

You Can't Say That!

Free Speech Issues in Public Employment

CALPELRA 2016 Annual Conference
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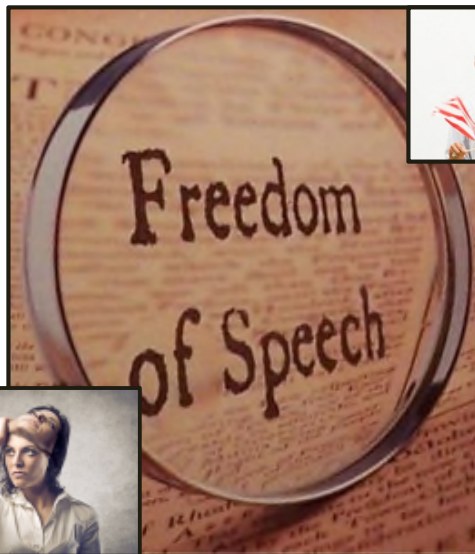
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Public Employee Free Speech

- ✦ *Pickering v. Board of Education* (1968) 391 U.S. 563:
- ✦ "The problem in any case is to arrive at a balance between 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 through its employees."



First and Fourteenth Amendments

- ✦ Prohibit Governmental Entities from Infringing on an Individual's Right to Free Speech
- ✦ Applies to Governmental Entities as an Employer
- ✦ Applies to Local Agencies and States through Fourteenth Amendment
- ✦ Employee's Right to Free Speech is More Limited than the General Public's



First Amendment Balancing Test

- ✦ *Pickering-Connick* Balancing Test
- ✦ To be protected speech must touch on a matter of public concern and be made as a citizen (not employee speech)
- ✦ If speech is citizen speech on a matter of public concern, then courts balance the employer's interest in workplace efficiency and employee's interest in speech



Is It A Matter of Public Concern?

- ✦ Determine in light of “content, form and context”- *Johnson v. Multnomah County* (9th Cir. 1995)
- ✦ 9th Circuit- Broad Standard
- ✦ Speech that provides information that is needed or appropriate to enable the public to make informed decisions about government “falls squarely within the boundaries of public concern”- *Ulrich v. City and County of SF* (9th Cir. 2002)



City of San Diego v. Roe (2004) 543 U.S.77

- ✦ Police Officer terminated for selling police paraphernalia and videotapes of himself engaged in sexually explicit acts on eBay
- ✦ Speech Did Not Touch On A Matter of Public Concern
- ✦ Speech Was Not Protected and Employee Could be Disciplined Based on Speech



Is It A Matter of Public Concern

- ✦ Personal Grievances Are Not Public Concern
- ✦ Example: Complaint about supervisor vs. complaint of systematic discrimination
- ✦ *Weeks v. Bayer* (9th Cir. 2001)
- ✦ *Havekost v. United States Dep't of Navy* (9th Cir. 1991)
- ✦ *Desrochers v. City of San Bernardino* (9th Cir. 2009)



Is the Speech Made as a Citizen or as Part of Official Duties



- ✦ Speech Must Be Made as a Citizen
- ✦ Not Pursuant to Official Duties
- ✦ *Garcetti v. Ceballos* (2006) 547 U.S. 410
- ✦ Overruled a line of 9th Circuit cases finding it irrelevant to the *Pickering* test that the employee's speech was part of her official duties

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Garcetti v. Ceballos (2006)

- ✦ Public employees make statements pursuant to official duties not speaking as citizens
- ✦ Not Protected by First Amendment
- ✦ May be Disciplined for their Speech
- ✦ *Garcetti* does not apply to teaching and writing on academic matters by publically employed teachers; *Pickering* does. *Demers v. Austin* (9th Cir. 2014)



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Kaye v. Board of Trustees of the San Diego Public Law Library (2009)

- ✦ Applied *Garcetti* to California Constitution
- ✦ Terminated for insubordination
- ✦ Email to Supervisor and Co-Workers
- ✦ Held Email was sent pursuant to official duties
- ✦ Not Protected Speech



Lane v. Franks (2014)

- ✦ After a supervisor fired an employee for participation in a corruption scandal, the supervisor was subpoenaed to testify about the events leading to termination, and was subsequently terminated himself
- ✦ The court held that the First Amendment protects public employees against retaliation for providing truthful, compelled testimony outside the course of ordinary job duties
- ✦ *Differentiated from Garcetti:*
 - Employee was subpoenaed to testify
 - Not whether about public employment or what learned on the job
 - Whether speech itself is ordinarily within the scope of duties



Is It Citizen Speech? *Dahlia v. Rodriguez* (2013)

- ✦ Requires close evaluation to determine official duties
- ✦ When an employee speaks outside of the chain of command, it is UNLIKELY speech pursuant to official duties
- ✦ Subject Matter is HIGHLY RELEVANT
- ✦ Routine Report v. Raising Broad Concerns



Is It Citizen Speech?

- ✦ *Freitag v. Ayers* (9th Cir. 2006): Communications by prison guard to superiors were employee speech but to state senator and department inspector general were citizen speech
- ✦ *Johnson v. Poway Unif. Sch. Dist.* (9th Cir. 2011): Classroom banners with religious message were not citizen speech
- ✦ *Huppert v. City of Pittsburgh* (9th Cir. 2011): Grand jury testimony by police officer in personal time was not citizen speech- **OVERRULED!**



Is It Citizen Speech?

- ✦ *Karl v. City of Mountlake Terrace* (9th Cir. 2012): A confidential assistant to a police chief could be speaking as a citizen in giving deposition testimony about the police chief's performance
- ✦ *Anthoine v. North Central Counties Consortium* (9th Cir. 2010): Case manager's complaints about agency's case management system might be citizen speech
- ✦ *Hagen v. City of Eugene* (9th Cir. 2013): Police officer's complaints about accidental weapon discharge not citizen speech because reported pursuant to official job duties



Union Speech

- ✦ *Ellins v. City of Sierra Madre* (9th Cir. 2013):
- ✦ Police officer does not act in furtherance of his public duties when speaking as a representative of the police union



Employer Perception of Employee's Exercise of Free Speech

- ✦ *Heffernan v. City of Paterson* 136 S.Ct. 1412 (2016) – Public employee First Amendment retaliation claim may be based on mistaken employer perceptions.



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Balancing Employee's Interest v. Government Employer's Interest

- ✦ First determine if it is protected speech, then balance
- ✦ What is the employee's interest in their speech
- ✦ Is workplace efficiency or effectiveness impaired by the speech
- ✦ What showing must be made by Employer

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Government Employer Interests

- ✦ Maintaining discipline
- ✦ Promoting harmony among co-workers
- ✦ Securing Confidentiality
- ✦ Ensuring proper and efficient performance of public agency function
- ✦ Maintaining supervisor-employee relationships that call for personal loyalty and confidence



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Hudson v. Craven (9th Cir. 2005)

- ✦ Community college economics instructor wanted to take a group of students to a protest of the World Trade Organization. For safety reasons, the District opposed her organizing a class trip to the protest
- ✦ The District warned her that participation in the event had to be voluntary and in no way related to the college or any grade or activity in the class
- ✦ Hudson did take a small group to the protest and informed them to observe info closely because “it might be on the test”

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Hudson, cont'd

- ✦ Violence broke out at the protest, but no one in Hudson's group was hurt
- ✦ The District did not renew Hudson's contract
- ✦ Hudson sued the District alleging violation of her First Amendment Rights
- ✦ Using the *Pickering* test the court held that even though Hudson's participation in the protest touched on a matter of public concern, her interest in free speech/association was outweighed by District's legitimate interest in student safety and pedagogical oversight.



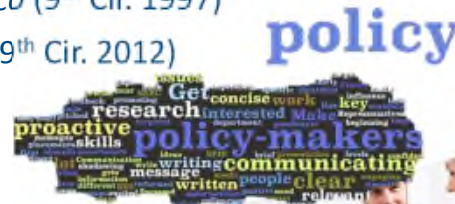
Cochran v. City of Los Angeles (9th Cir. 2000)

- ✦ Police Officers made accusations regarding supervisor's preferential treatment of minorities
- ✦ Officers were transferred to other divisions and filed lawsuit alleging transfer was in retaliation for exercise of free speech
- ✦ Court held that Officers' interest was outweighed by City's interest in maintaining authority and workplace harmony



What about Policymakers, Confidential employees or those with Public Contact

- ✧ A public employer may discipline an employee for political reasons if the employee is a “policy-maker”
- ✧ Is the employee in a position in which political considerations are appropriate requirements for job performance?
- ✧ *Fazio v. City of San Francisco* (9th Cir. 1997)
- ✧ *Hunt v. County of Orange* (9th Cir. 2012)



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Threats and Harassment



- ✧ Generally threats are not protected if “True Threat”- *Bauer v. Sampson* (9th Cir. 2001)
- ✧ If not true threat, weigh governmental interest against employee interest
- ✧ Harassment based on protected category (racial epithets) not protected- *Aguilar v. Avis Rent A Car* (1999)



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The Right NOT to Speak

- ✦ *Friedrichs v. California Teachers Association* (2016) 136 S Ct. 1083.: The US Supreme Court upheld *Abood v. Detroit Board of Education* (1977) which allows public sector agency shop agreements.
- ✦ The Court issued a one sentence decision: “The judgment is affirmed by an equally divided court.”
- ✦ The *Friedrich’s* plaintiffs argued that their free speech and associational rights were violated by being required to support public sector unions that engage in activities that are inherently political.



FIRST AMENDMENT ISSUES IN CYBERSPACE



Spanierman v. Hughes (2008)

- ✦ High School teacher's claims related to the non-renewal of his contract dismissed on summary judgment
- ✦ The teacher had posted materials deemed inappropriate on MySpace
- ✦ Content Was NOT Protected Speech



Spanierman, cont'd

- ✦ Any adverse action taken against an employee for social networking should be analyzed under the "Pickering" balancing test
- ✦ If employee is speaking outside the scope of employment on a matter of public concern, then the court must balance employee's interest in speaking out against government's interest in efficient operations



Munroe v. Central Bucks School District (3rd Cir. 2015)

- ✦ High school teacher blogged derogatory comments about identifiable students, like quoting an “obnoxious kid” and referencing a “jerk” who missed class to go on vacation
- ✦ Students discovered the blog, distributed it at school, and many demanded not to be in teacher’s class next school year
- ✦ Teacher publically defended comments to national media



Munroe, cont’d

- ✦ District allowed her to return after suspension and maternity leave, but also had to hire another teacher because so many students refused to register for her class
- ✦ District terminated her for poor performance
- ✦ Teacher sued claiming retaliation for exercise of free speech
- ✦ Assuming the posts related to a public concern, the court held that teacher’s interest in free speech was greatly outweighed by her significant disruption to the learning environment



San Diego Unified School Dist. v. Commission on Professional Competence (Lampedusa) (2011)

- ✦ Teacher posted a Craigslist ad seeking a sexual partner, where ad included pictures of his face and genitalia
- ✦ School District terminated employee
- ✦ Court relied on *Roe* and found no First Amendment concerns



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Bland v. Roberts (4th Cir. 2013)

- ✦ Not a California Case
- ✦ Deputy Sheriffs
- ✦ Failed to reappoint based on support for opposition to Sheriff
- ✦ “Liking” on Facebook is Speech
- ✦ Conveyed Support
- ✦ Equivalent of Displaying a Political Sign



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Bland, cont'd

- ✦ Clearly on A Matter of Public Concern
- ✦ Employee's interest in expressing support outweighed Sheriff's interest in providing effective and efficient services to the public
- ✦ Political Speech Highest Protection
- ✦ Sheriff's claim for need of harmony and discipline unsupported, no record of disruption of office or interference with efficiency



Wynar v. Douglas County School District (9th Cir. 2013)

- ✦ Student not Employee Case
- ✦ Cyber threats on MySpace
- ✦ Did Not Determine Whether True Threat
- ✦ Look at School's Interest



Creating A Policy Addressing Social Networking Issues

- ✦ Prohibit employees from engaging in online social networking and internet blogging during workday and on employer equipment
- ✦ Prohibit disclosure of confidential information or the posting of such information online



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Creating A Policy Addressing Social Networking Issues

- ✦ Direct employees not to use social networking sites for employer-related communications
- ✦ Employees should expect that any information created, transmitted, downloaded, exchanged or discussed on SN/blogs on employer equipment may potentially be accessed by employer and they do not have a reasonable expectation of privacy in such content
- ✦ Prohibit use of employer trademarks, logos and other identifying materials

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Don't Forget!

- ✦ Protected Whistleblower Speech
- ✦ Protected Labor Speech
- ✦ Retaliation under FEHA and Title VII for participating in an investigation or opposing illegal activity

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Thank you for attending.

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