SOCIAL MEDIA AND THE WORKPLACE:
WHEN A PUBLIC EMPLOYEE'S RIGHTS AND A PUBLIC EMPLOYER'S LEGITIMATE INTERESTS COLLIDE

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Our mission is to make the world more open and connected. We do this by giving people the power to share whatever they want and be connected to whoever they want, no matter where they are.

—*Mark Zuckerberg*, Chairman and CEO of Facebook, Inc.

I. INTRODUCTION

While the use of social media by employees in the workplace is currently a "hot topic," public school employers have long confronted issues arising out of employee speech. It is only within the last decade that the advent and proliferation of social media has created an entirely new outlet for speech by public employees and produced seemingly more difficult issues to address. Under the California Labor Code, the term "social media" has a broad definition and includes almost all forms of electronic communication. It means electronic services, accounts, or content, "including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations."[1]

Many of today's public employers have had a recent brutal awakening and discovered they are in the 21st century workplace—a workplace in which the days of private communications between a few employees are gone. In today's mobile Internet-driven world, communications by employees can be instantaneously read or viewed day or night by hundreds of people using smart phones and tablets. The speech may contain information previously held private by employees or workplace grievances which were previously addressed at the office rather than aired in public. The recipients of the speech may be members of the extended school community, including students, parents, other employees, school board members, or community members. In this new, apparently unchartered territory, employers may question their ability to discipline their employees as a result of the speech made on social media. They may wonder if the rules are any different when the medium for the speech has changed.

[1] See California Labor Code §980.

In the end, does it matter that a public employee is now posting, tweeting, pinning, blogging, and texting the problematic speech? The answer to this question is the focus of this article.

II. FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES

Although the use of social media is a relatively new avenue for speech to be expressed, the legal parameters surrounding speech by public employees remain essentially the same as they have for the last nearly 50 years. The fundamental right to free speech is rooted in the United States Constitution. The First Amendment to the Constitution states "Congress shall make no law . . . abridging the freedom of speech. . . ." This provision of the federal Constitution is applied to each state and local government through the Due Process Clause of the Fourteenth Amendment.[2] While a fundamental right of every United States citizen, the right to free speech is not absolute. Indeed, in certain narrowly-defined and limited circumstances such as speech which tends to incite others to violence, defamatory speech, speech that is obscene or is a true threat, the government can restrict expression.[3]

Public employees, like other citizens, generally have the right to speak freely as citizens on matters of public concern without fear of governmental retribution. However, public or governmental employers, like private sector employers, also have the right to ensure their operations are efficiently and effectively managed. The courts have ensured that public employees are not granted rights above and beyond the normal citizen's rights simply because they are employed by the government. Thus, the rights of public employees to freedom of speech are balanced in certain circumstances against the legitimate interests of their employers. The key decisions by the United States Supreme Court on this topic are instructive and are summarized below.

A. *Pickering v. Board of Education*

In the landmark case of *Pickering v. Board of Education*,[4] the Supreme Court set forth a balancing test to review whether discipline of a public employee resulting from that employee's speech is constitutionally appropriate. Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed by his public school employer after he sent a letter to the local newspaper in connection with a recently proposed tax increase. Pickering was quite critical in the letter of the school board and district superintendent's handling of past proposals to raise new revenue for the district's schools. He was terminated after the school board found the writing and publication of his letter to be "detrimental to the efficient operation and administration of the schools of the district."[5]

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[2] See *Near v. Minnesota* (1931) 283 U.S. 697, 707.

[3] See *Virginia v. Black* (2003) 538 U.S. 343, 358.

[4] *Pickering v. Bd. of Ed. of Township High School Dist. 205, Will County* (1968) 391 U.S. 563.

[5] *Id.* at 564.

Pickering unsuccessfully claimed at the trial court and Illinois State Supreme Court that his writing of the letter was protected by the First and Fourteen Amendments. The United States Supreme Court ultimately reversed the Illinois Supreme Court's decision, finding Pickering's right to freedom of speech was indeed violated and therefore his termination was unconstitutional.[6]

The *Pickering* Court found that public school teachers do not relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest when they enter the public workforce.[7] The Court also recognized that governmental employers have interests as an employer in regulating the speech of their employees. Those interests of an employer differ greatly from those the government possesses in connection with the regulation of citizen speech in general. To resolve the issue, "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 thorough it employees" must be balanced against one another.[8] The balance here tipped in favor of Pickering as he was clearly speaking on a matter of public importance (funding for local schools) and his employer could not legitimately establish a negative impact on Pickering's duties as a teacher or disruption to the regular operation of the schools generally.

B. ***Connick v. Myers***

The Supreme Court next addressed these issues when it clarified in *Connick v. Myers*[9] what is meant by "public concern" in the *Pickering* balancing test discussed above. In *Connick*, Sheila Myers was an Assistant District Attorney in New Orleans for 5 ½ years, serving at the pleasure of the District Attorney, Harry Connick. She was notified that she would be transferred to prosecute cases in another section of criminal court. Displeased with this information, Myers informed her superiors that she disagreed with the transfer. Despite her objections, she was advised that she would nevertheless be transferred.[10]

Myers thereafter circulated a questionnaire to 15 of her colleagues requesting their views on the office's transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and the perceived pressure to participate in political campaigns. She was ultimately terminated for insubordination due to her distribution of the questionnaire and also because of her refusal to accept the transfer. Myers sued alleging she had been wrongfully terminated for exercising her constitutional rights to free speech. The trial and appellate courts agreed with Myers, but the Supreme Court reversed.[11]

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[6] *Id.* at 565.

[7] *Id.* at 568.

[8] *Ibid.*

[9] *Connick v. Myers* (1983) 461 U.S. 138.

[10] *Id.* at 140-141.

[11] *Id.* at 141-142.

When considering application of the *Pickering* balancing test, the *Connick* Court first focused on whether Myers' questionnaire was speech upon a matter of "public concern." The Court found that nearly all of the questions in the questionnaire (except one regarding pressure to participate in political campaigns) involved matters of only a personal interest in that they related to internal office grievances.[12] They were designed to "gather ammunition for another round of controversy with [Myers'] superiors" and reflected "one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre."[13] The Court held:

> ". . . when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest… a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency. . . ."[14]

Thus, when a public employee speaks on matters of only a personal interest, rather than those that are political, social, or otherwise of concern to the community at large, the Constitution does not necessarily insulate the employee from discipline by his or her employer.

C. *San Diego v. Roe*

In *San Diego v. Roe,*[15] the Supreme Court reviewed a case involving misconduct by a police officer on an Internet website during non-duty hours. The Court reversed the judgment of the Ninth Circuit Court of Appeals and held the termination of the officer did not violate his First and Fourteenth Amendment rights. The City of San Diego terminated police officer John Roe for selling videotapes he made depicting himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay under the username Code3stud@aol.com. Roe also sold custom videos, police equipment, including official uniforms of the San Diego Police Department, and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.[16]

Roe's supervisor happened to discover the objectionable activity when he came across an official police uniform for sale under Roe's username. An investigation by the internal affairs department of the police department ensued and revealed that Roe's conduct violated specific police department policies, including conduct unbecoming of an officer, outside employment, and

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[12] Since one of the questions on the questionnaire circulated by Ms. Myers did involve a matter of public concern, the *Connick* Court went on to apply the *Pickering* Balancing Test. The Court found the test favored Mr. Connick as the employer because he was not required under the Constitution to tolerate behavior by employees "which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." (*Connick, supra,* 461 U.S. at 149-154.)

[13] *Id.* at 147-148.

[14] *Id.* at 147.

[15] *City of San Diego v. Roe* (2004) 543 U.S. 77.

[16] *Id.* at 78.

immoral conduct.[17] After failing to follow orders to cease his problematic conduct, Roe was terminated.

The Supreme Court reiterated that a government employee does not relinquish all rights under the First Amendment otherwise enjoyed by citizens just by virtue of his or her employment. However, a public employer also has legitimate interests in performing its mission as a governmental agency and therefore, as an employer, can regulate the speech of its employees.[18] Roe's expressions did not touch on a matter of public concern as they were not of legitimate news interest or of value and concern to the public. Instead, the speech was designed to exploit his employer's image, widely broadcast on the internet, and linked to his official status as a police officer. Based on the facts before it, the Court had no problem finding that Roe's termination was not in violation of his First Amendment rights.[19]

D. *Garcetti v. Ceballos*

In *Garcetti v. Ceballos*,[20] the Supreme Court reviewed whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties. Richard Ceballos was a long-time deputy district attorney for the Los Angeles County District Attorney's Office. After receiving a call from a defense attorney regarding perceived inaccuracies in a deputy sheriff's affidavit used to obtain a critical search warrant in a pending criminal case, Ceballos personally investigated the matter. He informed his supervisors both verbally and in a written memorandum that he had found serious misrepresentations in the affidavit and recommended that the pending case be dismissed. Despite Ceballos' concerns, the case was pursued.[21]

Ceballos claimed later that he suffered retaliation when he was reassigned from his current position to a different position, was transferred to another courthouse, and denied a promotion.[22] He sued in federal court, alleging violations of the First and Fourteenth Amendments due to the retaliation against him based on his earlier memorandum. The trial court found against Ceballos, but the Ninth Circuit Court of Appeals reversed and found that Ceballos' speech was protected under the First Amendment. The Supreme Court granted certiorari to consider the case further.

When analyzing the underlying circumstances in *Garcetti*, the Supreme Court noted that the *Pickering* balancing test discussed above first requires a determination as to whether the public employee in question spoke as a citizen on a matter of public concern. If not, the employee does not have a First Amendment cause of action. If so, then there is a possibility of a claim under the

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[17] *Id.* at 79.

[18] *Id.* at 80.

[19] *Id.* at 84-85.

[20] *Garcetti v. Ceballos* (2006) 547 U.S. 410.

[21] *Id.* at 413-414.

[22] *Id.* at 415.

First Amendment.[23] The next inquiry is then whether the governmental employer had adequate justification for treating an employee differently from any other member of the public.[24]

In *Garcetti*, the controlling factor in the Court's determination that Ceballos' speech was not protected under the First Amendment was the fact that his expressions were made pursuant to his duties as a calendar deputy in the District Attorney's office.[25] Ceballos wrote the memorandum in question because that is part of what he, as a specific type of deputy district attorney (a calendar deputy), was employed to do. The Court found that when Ceballos performed the tasks he was paid to perform, even if that included speaking or writing, he acted as a government employee and could be evaluated by his supervisors for his performance.[26] In *Garcetti*, the Court held that when public employees speak "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."[27] Further, the *Pickering* balancing test is not implicated when a public employee is simply performing his or her job duties.[28]

E. ***Lane v. Franks***

In the most recent decision by the Supreme Court regarding the free speech rights of public employees, a unanimous court held in *Lane v. Franks*[29] that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. Edward Lane was hired in 2006 by Central Alabama Community College to be the Director of Community Intensive Training for Youth, a statewide program for underprivileged youth. When conducting a comprehensive audit of the program's expenses, Lane discovered that an Alabama State Representative, Suzanne Schmitz, was on the program's payroll, but did not perform any work. Lane advised the Community College president and its attorney of this fact, but was warned that firing Schmitz could have negative consequences for him and the Community College.[30]

Despite this warning, Lane ultimately terminated Schmitz. The Federal Bureau of Investigation and a federal grand jury subsequently investigated the matter. The grand jury indicted Schmitz, alleging she had collected over $175,000 in federal funds despite performing "virtually no services." Lane testified before the grand jury about his reasons for firing her. He later testified, pursuant to subpoena, at two jury trials regarding the same issues.[31] The Community Intensive Training for Youth program had considerable budgetary shortfalls and Lane was thereafter laid off. He alleged

[23] *Id.* at 418.

[24] *Ibid.*

[25] *Id.* at 421.

[26] *Id.* at 422.

[27] *Id.* at 421.

[28] *Id.* at 423.

[29] *Lane v. Franks* (2014) 189 L.Ed. 2d 312.

[30] *Id.* at 319.

[31] *Id.* at 319-320.

that his termination was a retaliatory act in violation of his First Amendment rights for his testimony against Schmitz.[32]

The Supreme Court used the cases described above as a backdrop to consider the circumstances before it in *Lane*. The Court determined at the outset that Lane's testimony at Schmitz' trials was speech as a citizen on a matter of public concern. According to the Court, "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes…even when the testimony relates to his public employment or concerns information learned during that employment." The Court confirmed that the critical inquiry is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.[33] Further, it was clear in *Lane* that Lane's testimony was of a public concern as it involved corruption in a public program and misuse of state funds.[34]

The Court noted that the matter was not settled after its initial determination that Lane spoke as a citizen on a matter of public concern. Instead, the *Pickering* balancing test was then applied. The balance clearly tipped in favor of Lane because the government employer failed to provide any evidence that Lane's compelled testimony had a detrimental impact on the employer's legitimate "interest[s] in the effective and efficient fulfillment of [its] responsibilities to the public. . . ."[35] His testimony was subject to a subpoena and was not false or erroneous. It did not unnecessarily disclose any sensitive, confidential, or privileged information. Under these circumstances, the Court found that Lane's speech was entitled to protection under the First Amendment.

III. CONCLUSION

The workplace has evolved into an environment where employees feel much more comfortable speaking about their personal lives and their personal workplace grievances in a significantly more public manner. Although the medium on which they speak has changed, the constitutional rules remain the essentially the same. Each situation faced by a public school employer should be considered on its individual facts against the backdrop of the cases discussed above. Should you have any questions regarding this topic, please do not hesitate to contact our office.

[32] *Id.* at 320.

[33] *Id.* at 323-325.

[34] *Id.* at 325.

[35] *Id.* at 326.

HYPOTHETICALS

1. Aide Miley Cyrus is assigned to a mild/moderate special education classroom. She has a personal Instagram account. After work one Thursday evening, she posts a "selfie" taken in the classroom of her with two students and the caption: "they're retards, but i still love ‘em!" Former fiancée, Liam Hemsworth, is a teacher in your district, and follows Miley's Instagram. He sees the post, prints it on his home computer, and brings it to your office on Friday morning. He asks you, the Superintendent, what you plan to do about it. What do you do?

2. Ryan Gosling, a long-time junior high counselor in your district, has a personal Facebook page. On this page he posted a link to a self-published short book of adult relationship advice entitled "It's Her Fault." In this book, Ryan repeatedly discussed sexually provocative themes and used sexually explicit terminology. He referenced his employment in your district and noted that he often deals with women when working in an office where he is the only male counselor and where he is responsible for roughly 200 junior school students a year, about half of whom are females. A mother of four students in your district, two of whom are young females assigned to Ryan for counseling services, is Ryan's "friend" on Facebook. She noticed the posted link and also comments between various "friends" on Ryan's page indicating that his partner, Eva Mendes, is bisexual. The mother copies the Facebook page and the informational page about the book and includes them as attachments in an e-mail to you, the Superintendent (with copies to the Board). She advises that "Our children deserve better. This freak better not be near my kids ever again! I demand a response or I'm going to the newspaper." What do you do?

3. School Psychologist Savannah Guthrie is a Probationary 1 employee. She has been busy in her first year! Ms. Guthrie has filed four written complaints and two verbal complaints to her supervisors, Special Education Director Al Roker, and Superintendent Matt Lauer regarding her case load and what she believes are improper and illegal practices among other special education staff members. She has also filed external complaints with the Office of Civil Rights and the California Department of Education. Her performance has left something to be desired. Can she make a successful claim for retaliation due to her exercise of free speech rights if Mr. Lauer and his Board non-reelect her?