Employee and Student Free Speech Rights

Contending with a Politicized and Polarized Environment

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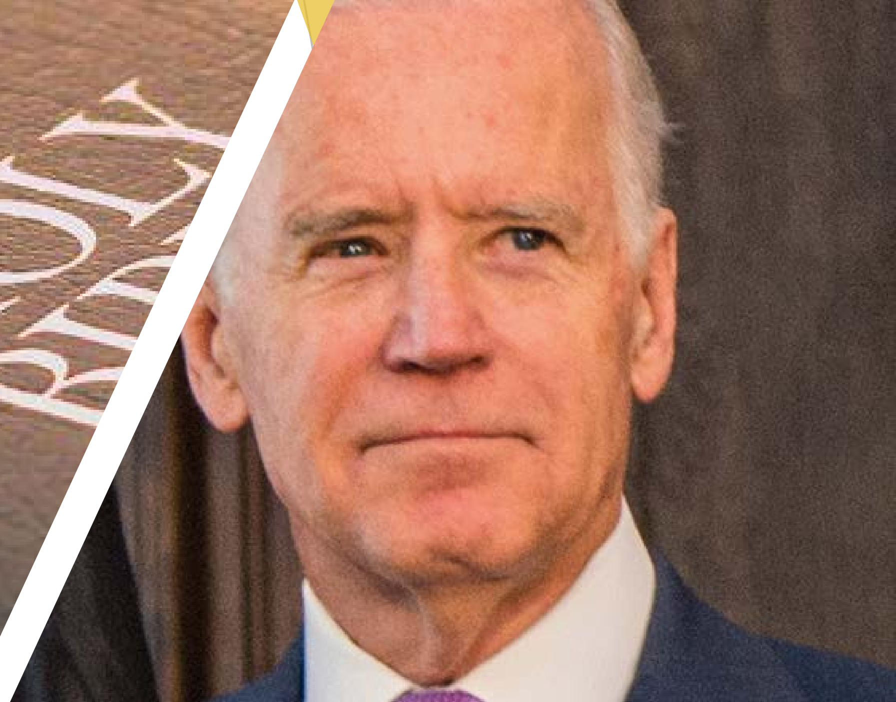

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The First Amendment

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.

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First Amendment Rights-Students

State law requiring students to salute flag or face expulsion was illegal for violating free exercise of religion and freedom of speech

West Virginia State Board of Education v. Barnette (1943)

Supreme Court overturned state laws mandating prayer or reading from bible in public schools.

Engle v. Vitale (1962) and Abington School District v. Schempp (1963)

Arkansas law banning the teaching of evolution was unconstitutional.

Epperson v. Arkansas (1968)

Tinker v. Des Moines Independent Community School District (1969)

In Des Moines, Iowa, students planned to wear black armbands at school as a silent protest against the Vietnam War. The principal warned the students they would be suspended if they wore them. Some students wore them and were suspended.

7-2 decision concluded:

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

  Schools can however prohibit speech that is "substantially disruptive"

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Tinker Test = Substantial Disruption

Tinker Court-Schools must be able to provide evidence of disruption than rely on an "undifferentiated fear or apprehension of disturbance"

Tinker Ruling has been chipped away at in later cases:

- Can limit student speech that is vulgar, lewd or plain offensive
  - Bethel School District No. 403 v. Fraser (1986)
- Can control student newspaper content (subject to public forum test)
  - Hazelwood School District v. Kuhlmeier (1988)
- Can censor student speech the encourages illegal activities
  - Morse v. Frederick (2007)

What about off-campus or online speech?

The Supreme Court has not yet decided cases regarding schools' ability to limit off-campus or online speech.

General rule established by lower federal courts provide that students can be punished for online publications that are:

1. linked to the school or likely to reach the school community

AND

2. are expected to disrupt schoolwork or discipline

(Tinker analysis still applies)

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Cases:

- Courts have found schools can punish students when:
  - Social media pages inviting students to harass another
    - Kowalski v. Berkeley County Schools (4th Circuit) (2011)
  - Online messages threatening violence to students at school
    - Wynar v. Douglas (9th Circuit) (2013)
  - Blogs with racist and explicit comments about classmates
    - S.J.W. v. Lee's Summit R-7 School District (8th Circuit) (2012)
  - Video posted online from student's home intended for fellow students threatening staff with violent language
    - Bell v. Itawamba County School Bd. (5th Circuit) (2015)
  - Sexual harassment of students on walk to school
    - CR v. Eugene School Dist. 4J (9th Circuit) (2017)

Cases cont.

- Student speech protected:
  - Vulgar and embarrassing fake social media profiles of school administrators protected because didn't disrupt school activities
    - Layschock v. Hermitage School Dist. (3rd Circuit) (2011)
  - Vulgar, lewd, profane or offensive online speech that is conducted off-campus even when speech relates to an extracurricular activity
    - BL v. Mahanoy Area School District (3rd Circuit) (2020)

Current Issues:

Student wears a t-shirt promoting border wall.

Student and staff complained complain they were offended.

What should you do?

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This issue was confronted by an Oregon school district

- Hillsboro School District punished a student for wearing a T-shirt to a class that was to discuss immigration issues that day.
  - T-shirt said-"Donald J. Trump Border Wall Construction Co." and "The wall just got 10 feet taller"
  - Student was summoned to the principal's office. Was told cover the shirt or go home. The student left and the school listed the absence as a suspension, which was later rescinded.
    - Schools believed it could reasonably forecast that shirt might cause other students to feel unsafe, lead to walkouts or altercations or other disruptive actions. Cites cases that allowed bans of confederate flag t-shirts.
    - Student sued for a temporary restraining order which was granted barring the school from prohibiting the t-shirt saying it school hadn't justified its actions.
  - Result: In 2018, a settlement was reached. School agreed to pay $25k in attorney's fees and issue a letter of apology to the student.

Selsky, Andrew. "Lawsuit Settled for Student Disciplined for pro-Trump Shirt." *The Seattle Times*, The Seattle Times Company, 24 July 2018, www.seattletimes.com/nation-world/lawsuit-settled-for-student-disciplined-for-pro-trump-shirt/.

Current issue:

Student posts campaign video for student president on his Twitter account.

Parents, student and staff complained that the video contained harmful stereotypes of Muslims and depicted torture and racists references

What should you do?

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This issue was confronted by a California school district

- San Ramon Unified School disqualified the student from taking the position as student body president for posting a videos with harmful stereotypes and offensive content in his campaign video
  - The student sued contending that it was off-campus speech, not using school resources
  - Once student sued, the school reinstated him to the position of class president. Student did not dismiss the case contending that employees of the school district disparaged him.
  - Result: In 2020, a settlement was reached. School agreed to pay $665,000 and issue a letter of apology to the student.

Ruggiero, Angela. "East Bay Student Who Made 'Terrorists' Video Settles with School District over Free Speech Lawsuit." *The Mercury News*, The Mercury News, 8 Apr. 2020, www.mercurynews.com/2020/04/07/east-bay-student-in-terrorists-video-settles-with-school-district-over-free-speech-lawsuit/.

Current issue:

School assigns parking spots to seniors in school owned parking lot.

School policy allows assigned spots to be decorated.

Student decorates parking spot with Trump's portrait wearing sunglasses and stars and stripes bandana.

Superintendent worried it may offend some.

What should you do?

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This issue was confronted by a Louisiana School District

- Superintendent ordered the Trump portrait removed because it might offend other students and lead to vandalism.
- Student sued for violation of free speech rights.
- The District Court for the Eastern District of Louisiana applied the Tinker standard.
- School failed to prove a "substantial and material disruption was reasonably foreseeable under the circumstances if the Trump painting remained."

October 12, 2. (n.d.). High school student had First Amendment right to Trump portrait on his parking spot, federal court rules. Retrieved October 13, 2020, from https://mtsu.edu/first-amendment/post/1023/high-school-student-had-first-amendment-right-to-trump-portrait-on-his-parking-spot-federal-court-rules/

First Amendment Rights - Employees

- Public employees retain rights as citizens to comment on matters of public importance, but those rights are balanced against school districts' interests in avoiding disruption of their operations.
- *Pickering Connick* Test – a test used by courts to determine whether a public employer violated an employee's free expression rights.
- The test takes its name from two public employee free speech decisions from the U.S. Supreme Court: *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983).

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Pickering v. Board of Education (1968)

- Public high school teacher, Marvin Pickering, wrote a letter to the editor published in the local newspaper where he criticized the school board for paying too much on athletics at the expense of academics.
- "To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse."
- Pickering was fired and blacklisted from obtaining another teaching position.
- The Supreme Court reasoned that Pickering spoke on a matter of public concern – whether the school district spent too much money on athletics as opposed to academics.
- Pickering's rights to free speech outweighed the school board's interests in a disruptive free workplace, largely because Pickering did not criticize people that he worked with daily, such as fellow teachers or his principal.

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Connick v. Myers (1983)

- New Orleans District Attorney Harry Connick Sr. fired assistant district attorney Sheila Myers after learning that Myers distributed a questionnaire to fellow employees, questioning various policies in the district attorney's office.
- The Court determined that while most of the questions on her questionnaire were closer to a private grievance than matters of public concern, one question – whether employees felt pressured to support political candidates backed by the district attorney – touched on a matter of public concern.
- Next the court looked to the employee's free speech rights versus the employer's interests in an efficient, disruptive free workplace.
- The court found in favor of the employer as the questionnaire caused disruption in the office.

Pickering Connick Test

1) Is the statement a matter of public concern or importance (defined as a matter of larger societal significance or importance)?
   - If yes, then move on to the balancing prong
   - If no, then the employer may discipline
2) Balancing prong: The court must balance the employee's right to free speech against the employer's interests in an efficient, disruptive-free workplace.

Related Cases

- In *Givhan v. Western Line Consolidated School District* (1979), the U.S. Supreme Court reinstated the First Amendment claim of a public school teacher in Mississippi who had been discharged after complaining to her principal about racial discrimination. The Court explained that a public school teacher does not lose her free speech rights simply because she chose to speak on an issue of public concern to her employer directly rather than to the public at large.
- In *Hazelwood School District v. Kuhlmeier* (1988), the Supreme Court ruled that public school officials can regulate school-sponsored student speech as long as there is a legitimate educational purpose for their action.

Related Cases, cont.

- In *Lacks v. Ferguson Reorganized School District R-2* (8th Cir. 1998), the U.S. Court of Appeals for the Eighth Circuit ruled that a public school in Missouri could discharge an English teacher for failing to censor her students' written works. Applying Hazelwood, the Eighth Circuit wrote, "A flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally accepted social standards."
- In *Miles v. Denver Public Schools* (10th Cir. 1991), the Tenth Circuit Court of Appeals applied Hazelwood to conclude that a public school teacher could be disciplined for talking about declining discipline and passing along a rumor about students having sex on a tennis court. "Because of the special characteristics of a classroom environment, in applying Hazelwood instead of Pickering we distinguish between teachers' classroom expression and teachers' expression in other situations that would not reasonably be perceived as school-sponsored," the appeals court explained.

Garcetti v. Ceballos (2006)

- In *Garcetti v. Ceballos* (2006), the Court introduced a new threshold inquiry by holding that when public employees make statements pursuant to their official job duties, they have no First Amendment protections
- Ceballos claimed that his transfer to a less-desirable position and office location were a direct result of his critical speech in a memo, his testimony at a suppression hearing, and a public speech he delivered at a conference.
- The Court 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.
- The employees are representatives of the public entity and the employers must be able to control their speech in their public capacity.

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Related Cases,

- In *Brown v. Chicago Bd. of Educ.* (7th Cir. 2016), a public school teacher did not have a First Amendment claim when his principal disciplined him for using the N-word in a well-intentional lecture instructing students about not using racial slurs.
- *Garcetti* is applied to limit teacher classroom speech.
- Brown's first amendment claim failed right out of the gate because the speech occurred during the course of his official job duties (classroom teaching).

Examples

Teacher attends a Women's March on the weekend.

Teacher shares a local news article in favor of a political candidate on her Twitter feed.

Teacher writes a letter to the editor that is critical of the school board for one of its actions or ideas.

Teacher puts up a Trump flag behind his desk.

Examples, Cont.

Administration instructs teachers not to discuss with students their personal opinion on political matters. In a classroom discussion on racial issues in America, teacher tells students she recently participated in a Black Lives Matter demonstration.

Teacher posts a "joke" on Facebook about her students being lazy.

Teacher publishes online book containing explicit sexual passages.

Questions?

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Thank You for Attending

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