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2023 Public Sector Conference

Speech in Public Employment in the Age of Social Media: Untangling the Protections and Limitations

Friday, April 28, 2023

2:30 p.m. – 3:45 p.m.

Speakers:

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Conference Reference Materials

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First Amendment Presentation

California Lawyers Association

Presented by: Susan Garea, Megan Degeneffe & David Urban

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California Lawyers Association: First Amendment Presentation

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Our Political Times

- Vaccine mandates
- COVID information and mis-information
- Black Lives Matter
- Aftermath of Trump's Presidency
- #MeToo
- Critical Race Theory
- Mid-Term elections
- Monuments and school re-naming
- Debates over "cancellations"
- The 2024 election

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Our Political Times & The Workplace

- Votes of no confidence
- Derogatory statements about supervisors/managers on social media
- Employees engaging in "free speech"
- Heated feelings around national politics entering the workplace
- Academic Freedom

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Social Media & SCOTUS: *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)


- Social Media Is:
 - The “modern public square”
 - Represents a revolutionary space for civic discourse
 - Provides “the principal sources for...current events...and otherwise exploring the vast realms of human thought and knowledge”
 - Provides the “most important places...for the exchange of views” today



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Public Scrutiny


- “The Plain View Project” – Watchdog group has monitored social media in several Police Departments since 2017
- Revealed thousands of social media posts that are now publicly available
- Examples of released posts/comments from The Plain View Project:
 - “It’s a good day for a chokehold”
 - Reply to a video post of how the individual “[c]an’t wait to plow through” the anti-Trump protestors shown in the video
 - Comments about how apprehended suspects “should be dead” or “should have more lumps in the head”



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The First Amendment Balance

- “The problem in any case is to arrive at a balance between the interests of the [employee], 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 v. Board of Education*, 391 U.S. 563 (1968)



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The Parameters of First Amendment Speech


- How do Courts “strike the balance”?
 - Is the speech on a matter of public concern?
 - Did the employee speak as a private citizen or a public employee (i.e., pursuant to “official duties”)?
 - If yes, is the employee’s First Amendment right outweighed by injury the speech can cause to the government agency?
- *Pickering v. Board of Education*, 391 U.S. 563 (1968)



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Summary – Elements of Public Employee First Amendment Claim

1. Public Concern
Connick v. Myers, 461 U.S. 138 (1983)
2. Outside “Official Duties”
Garcetti v. Ceballos, 547 U.S. 410 (2006)
3. Survives Balancing of Interests (Administrative Interests of Employer against Speech Rights of Employees)?
Pickering v. Board of Education, 391 U.S. 563 (1968)



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Question No. 1: Was the Speech a Matter of Public Concern?



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Speech Must Be On a Matter of Public Concern

- A matter of public concern is one upon which “free and open debate is vital to informed decision-making by the electorate.”

Connick v. Myers, 461 U.S. 138 (1983)

- However, simply because a topic may be of “general interest” to the public, does not, in and of itself, raise it to a level of constitutional public concern.




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Speech Must Be On a Matter of Public Concern

- 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.”


Connick v. Myers, 461 U.S. 138 (1983)



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Speech Must Be On a Matter of Public Concern

- Speech is NOT a matter of public concern when:
 - The speech “deals with individual personnel disputes and grievances, and
 - When that information ‘would be of no relevance to the public’s evaluation of the performance of governmental agencies.’”



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Our Political Times

- Employee posts comments on Facebook stating, among other things, that defunding the police puts everyone at risk.

Matter of public concern?




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Matter of Public Concern

- Officer files a grievance against this supervisor asserting the supervisor should get interpersonal skills training, is a bully and is incompetent. The officer then claims retaliation after he is given “undesirable” assignments and low level discipline.

First Amendment violation?


Desrochers v. San Bernardino,
572 F.3d 703 (9th Cir. 2009)



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Other Cases – Matter of Public Concern or Not?

- *Cochran v. City of Los Angeles*, 222 F. 3d 1195 (9th Cir. 2000)
 - Peace officer disputes with superior officer involving among other things supposed race and gender bias
- *Eng v. Cooley*, 552 F. 3d 1062 (9th Cir. 2009)
 - Deputy DA told newspaper that a colleague’s representation to IRS about school lease
- *City of San Diego v. Roe*, 543 US 77 (2004)
 - police officer’s sale of sexually explicit videos on-line



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Question 2: Was the Speech Pursuant to “Official Duties” Speech?

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Speech Must Be Made in Employee’s Role as a Private Citizen

- To be protected by the First Amendment, speech must be made in the employee’s role as a **private** citizen; not as part of the officer’s **official** capacity.
- If the speech is made in an official capacity, such as comments as part of official duties, the speech is not protected by the First Amendment.

Garcetti v. Ceballos, 547 U.S. 410 (2006)

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Speech as Private Citizen? Look to “Official Duties”

- Formal job descriptions are helpful but not dispositive
- Scope of the employee’s job duties requires a case-by-case evaluation
- Speech often outside “official duties”
 - To elected officials and outside agencies
 - To media
 - On behalf of a union
 - Testifying in court or at a deposition

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Speech as a Private Citizen?

- John Ellins, a police officer for the City, led a no-confidence vote of the police officers' union against the Chief of Police. The Chief subsequently delayed signing an application for a certification that would entitle Ellins to a five percent salary increase.

Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2012)




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“Official Duties” - Academic Freedom

- Important Exception to “Official Duties” Rule is Carve-Out for Academic Freedom
- *Garcetti* case – Supreme Court said it was not deciding if rules cover academic freedom
- Ninth Circuit has held it does not cover a college professor’s “scholarship and teaching.”
- Such speech can have First Amendment protection even though it is part of a professor’s “official duties”

Demers v. Austin, 746 F.3d 402 (9th Cir. 2014)



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Question 3: Does the Government’s Interest Outweigh the Employee’s First Amendment Rights?



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The Balancing Test


- Must weigh the interest of the employee in free expression versus the need of the government to run efficiently and to provide harassment-free workplace.
- If the balancing test weighs in favor of the employee or if the government cannot justify treating the employee differently than a private citizen, then the speech will be protected.
- If the balancing test weighs in favor of the employer, then the speech will not be protected.



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Balancing Test Factors

1. Whether the employee's speech disrupted harmony among co-workers;
2. Whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful;
3. Whether the employee's speech interfered with performance of his duties;




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Factors That Must Be Considered in the *Pickering* Balancing Test

4. Whether the employee's speech was directed to the public or the media or to a governmental colleague; and
5. Whether the employee's statements were ultimately determined to be false.

Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999)



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Other Disruption Factors

- Reasonable predictions of disruption may be sufficient.
- Speech by management vs. by rank and file.
- How broadly was speech disseminated?



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Moser v. Las Vegas Metropolitan Police Department, 984 F.3d 900 (9th Cir. 2021)


- A split panel of the Ninth Circuit has held that police officer's suit could proceed after he was disciplined for posting that it was a "shame" a suspect had no "holes" in him.
- Opinion rendered by U.S. Court of Appeals for the Ninth Circuit on January 12, 2021.



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Disruption Evidence

- Media coverage
- Statements from members of public
- Statements from fellow officers/supervisors
- Statements from DA regarding impact of speech
- Actual disruption not necessarily required
- Violation of rules or policies



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Social Media Examples


- Six deputies not reinstated after the town election for Sheriff. Each claimed termination was in retaliation for supporting rival candidate. Some deputies had expressed support by “liking” rival’s campaign page on Facebook, putting bumper stickers on cars and making statements in favor of rival.
 - *Bland v. Roberts* 730 F. 3d 368 (4th Cir. 2013)
- Police officer alleged that department’s failure to promote was retaliation for her Facebook comment criticizing another law enforcement officer.
 - *Gresham v. Atlanta*, 542 F. App’x 817 (11th Cir. 2013)

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Policies To Restrict Speech

Can a public entity restrict speech through implementation of a policy?



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Polices Addressing Speech

- Policy from Petersburg Virginia
 - “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.”


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<h3>Policies Addressing Speech</h3> <ul style="list-style-type: none">• 2 officers disciplined under the City of Petersburg policy for saying:<ul style="list-style-type: none">▪ “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.’” <p><i>Liverman v. City of Petersburg</i>, 844 F.3d 400 (4th Cir. 2016)</p>	
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<h3>Policies Addressing Speech</h3> <ul style="list-style-type: none">• Policy prohibited right to speak on matters of public concern.• “the restraint if a virtual blanket prohibition on all speech critical of the government employer.”• While social media may “amplify” expressions of “rancor and vitriol” such sites “have emerged as a hub for sharing information and opinions with one’s larger community.”	
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<h3>Policies – EERA Considerations</h3> <ul style="list-style-type: none">• “EERA generally protects union and employee speech related to legitimate labor and employment concerns.” <i>Chula Vista Elementary School District</i> (2018) PERB Decision No. 2586.<ul style="list-style-type: none">• Loses protection if employer can prove “(1) the employee’s statement was false and (2) the employee made the statement ‘with knowledge of its falsity, or with reckless disregard of whether it was true or false.’” <i>Chula Vista Elementary School District</i> (2018) PERB Decision No. 2586.• Loses protection if the speech is so “opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to substantially disrupt or materially interfere with employer operations.” <i>Carpinteria Unified School District</i> (2021) PERB Decision No. 2797.	
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Policies – EERA Considerations


- “In the area of employer rules and directive, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct.” *Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 6.
- Objectionable policies may contain explicit prohibitions on protected speech *or*
- It may be reasonably construed to prohibit protected speech, may be promulgated in response to protected speech, or may have been applied to restrict protected speech



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Policies – EERA Considerations


- Ambiguity is construed against employer
- Rules do not need to be enforced to be unlawfully maintained



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Common Policy Restrictions

- Outside the workplace – can warn employees:
 - Use of internet generally private if usage not made public.
 - If using a social media site that is not private then communications not private.
 - Agencies can typically discipline employees for Internet usage that creates liability for the agency.




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<h3>Common Policy Restrictions</h3> <ul style="list-style-type: none">• Common restrictions set forth in social media policies:<ul style="list-style-type: none">▪ Do not post images of crime scenes.▪ Do not engage with victims, witnesses or defense attorneys.▪ Do not “friend” or follow minors encountered on the job.▪ Do not post pictures “in uniform” except for ceremonial activities.▪ Do not post pictures of other employees, or “tag” other officers in pictures.▪ Do not post offensive or harassing pictures or content.▪ Do not post or allude to confidential information.	
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<h3><i>Hernandez v. City of Phoenix, 43 F.4th 966 (9th Cir. 2022)</i></h3> <ul style="list-style-type: none">• Addresses Whether Police Officer violated Department Social Media Policy• Held that bigoted, biased statements about religious group were matter of public concern, albeit low value in balancing• Found social media elements potentially overbroad<ul style="list-style-type: none">• -officer social media cannot “cause embarrassment or bring discredit to department in any way”• -officers cannot divulge information gained while in performance of official duties• (restriction just on confidential information might be acceptable)	
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<h3>Religious Freedom – Social Media</h3> <ul style="list-style-type: none">• Same principles apply for protection<ul style="list-style-type: none">• Public concern• Outside “official duties”• Balancing of interests (is there disruption?)• Establishment Clause Concerns<ul style="list-style-type: none">• New test is whether historical practice and coercion• How apply to social media?• Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022)<ul style="list-style-type: none">• School could not discipline football coach for praying on field at end of games• Court warned against overly broad Establishment Clause concerns	
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Religious Freedom, Free Speech & Discipline

Could a district discipline a community college professor who refuses to use the preferred pronouns of students where the professor cites a religious objection?

How should the CCD approach this situation?

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Disciplining Employees for Speech

- Different discipline framework for different public employees based on governing statute or contract language.
- “[E]ven a probationary public employee or one serving at the pleasure of the appointing authority may not be dismissed from his employment for the exercise of constitutional rights absent a showing that the restraints which the employing body would impose on those rights are justified by a compelling public interest.”
Bekiaris v. Board of Education, 6 Cal. 3d 575, 585–586 (1972)

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Disciplining Employees for Speech

- “[I]t is well-settled that if the agency’s motivation is to silence a public employee’s lawfully protected speech, that would invalidate a disciplinary action.”
Thornbrough v. Western Placer Unified School Dist., 223 Cal. App. 4th 169, 195 (2013)
- If both performance and protected speech are the motive, “the courts apply a ‘but for’ test, and reinstatement is not mandated if the employer can demonstrate that it would have reached the same decision even had the employee not engaged in protected conduct.”
Williams v. City of Los Angeles, 47 Cal. 3d 195, 205 (1988)

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Dodge v. Evergreen School District


- Teacher wore Make America Great Again hat to school for training. Had it with him at trainings with only other teachers present.
- Principal told him he could not wear it, threatening adverse action by saying that the next time, they would have a meeting with union rep.
- Analysis:
 - Hat with a presidential candidate's slogan is speech on a matter of public concern in capacity as private citizen
 - Hat did not result in actual disruption
 - "That some may not like the political message being conveyed is par for the course . . ."



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Would discipline interfere with free speech rights?


AP History teacher has been observed (not at school) wearing t-shirts with controversial slogans such as "fuck the police" and has posted on her personal social media the statement, "Mace proliferates in the face." At school, the teacher has decorated their classroom with many political posters, including an antifa flag.



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Would discipline interfere with free speech rights?

A newly elected District Attorney has made sweeping changes to internal policies including on charging defendants and settling cases. A prosecutor disagrees with these policy. The prosecutor speaks to the media and criticizes the new District Attorney as not caring about victims or their families and that non-prosecution is leading to a proliferation of drugs.



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Would discipline interfere with free speech rights?

A maintenance mechanic at a City has no interaction with the public on his job. He is an avid poster on facebook and other social media in his free time and posts a lot about his support for Trump. Nothing on his social media identifies him as a City employee. A citizen figures out that he works for the City and complains to the City. The citizen alleges that his posts are racist and sexist – the examples are mostly retweeting and supporting Trump’s tweets and talking points.




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Restrictions on Content

- State laws or school boards restricting teaching related to topics that are considered controversial
- Oklahoma law H.B. 1775 – ACLU challenging it as unconstitutionally vague & overbroad. Includes:
Prohibition on “[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex shall be prohibited.”

Prohibits the concept that “an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.”


Prohibits the concept that “any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.”



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Speech of Public Employers

- A public employer shall not **deter or discourage** public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law.
Cal. Gov’t Code § 3550.
- *Barke v. Banks*, 25 F.4th 714 (9th Cir. 2022) - First Amendment challenge by school board members claiming they were chilled from making statements in their individual capacities.



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Speech of Public Employers

- Ninth Circuit held the plaintiffs lacked standing, citing *Garcetti v. Ceballos*.
- Local elected officials do not *only* speak as public employers, but when they do, they are subject to state regulation.
- Risk of chill from erroneously attributing private statements to public employers?
 - No credible threat of the law being applied in that manner.
 - Traditional agency principals apply to determine if the speaker was speaking on behalf of the public employer.
 - Actual authority
 - Apparent authority

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Speech of Public Employers

- Charter schools are now challenging the same law in *Alliance Marc and Eva Stern Math and Science High School, et al. v. PERB*.
- Charter schools are part of the California public school system, but many are organized as nonprofit public benefit corporations.
- Are public charter schools required to follow the state's regulations regarding what can be said in public schools?

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Government-Hosted Social Media

- Public officials' social media pages can be "public forums," so that the officials cannot "censor" viewer comments
- *Garnier v. O'Connor-Ratcliffe*, 41 F.4th 1158 (9th Cir. 2022)
 - School District Trustees block certain members of public who posted negative comments on Trustees' pages
 - Court of Appeal found improper censorship
 - Test for whether First Amendment applies relates to whether social media page is for personal or government purposes.

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