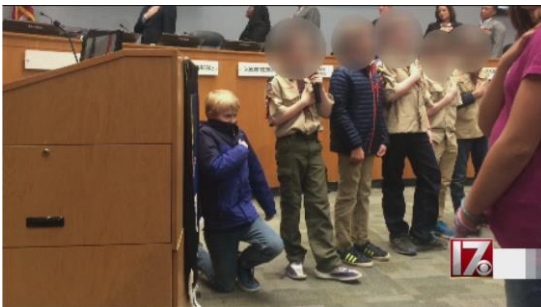
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