

# Can They Say That?

## Speech Issues for Employees

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# Topics

## Speech in Schools

- Briefly, student speech
- Employee Speech
  - Employee v. Citizen
  - Matter of Public Concern
  - Balancing Test
- Employee Religious Expression – May not have time to cover deeply


# Student Speech

*(this is just a reminder for  
comparison purposes)*



# The First Amendment

CONGRESS SHALL MAKE NO LAW *respecting*  
*an establishment of religion, or prohibiting the free*  
*exercise thereof; or abridging the freedom of speech,*  
*or of the press; or the right of the people peaceably*  
*to assemble, and to petition the Government for a*  
*redress of grievances.*

 **THE FIRST AMENDMENT  
TO THE U.S. CONSTITUTION**  
15 DECEMBER 1791



# Student Speech

- The case that started it all in 1969:

*Tinker v. Des Moines Indep. Sch. District*

- In *Tinker*, the Supreme Court stated that:

*Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate*



# Student Speech

- The Court in *Tinker* was dealing with this:



# Seminal Cases

- ***Bethel School District No. 403 v. Fraser* (1986)**
  - On campus, school personnel can take action to limit vulgar, profane, lewd, etc. speech.
  
- ***Hazelwood School District v. Kuhlmeier* (1988)**
  - School personnel is allowed to control the topics of “school” speech (meaning speech that carries the imprimatur of the school itself, like the newspaper, graduation, etc.) as long as it is viewpoint neutral.
  
- ***Morse v. Frederick* (2007)**
  - School personnel can limit student speech advocating for illegal activities.

# Seminal Cases

- ***Mahanoy Area School District v. B.L.* (2021)**
  - The authority of school personnel to limit and restrict off campus speech is significantly limited.
  
- And, of course, ***Tinker v. Des Moines Indep. Sch. District* (1968)**
  - School personnel may limit or restrict on campus speech that causes or is reasonably likely to cause a material disruption to the school environment.



# Employee Speech

*(the tests for First Amendment violations are significantly different from those for students)*



# Employee Speech Seminal Cases

- *Pickering v. Board of Education* (1968)
- *Connick v. Myers* (1983)
- *Garcetti v. Caballos* (2006)

It is well settled that “a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.”

# *Pickering v. Board of Education*

## Facts:

- A teacher in Will County, Illinois submitted a letter challenging a tax increase by the Board because he felt that the Board had not previously used funds in a manner he found to be responsible;
- Largely, his concern was about the amount of money being spent on athletics versus academics;
- It also included a criticism of the superintendent stating that he was attempting to prevent teachers from opposing or criticizing the bond issuance;
- He was fired.

# *Pickering v. Board of Education*

## Holding:

- “In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak **on issues of public importance** may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter . . . his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion. It is so ordered.”

# *Connick v. Myers*

## Facts:

- District attorney in New Orleans was told that she would be reassigned to a different section of the office;
- She vehemently opposed this;
- She prepared a 15-question survey to distribute to her coworkers, including questions about the competency and trustworthiness of her supervisors AND whether assistant district attorneys felt compelled to participate in campaigns.
  - Only one question was about the campaign, the rest were generally about the workplace conditions.

# *Connick v. Myers*

**Holding:** – speech not protected by First Amendment

- “To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, **the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.**”

# *Connick v. Myers*

## Holding: (cont'd)

- “The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.”

# *Garcetti v. Caballos*

## Facts:

- District attorney completed a memorandum calling into question the evidence that its office had in a particular matter;
- His supervisors disagreed with his memo and prosecuted the case anyway;
- District attorney testified for the defense in the case;
- He was denied promotions and transferred from his position;
- He sued.



# *Garcetti v. Caballos*

## Holding:

- “We hold 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.”

# *Garcetti v. Caballos*

## Holding:

- “Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the **efficient provision of public services**. *Cf. Connick, supra*, at 143, 103 S.Ct. 1684 (“[G]overnment offices could not function if every employment decision became a constitutional matter”). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.”

# *Garcetti v. Caballos*

**Holding:** (important for school boards)

- It also noted that teachers are “the members of a community most likely to have informed and definite opinions” about school expenditures.

# Employee Speech Legal Test

- So, after that, what is the test?
  - (1) Is the individual speaking as a citizen or employee?
  - (2) If speaking as a citizen, was it on a matter of public concern?
  - (3) If both a citizen and a matter of public concern, do the employee's speech interests outweigh the employer's interest in effective and efficient fulfillment of its responsibilities?
  - (4) Lastly, was the individual's speech a substantial part of an adverse employment action?

# Employee Speech Legal Test

- If the employee establishes the first three prongs, the burden shifts to the employer to show that it would have made the adverse employment decision even in the absence of the protected speech.
- In other words, would the employer have done the same thing despite the employee's speech.

# Speaking as a Citizen

- Courts consider whether the employee's speech:
  - Stems from the employee's official, professional duties;
  - Advanced official duties or was made pursuant to them;
  - Can create the stamp of the employer's official authority; or
  - Used workplace resources.
  
- Notably, a citizen's speech does not become "employee" speech merely because the individual's speech included information learned during the course of public employment.
  - Remember, *Pickering*
  
- *The difference between speaking as a citizen and an employee is whether the speech is part of the employee's usual duties.*

# Matter of Public Concern

- Courts must determine whether the speech related to “any matter of political, social, or other concern to the community.”
- Courts consider **BOTH content and context**
  - **The content may be public**
  - **But the context could be non-public**
- Not all comments made outside of the workplace are matters of public concern.
- Workplace grievances are not matters of public concern.

# Matter of Public Concern

- Classic examples:
  - Publicly speaking about “corruption in a public program and misuse of state funds . . . obviously involves a matter of significant public concern”
  - The *Pickering* Court explained that “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”



# Balancing Test

- If an employee's speech is as a citizen on a matter of public concern, then Courts perform a balancing test:
  - The employee's speech interests
  - versus*
  - The employer's interest in executing its mission
  
- This isn't done in a vacuum.
  - The context, circumstances, and impact, or potential impact, of the speech are relevant.
  - For example:
    - Non-disruptive expression – even if uncomfortable – will likely be protected
    - Whereas vulgar and insubordinate outburst may weigh against the employee

# Balancing Test

- Most cases fall between the two extremes on the last slide.
- In these cases, the Court considers whether the speech:
  - Disrupts harmony in the workplace;
    - (Likelihood of disruption is sufficient)
  - Damages critical relationships;
    - (This is especially true for sensitive relationships like those between teachers and students)
  - Prevents the regular operation of the employer.

# How About Some Examples?



# Example 1

- Mr. Jones is an aide in a Pre-Kindergarten Class.
- Like most, his avatar on Schoology is fairly generic except that he placed a symbol on his avatar's shirt that is clearly political.
- One parent, seeing the image on her child's computer, raised a complaint to the school's principal.
  - The family said that they wanted their children to be in a politically neutral environment while at school, even virtually.
  - If the aide didn't remove the avatar's shirt, the family said they would withdraw their children.

# Example 1

- Is the aide's speech on a matter of public concern?  
**Yes.**
- Is it as a citizen? **No, so it is not protected.**
  - The speech is occurring on the school's internal educational platform.
  - It is part of the method that the aide speaks to students.
- As long as the school doesn't allow one political viewpoint over another, it can exert control over its classroom staff's speech to students.

# Example 2

- Ms. Smith is a teacher at a small town high school *and* the local organizer for the major political party that is the opposite of the current Superintendent.
- She actively campaigns and uses her personal Facebook, Instagram, and Twitter to do so.
- She refrains from campaigning on campus.

# Example 2

- Ms. Smith's candidate loses to the incumbent Superintendent.
- The Superintendent decides that Ms. Smith has not been loyal, and terminates her at the end of the school year.
- Can he do so, lawfully?

# Example 2

- Was her speech done as a citizen? Yes.
- Was it on a matter of public concern? Yes.
- Balancing test:
  - Employee's interest in vigorously campaigning for her candidate vs.
  - Employer's interest in maintaining a non-disruptive environment in school and ensuring that employees respect leadership
- **Answer**: It depends. We need more facts, but this is tricky, and not recommended.



# Example 2

## Another Wrinkle

- The Supreme Court has recognized two ways to analyze First Amendment retaliation claims brought by government employees.
  - Claims based purely on political affiliation are governed by the Elrod-Branti test.
  - Claims based on expressive conduct or speech are governed by the Pickering-Connick test.

From: Pasek v. Kinzel, 566 F. Supp. 3d 1307, 1311–12 (M.D. Fla. 2021)

# Example 2

## Another Wrinkle

- To be a **Pickering-Connick** Claim:
  - A plaintiff must offer “more than bare statements of support for a candidate”
  - Or, stated differently, a plaintiff must allege that he or she “engaged in expressive conduct beyond mere manifestation of political affiliation.”
  - For example, plaintiffs who allege “that they actively criticized [a defendant's] fitness or that they spoke out on the issues of public concern surrounding the campaign” could potentially state a political expression claim governed by the **Pickering-Connick** test.

# Example 2

## Another Wrinkle

- Under the Eleventh Circuit's precedent, conduct that does not rise beyond a bare statement of support includes:
  - Contributing personal funds to a campaign.
  - Appearing in campaign advertisements.
  - Attending political rallies.
  - Participating in “get out the vote” efforts.
  - Putting a sign supporting a candidate in your yard
  - Attending campaign kickoff events.
  - Spending time at campaign headquarters.
  - Attending public debates.

# Example 2

## Another Wrinkle

- So, what is the **Elrod-Branti** test?
  - The Eleventh Circuit asks whether state or local law gives the plaintiffs “the same statutory powers and duties” as the elected official for whom they work.
  - If so, then the plaintiff “is essentially the legal alter ego” of the elected official and therefore “the type of confidential employee who can be terminated” under **Elrod-Branti**.

# Example 3

- Coach Knight was the offensive coordinator for the highly successful high school football team.
- The head coach encouraged all coaches to place a BLM poster on their office doors to show support for the players.
- Coach Knight took his BLM poster down and replaced it with an “All Lives Matter” poster.
- He was terminated as the offensive coordinator shortly after he posted the replacement poster.

# Example 3

- Is the coach's speech on a matter of public concern? **Yes.**
- Is it as a citizen or an employee? Not sure?
- What is the result?

# Example 3

- “The Court does not find that Plaintiff's actions were taken in furtherance of his official job duties. In putting up the replacement poster, Plaintiff was expressing his personal views, which in no way “owed their existence” to his responsibilities as a public employee.”
- “Plaintiff was not paid by the University to decorate his door or to use it to promote a particular viewpoint, he was employed to coach football.”

Beathard v. Lyons, 620 F. Supp. 3d 775, 782 (C.D. Ill. 2022)

# Example 3

- “There was no school policy prohibiting Plaintiff decorating his door in whichever fashion he might choose. Further, Plaintiff was not required, as a term of his employment, to either refrain from decorating his door or to decorate it in a certain way. Here, Plaintiff was not acting in his official job duties when he placed the poster on his door, and therefore, his was private speech protected by the First Amendment.”



# Example 3

- It was too early for the Court to determine whether the balancing test would fall in favor of the Coach or the University, so the Court chose to let the case proceed.
- But, at the motion to dismiss stage, the speech was protected.

# Example 4

- Mr. Jones, a teacher for the District, created a social media post on a private chat group that included a meme of George Floyd with pink skin.
- The principal learned of this post, and thought it offensive.
- The principal recommended that Mr. Jones be terminated, and the Superintendent and Board did so.

# Example 4

- Speech involves matters of public concern  
“when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’ ”

Darlow v. Babineck (11<sup>th</sup> Cir.)

# Example 4

- “Whether an employee's speech involves a matter of public concern is determined by analyzing the speech's content, form, and context.”
- “The arguably inappropriate or controversial nature of the speech at issue is not relevant to the question of whether that speech involves a matter of public concern.”

Darlow v. Babineck (11<sup>th</sup> Cir.)



# Example 4

- “We cannot conclude that Darlow's meme of George Floyd with pink skin is anything other than commentary on the racial issues raised by the George Floyd incident. We conclude . . . that Darlow's speech involves a matter of public concern”

Darlow v. Babineck (11<sup>th</sup> Cir.)



# Example 4

## Important Quote from Darlow

- This Court has also held that speech concerning racial matters can involve matters of public concern. *See, e.g., Belyew v. Coosa Cnty. Bd. of Educ.*, 998 F.2d 925, 927-28 (11th Cir. 1993) (holding that speech constituted a matter of public concern when a black teacher's employment was not renewed because she advocated at a PTA meeting in a recently integrated high school that students should be informed during Black History Month of contributions of Black Americans)

# Example 4

- Is the teacher's speech on a matter of public concern? **Yes.**
  - Note: That the fact that it was done on a private social media account does not prevent it from being a matter of public concern.
- Is it as a citizen or an employee? **Citizen**
- What is the result?
  - The facts of the case will determine whether the interest in posting the picture outweighs the posting of it.

# Example 4

- Compare *Darlow* with *Doggrell v. City of Anniston, Alabama* (2017):
  - Police officer was a member of an organization that did not allow Black members.
  - He gave a speech at a national convention as part of this organization.
  - It caused significant concern throughout the community, and the police department ultimately terminated him.



# Example 4

- “This Court concludes that Mr. Doggrell's ‘speech was not protected because [his] interest in speaking out was outweighed by the [A]PD's interests in maintaining order, loyalty, morale, and harmony [within the APD and throughout the community].’”

# First Amendment Update

## Recent Supreme Court Cases

*Kennedy v. Bremerton School District* (U.S. 2022)



# First Amendment - Religion

- Two Major Doctrines
  - **Establishment Clause**
    - “Congress shall make no law respecting an establishment of religion.”
  - **Free Exercise Clause**
    - “Congress shall make no law . . . Prohibiting the free exercise thereof.”
- Possible tension between the two protections?
  - The more flexible the school acts in order to ensure that a person is not deprived of free exercise rights, the more likely it is that the school will violate the establishment prohibition.

# First Amendment - Religion

- The various legal standards for both doctrines are very complicated and likely require their own two-hour presentation.
- Today, we will focus only on the Supreme Court's analysis in the *Kennedy* opinion.



# Facts

- Coach Kennedy lost his job as high school football coach after he knelt at midfield after football games to pray.
- Beyond this simple point, there was significant disagreement among the majority and dissent as to the facts of the case.
- For our purposes, we will focus on the facts that formed the basis of the majority opinion.

# Facts

- Kennedy knelt and prayed after the game was over and after players and coaches had shaken hands.
- Kennedy would kneel at the 50 yard line and “pray quietly” for “approximately 30 seconds.”
- At first, Kennedy prayed alone. Over time, some players joined Kennedy in quiet prayer.
- No student was ever told that it was important or required that he participate in the post-game prayer.

# Facts

- For over 7 years, no one complained.
- The Superintendent of the school system learned of the practice from an opposing school employee who commented positively on Coach Kennedy's action.
- After this, there was a lot of back and forth between the school and coach regarding the post-game prayer.

# Facts

- On October 16, the school district forbade Coach Kennedy from engaging in any actions that appeared to endorse prayer while Kennedy was on duty as a football coach.
- After receiving the letter, Kennedy continued his practice of kneeling to pray after the game.
- Shortly after October 26, the school district placed Coach Kennedy on administrative leave. He was ultimately terminated.



# *Kennedy* Decision

- The free exercise clause protects an individual's right to engage in personal religious observance.
  - Government cannot “punish an individual for engaging in a brief, quiet, personal religious observance.”
- The holding in *Kennedy* is very narrow. The majority opinion did not dramatically change the analysis for prayer in schools.

# *Kennedy* Court's Analysis

- Free Speech Key Question – Was the coach's prayer within the scope of the employee's duties?
  - No. Why?
    - Court found prayer occurred at a time when Kennedy was not supervising students (effectively on break). Coaches “were free to attend briefly to personal matters” at time Kennedy prayed.
    - It did not matter to the Court that Kennedy was still in his coaching attire, players were still on field, fans were still in the stands, and the game had just ended.

# *Kennedy Court's Analysis*

- Free Exercise/Establishment Clause Key Question – What would the founding fathers think?
  - Court rejected previous test (Lemon test) and created a new test.
  - The line between permissible and impermissible is now defined by “history” and “faithfully reflecting the understanding of the Founding Fathers.”
- The key facts for majority seemed to be belief that Kennedy was engaged in a silent, personal prayer.
  - No evidence Kennedy coerced students into praying.
  - Court rejected concerns about implied coercion.

# *Kennedy* Takeaways

- Prayer is okay in the school environment if:
  - It is a personal and individual prayer (private act);
  - That does not involve leading students in prayer or coercing students to pray; and
  - Occurs outside of job responsibilities (outside scope of duties).
    - Remember, Court viewed Kennedy as on an effective break.
- Documentation of employee conduct matters.
  - Court relied heavily in opinion on statements school district made in letters to *Kennedy*.

# **Can They Say That?**

## **Speech Issues for Employees**

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