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Public Employees' Right to First Amendment Free Speech

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Earlier this year, President Donald Trump's administration ordered several executive agencies to halt making statements to the public, even going so far as prohibiting any communications to the public through official agency social media accounts. Shortly thereafter, a number of new Twitter handles sprang up, including @altUSEPA, @AltUSNatParkSer, and @RogueNASA, created by individuals ostensibly identifying as current federal employees. Another Twitter account, @RoguePOTUSStaff, was created by federal employees who claim to be the "unofficial resistance team inside the White House."

A number of these accounts communicate information about climate change and make critical statements about President Trump's policy positions on the environment. For example, @altUSEPA is described by its administrators as the "Unofficial 'Resistance' team of the U.S. Environmental Protection Agency," noting that "[e]nvironmental conditions may vary from alternative facts." Unlike @altUSEPA, the @RoguePOTUSStaff account does not focus on policy positions, but instead claims to "pull back the curtain" on the inner workings of an incompetent and dishonest administration. The proliferation of these "rogue" Twitter accounts received a great deal of media attention, and some of these accounts maintain thousands of followers. To date, the account @RogueNASA has approximately 905,000 followers.

The administration's actions, as well as the social media response, raise important constitutional questions: What rights do public employees have to exercise their First Amendment right to free speech as citizens? What rights do public employees have to speak on information related to their public employment or learned through their public employment? Although one reason for these gag orders may be to unify the message of the new administration as it implements its policy platform, the blunt enforcement of such orders could lead to violations of public employees' First Amendment rights. This article looks at the framework for evaluating First Amendment claims by public employees set forth by the U.S. Supreme Court and applied in Minnesota.

First Amendment Protection for Public Employee Speech: U.S. Supreme Court

Citizens do not surrender First Amendment rights when they enter the public workforce. Over the years, the U.S. Supreme Court has made clear that the First Amendment protects a public employee's right to speak as a *citizen* on matters of public concern without fear of retaliation by his or her employer.[2]

The U.S. Supreme Court addressed this issue in its landmark 1968 decision, *Pickering v. Bd. of Educ.*[3] The case involved Marvin Pickering, a public school teacher, who sent a letter to the local newspaper criticizing the board of education's efforts to fund the schools. The board fired Pickering for publishing the letter, claiming it contained falsehoods and unjustified attacks on the board's integrity. The Court identified its job in such cases as striking "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." The Court held in favor of Pickering, finding that the letter did not prevent Pickering from teaching students in his classroom or otherwise interfere with the regular operation of the school.

More recently, the Supreme Court addressed the issue of public employee speech in *Garcetti v. Ceballos*.[4] In *Garcetti*, the Court characterized its jurisprudence as seeking "both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." Public employers, like any employer, understandably require a substantial degree of control over their employees' conduct. And, when public employees express views that defy government policy or disclose confidential information, there is a risk that the speech could harm the proper performance of governmental functions. Nonetheless, the Court recognized that a citizen who works for the government remains a citizen, and that the First Amendment limits the ability of government employers "to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."

In *Pickering*, the Court set forth a two-prong analysis for such cases. First: determine whether the employee spoke as a citizen on a matter of public concern. If not, the employee does not have a First Amendment cause of action based on any adverse reaction of his or her employer to the speech. However, if the employee spoke as a citizen on a matter of public concern, then the possibility of a First Amendment claim arises, and the inquiry continues. Speech that relates "to any matter of political, social, or other concern to the community . . . a subject of legitimate news interest . . . or a subject of general interest and of value and concern to the public" will likely satisfy the first prong.[5]

Second: determine whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. A government employer has discretion to restrict speech when it acts as an employer, but the restrictions it imposes must be directed at speech that affects the employer's operations. This inquiry is fact-intensive; determined case-by-case; and depends on the speech's content, form, and context.[6] In addition, the more an employee's speech implicates a matter of public concern, the greater the burden on the government to show that its employer-based interests justify adverse action.

Notwithstanding this two-prong analysis, the Supreme Court has held that "when public employees make statements 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."[7] For example, in *Garcetti*, the Court found that a prosecutor's internal memorandum written in the course of his ordinary job duties constituted unprotected speech.[8] But, again, speech outside the course of an employee's ordinary duties is protected—see *Lane v. Franks*.[9] Indeed, the First Amendment protects public employees' speech even when it "relates to his [or her] public employment or concerns information learned during that employment." The Court has made clear in Lane that a public employee's speech relating to his or her employment, or otherwise concerning information acquired through his or her employment, "does not transform that speech into employee—rather than citizen—speech." Instead, the analysis must center on "whether the speech at issue is itself ordinarily *within the scope of an employee's duties*, not whether it merely concerns those duties" (emphasis added).

More generally, the Supreme Court has recognized that there is significant value in encouraging, rather than "gagging," speech by public employees. After all, such employees "are often in the best position to know what ails the agencies for which they work."[10] Indeed, the Court has consistently held that the First Amendment interests at stake when a public employee speaks on a matter of public concern extend beyond the individual employee to the public's interest in receiving the information.[11] In *Pickering*, for example, the Court rejected the efforts of the school administration to "limi[t] teachers' opportunities to contribute to public debate," as teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. Speech by a public employee conveying information on a matter of public concern

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will often hold "special value" because he or she is "uniquely qualified" to address the matter.[12] To this extent, the First Amendment permits government employers to restrict their employees' speech only so much as necessary for the efficient and effective operation of the organization.

Public Employee Speech Protections in the Eighth Circuit

When deciding whether a public employee's speech was on a matter of public concern, the Eighth Circuit Court of Appeals instructs courts to focus on whether the public employee meant to inform "the public that the [government] institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance," or meant to complain about "internal policies and practices which are of relevance only to the employees of that institution."[13] In short, the Eighth Circuit has held that speech is not protected by the First Amendment when it is "purely job-related."[14]

For example, in *Saffari v. St. Cloud State Univ.*, the court held that a public employee's statements at a university leadership retreat regarding the school's reputation and enrollment were "purely job-related" and, thus, not protected.[15] The public employee argued enrollment issues were a matter of concern and interest to the university community and faculty. However, the court concluded that the statements were made in the ordinary course of the employee's role as associate vice president for enrollment management.

The issue, again, is whether the speech is *purely* job-related. Even where a public employee's speech is unquestionably related to his or her employment, the employee's speech can raise matters of public concern. For example, in *Belk v. City of Eldon*, the Eighth Circuit held that the First Amendment protected an employee's reports concerning the wrongful payment of benefits to a co-worker because it meant that public funds were being misused and affected her interest as a citizen-taxpayer.[16] More generally, *Belk* stands for the rule that where public employees criticize supervisors in their capacity *as public officials*—as opposed to criticizing them in their capacity *as supervisors*—courts have found that the speech is on a matter of public concern. The public employee's speech addressed a matter of public concern where she criticized the city administrator's conduct as a public official, not as her supervisor, and found fault not with internal office policies, but with what she perceived as the administrator's misuse of his public position.

Indeed, even where a public employee's personal interests are implicated by the speech, courts may still find that it was made as a citizen on a matter of public concern. In *Davison v. City of Minneapolis*,[17] a firefighter's comments publicly criticizing her chief were protected even though they related to potential layoffs, because she claimed the chief's plan would result in longer response times by the fire department. The city did not even challenge whether the speech—which implicated the safety of firefighters and the community—involved a matter of public concern.

Yet, where a public employee's speech is "mostly intended to further the employee's private interests," then it is not protected.[18] When determining the public employees' motivation for the speech, the court must examine the content, form, and context of the speech.[19] For example, where a public employee made comments to the press regarding what he considered his wrongful termination, the court found that the comments were "designed to further his private interest" and thus not made as a citizen.[20]

Even where a public employee's speech addresses a matter of public concern, the employer may still be justified in taking adverse action against the employee if the speech caused actual, or at least reasonably foreseeable, disruption to the organization.[21] For instance, in *Palmer*, the plaintiff, Leah Palmer, was the spokesperson for Anoka County Attorney Anthony Palumbo. On more than one occasion, Palmer made comments on her personal Facebook page disparaging Republicans and comments relating to police violence against impoverished communities of color. The comments also included links to "inflammatory" articles written by others. One article said: "Harsh police tactics in black communities and a history of high rates of unemployment and poverty go hand in hand." Palmer's posts angered the Anoka County sheriff so much that they began to create a "rift" between Palumbo and the sheriff's office. Because Palmer was supposed to be serving as a liaison between Palumbo and the sheriff, the court found that Palmer's Facebook posts constituted an actual *and* reasonably foreseeable disruption to the organizations.

Then, in attempting to balance the interests implicated by Palmer's speech, the court held that the employer's interests in avoiding disruption substantially outweighed Palmer's interest in making the posts. On Palmer's side of the equation, the court found that her posts were not made from "any particular expertise," that she was not acting as a whistleblower, or otherwise adding unknown facts or insights to the "public debate" regarding the excessive use of police power. Instead, the court found that Palmer was "simply adding her views to the views of countless others."

On the other side of the equation, the interests of the government were weighty. In this regard, the court stressed the "unique nature of Palumbo's and Palmer's positions." Palumbo was charged with giving "confidential legal advice" to the sheriff's office, to represent the sheriff's office if sued, and to decide whether to prosecute criminal charges submitted by the office. And Palmer was no mere "clerk or custodian," the court explained, she was Palumbo's spokesperson, and, as such, designated to represent him in the community and as a liaison with law enforcement. Accordingly, the court found, it was "critical" to the interests of Anoka County to preserve a harmonious working relationship between Palmer, Palumbo, and the sheriff's office. Because Palmer's Facebook posts threatened that relationship and impeded her ability to perform her job, the court held that Anoka was justified in terminating her employment.

Conclusion

Unlike private employees, public employees carry their First Amendment rights with them into the workplace. This means, for example,

that the First Amendment might well protect the public employees behind the emergent "rogue" Twitter accounts and their tweets from retaliation by their government employers. How far such protection goes and how much weight it might bear will depend critically on the content, form, and context of the speech. As cases like *Palmer* illustrate, while hecklers' vetoes are generally frowned upon in other First Amendment contexts, courts will sometimes lay the blame for workplace disruptions at the feet of public employees who speak on matters of public concern, rather than at the feet of co-workers who take offense to their speech. Nonetheless, during a time of increasing distrust of government institutions, officials, and policy choices, it is more likely that public employees' speech critical of government will fall squarely within the bounds of First Amendment protection. And, in this environment, the special value of public employees speaking on matters of public concern will raise the burden on government employers to show that their employer-based interests justify taking adverse actions against employees for engaging in such critical speech.

[1] *See*, e.g., "Trump Administration Puts Gag Order on Several Government Agencies," *Fortune* (Jan. 25, 2017), http://fortune.com/2017/01/24/trump-gag-order/; "Agencies Told to Halt Communications as Trump Administration Moves In," *New York Times* (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html?_r=0.
[2] Indeed, this protection even extends to public employees who do not engage in protected activity, but whose employers mistakenly believe they did. *See* Heffernan v. City of Paterson, N.J., 136 S.Ct. 1412 (2016) (holding that city could be held liable for terminating police officer for allegedly supporting a particular mayoral candidate).
[3] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
[4] Garcetti v. Ceballos,547 U.S. 410, 417–20 (2006)..
[5] *See* Snyder v. Phelps, 562 U.S. 443, 453 (2011).
[6] *See also* Connick v. Myers, 461 U.S. 138, 147–48 (1983).
[7] Garcetti, 547 U.S. at 421.
[8] *Id.* at 424.
[9] *See* Lane v. Franks, 134 S. Ct. 2369, 2378 (2014) (holding that truthful testimony under oath by a public employee outside the scope of his ordinary job duties is protected).
[10] Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion).
[11] Pickering, 391 U.S. at 571–73; Garcetti, 547 U.S. at 419–20; San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam).
[12] Lane, 134 S. Ct. at 2379–2380 (internal citation omitted).
[13] Kincade v. City of Blue Springs, Mo., 64 F.3d 389, 396 (8th Cir. 1995) (quoting Cox v. Dardanelle Public School Dist., 790 F.2d 668, 672 (8th Cir. 1986).
[14] Buazard v. Meridith, 172 F.3d 546, 548 (8th Cir. 1999).
[15] No. CIV. 13-30 MJD/LIB, 2014 WL 3955719, at *15–17 (D. Minn. Aug. 13, 2014).
[16] 228 F.3d 872, 879 (8th Cir. 2000).
[17] 490 F.3d 648, 651, 655 (8th Cir. 2007).
[18] Bailey v. Dep't of Elementary & Secondary Educ., 451 F.3d 514, 518 (8th Cir. 2006) (quoting Schilcher v. Univ. of Ark., 387 F.3d 959, 963 (8th Cir. 2004)).
[19] *See* Altonen v. City of Minneapolis, 487 F.3d 554, 559 (8th Cir. 2007).
[20] Frizell v. Harteau et al., No. CV 15-78(DSD/KMM), 2016 WL 3636987, at *5–6 (D. Minn. June 30, 2016) (granting summary judgment to government on plaintiff's First Amendment claim).
[21] Palmer v. Cnty. of Anoka, 200 F. Supp. 3d 842, 847 (D. Minn. 2016) (citing Hemminghaus v. Missouri, 756 F.3d 1100, 1112 (8th Cir. 2014) and Anzaldua v. Ne. Ambulance & Fire Prot. Dist., 793 F.3d 822, 834 (8th Cir. 2015)).

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