



Employee Speech


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The Scope of the First Amendment




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The Scope of the First Amendment

“Thank God for dead soldiers.”

Snyder v. Phelps, 131 S.Ct. 1207 (2007)




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The Scope of the First Amendment

“Thank God for dead soldiers.”

Statute makes it a crime to stand in a sidewalk outside an abortion clinic.



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Mayor sues for false and defamatory statements.

The Scope of the First Amendment

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“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.”

Oliver Wendell Holmes
Schenck v. U.S., 249 U.S. 47 (1919)

The Scope of the First Amendment

“We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”


The Scope of the First Amendment



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The Scope of the First Amendment


Where is the speech occurring?
What is the speech about?
Who is speaking?



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Who is Speaking?


Prisoners

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Who is Speaking?


Prisoners
Members of the armed forces

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Who is Speaking?


- Prisoners
- Members of the armed forces
- School students



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Who is Speaking?

- Prisoners
- Members of the armed forces
- School students
- Government employees



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Government Employees

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Public employee free speech

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The legal test



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The legal test

Three questions the court will ask when a government employee makes a free speech claim.



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The legal test—three questions



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The legal test—three questions


Outside of job duties?



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The legal test—three questions


Outside of job duties?
Touch on matter of public concern?



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The legal test—three questions

Outside of job duties?
Touch on matter of public concern?
Balance of interests?



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A real world example


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A real world example

College hits financial trouble

McGettigan v. Di Mare, 173 F. Supp.3d 1114)(D. Colo. 2016)

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Professor McGettigan sends email to all students:

President thinks you students are losers

Believes educational resources are wasted on you

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McGettigan sues

The legal test—three questions

Outside of job duties?
Touch on a matter of public concern?
Balance of interests?




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The legal test—three questions


Outside of job duties?
Touch on a matter of public concern?
Balance of interests?
 College claims fear of violence
 Court: inadequate grounds to fear violence
Professor's case survives



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An example closer to home



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An example closer to home

North Carolina town has fire, police, EMS, and water rescue combined

Chief is quoted saying all but two officers are fully certified in all four

Officers begin a group text message exchange

Cannon v. Village of Bald Head Island, 891 F.3d 489 (4th Cir. 2018)



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An example closer to home

Maybe she is going to Colorado for a math class,
or maybe they are all just complete liars

The legal test—three questions

Outside of job duties?

Touch on a matter of public concern?

Balance of interests?

The legal test—three questions

Balance of interests:

“This Court has recognized on several occasions that ‘police officials are entitled to impose more restrictions on speech than other public employers because a police force is a paramilitary—discipline is demanded, and freedom must be correspondingly denied.’”

A question over the phone

A question over the phone

County EMT on Facebook:

“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.”

A question over the phone

“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.”

The legal test—three questions

Outside of job duties?

Touch on a matter of public concern?

Balance of interests?

Workplace Free Speech

Fire battalion chief:

“My aide had an outstanding idea .. lets 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 almost poetic”

Grutzmacher v. Howard County, 851 F.3d 332 (4th Cir. 2017)

Workplace Free Speech

Response:

“But... was it an ‘assult 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!”

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Workplace Free Speech

Battalion chief:

“Too cool!”

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Workplace Free Speech

Outside of job duties?

Touch on a matter of public concern?

Balance of interests?

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Workplace Free Speech

Deputy police chief, just after Obama election,
while off duty and using own computer and
Facebook account, posts picture of
Confederate flag, with phrase:

“It’s time for a second revolution.”

Duke v. Hamil, 997 F. Supp.2d 1291 (N.D. Ga. 2014)

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Workplace Free Speech

Outside of job duties?

Touch on a matter of public concern?

Balance of interests?

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Workplace Free Speech

“[A] Confederate flag can communicate an array of messages, among them various political or historical points of view.”

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Workplace Free Speech

“After all, while the Court acknowledges that Plaintiff intended to express his disapproval of Washington politicians, on its face his speech could convey a drastically different message with different implications. Many of these messages are controversial, divisive, and prejudicial to say the least. Because these potentially offensive messages came from the Department’s second-in-command, [the chief] did not have to wait to see if the controversy affected the discipline, mutual respect, or trust among the officers Plaintiff supervised before addressing it.”

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Workplace Free Speech

Confederate flag with words:

“Heritage Not Hate”

Erickson v. City of Topeka, 209 F.Supp.2d 1131 (D. Kan. 2002)

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Workplace Free Speech

Outside of job duties?

Touch on a matter of public concern?

Balance of interests?

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Workplace Free Speech

Employee claims dismissal was violation of free speech based on his complaint about another employee's Confederate flag tattoo.

Hartwell v. City of Montgomery
487 F. Supp.2d 1313 (M.D. Ala. 2007)

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Workplace Free Speech

Outside of job duties?

Touch on a matter of public concern?

Balance of interests?

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Workplace Free Speech

“On the one hand, it is certainly possible that Hartwell complained about Gordon purely out of self-interest: he was offended by Gordon’s tattoo, learned that it might be prohibited by a new workplace tattoo policy, and filed a grievance because life would be more tolerable working alongside colleagues who did not sport a Confederate-flag tattoo.”

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Workplace Free Speech

“On the other hand, it is equally possible that Hartwell complained about Gordon in the public interest: he felt, as a citizen, that it reflected poorly on the city and the fire department for public employees to bear racially insensitive tattoos; that taxpayer dollars should not pay the salaries of such persons; and that African–Americans employed by the government should not be forced to stand by in silence while such persons contribute to racial tension in the workplace.”