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Employee Free Speech Rights:
Sounding Off On Controversial Issues

The First Amendment to the U.S. Constitution limits the government's ability to restrict private citizens' freedom of speech, and a long line of decisions from our courts have explained how those limits apply to speech by public school employees. In light of recent events, it's more important than ever to be mindful of the legal ground rules for balancing school staff's right of free expression on the one hand, and school districts' right to operate without undue disruption on the other.

This Alert has a narrow focus: controversial statements by school employees in their capacity as private citizens regarding matters of general public concern. Employees' free speech rights while at work are governed by a different legal framework that is beyond the scope of this discussion. Perceived district endorsement, and concerns about using one's official position as a soapbox to preach to a captive audience, come into play. Suffice it to say, when staff are functioning as representatives of the school district, or whenever they're in the presence of students or parents even on a break, their freedom to express their views on controversial issues is more limited. Outside of work, however, they are much freer to sound off on sensitive topics, even if their opinions are controversial and offend others. But only up to a point.

The basic ground rules were laid out by the U.S. Supreme Court in a 1968 decision involving an Illinois school teacher who was fired for sending a letter to the editor of the local newspaper complaining about his school board's budgetary priorities (athletics over academics – some things never change!). In Pickering v. Board of Education, a landmark precedent that remains good law today, the Court overturned the board's action, establishing in the process a general rule that when public employees speak in their capacity as private citizens on matters of public concern, their speech is likely protected by the First Amendment unless the employer can demonstrate that its interest in maintaining efficient operations outweighs the employee's interest in speaking out on the issue at hand – a showing the board was unable to make in that case.

In several decisions since Pickering, the Supreme Court has clarified the difference between speech on matters of public concern that enjoys constitutional protection and personal workplace grievances that do not. The Court also ruled that employees enjoy no First Amendment protection at all for statements made in the performance of their official job duties.

With the start of the new school year in this fraught political environment, our office has received numerous inquiries about provocative public comments and social media posts by school employees concerning all manner of current events. Since most of those statements were clearly made in the employees' private capacity and related to issues at the center of public debate, this Alert will address the final step of the First Amendment inquiry: the balancing test where courts weigh the employee's interest in speaking against the government employer's interest in efficiency and avoiding undue disruption.

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On the employees' side of the scale, courts will often consider whether the message serves some socially valuable purpose like whistle blowing on illegal conduct or exposing inefficiencies in government operations. Employees get extra points if they have specialized knowledge of the subject matter. That was the case in Pickering itself, where the Court observed that public school teachers may be among the most likely to have informed opinions about to how funds allotted to the operation of the schools should be spent.

On the employer's side, courts look at whether the speech impairs employee discipline or harmony, detrimentally impacts close working relationships requiring personal loyalty and confidence, impedes the performance of the speaker's duties, or interferes with the employer's regular operations. Employers don't have to wait for disruption to occur, as long as it seems reasonably likely.

Key factors in the balance are the nature of the particular workplace, whether the employee was a high-profile policy maker or a rank-and-file worker with no public visibility, and if the employee's job duties necessarily require the community's trust and respect. The same inflammatory tirade may or may not cross the line depending on whether it was uttered privately by a sanitation worker to friend on a lunch break, or in a public-facing social media post by the police chief.

When it comes to educational institutions, our courts treat universities and K-12 schools differently because of the separate roles they play in our society. For example, our local federal appeals court recently considered the non-renewal of a New Jersey Institute of Technology philosophy lecturer for remarks that many perceived as racist. Some students and faculty were upset by his statements, but the court found no evidence of student protests, upheaval, or unwillingness to abide by university policies. In the court's view, college students have an "interest in hearing even contrarian views," and "the efficient provision of services" by a university "actually depends, to a degree, on the dissemination in public fora of controversial speech."

The court saw objections by fellow faculty members as "precisely the sort of reasoned debate that distinguishes speech from distraction." There was no evidence that the professor's statements "interfered with the ability of other faculty to fulfill their responsibilities in research, teaching, or shared governance, or otherwise thwarted the university's efforts to educate its students." Although challenges to employee harmony might pose disruption when disagreements disturb close working relationships, "that concern is irrelevant inside the university where professors serve the needs of their students, not fellow academics."

By contrast, courts have approached provocative statements by K-12 employees with much more deference to the operational needs of school districts. Two examples from federal appeals courts over the past year make the point. In one case, a Milwaukee elementary school guidance counselor was fired for a profanity-laced speech at a state capitol rally denouncing gender ideology

and transgenderism and their impact on children. She identified herself as a counselor at the school district and vowed that "not a single" student at her school "will ever, ever transition" on her watch.

In upholding the district's action, the court observed that teachers and guidance counselors occupy roles requiring a degree of public trust not found in many other positions of public employment. The counselor's speech "was fundamentally at odds with this foundational duty. It was not a calm, reasoned presentation of her views on this sensitive subject. She made a harsh, angry, and profanity-filled public pledge to carry out her counseling duties in a relentlessly rigid way when it comes to transgender issues. That pledge was hardly compatible with her obligation to build student and parental trust when counseling children with gender dysphoria or who otherwise struggle with gender-identity concerns. Nor is it compatible with her responsibility as a school counselor to promote respect for and humane treatment of these children by other students."

In another recent case, an Illinois high school social studies teacher was fired after a series of Facebook posts commenting on protests after the killing of George Floyd. The first post featured pictures from her vacation with the caption, "I don't want to go home tomorrow. Now that the civil war has begun I want to move." A Facebook friend commented on her post, "Follow your gut! Move!!!!!!!!" to which she replied, "I need a gun and training." She also reposted a viral meme evoking the high-pressure water hoses used against civil rights protestors in the early 1960s that read, "Wanna stop the Riots? Mobilize the septic tank trucks, put a pressure cannon on em ... hose em down ... the end," with her own comment, "You think this would work?" She also engaged in an online debate with a former student about race in America, writing in a Facebook comment, "I find the term 'white privilege' as racist as the 'N' word."

The district produced ample proof of actual disruption, including over a hundred emails about her posts, and many examples of students and parents expressing concern about her fitness as a teacher. Her posts caused considerable distraction in her colleagues' classrooms, sparking outrage, drawing media attention, and forcing the district into a costly and time-consuming public relations response. The district's summer school program was disrupted by ongoing discussions about the controversy. She also had two prior incidents of workplace discipline for similar violations of the district's decorum policies, which the district was free to consider in determining the consequences for her actions.

The court also addressed one of the more challenging concerns districts face in these situations: the "heckler's veto." School districts often feel pressure from parents, students and other community members to punish staff members who make controversial statements. As a general rule, though, government may not silence speech protected by the First Amendment just because others with differing viewpoints loudly object to it. As the court in this case noted, however, in the K-12 context the "heckler's veto" argument does not account for the "unique relationship" between the teacher as a role model and her audience in the school community. Community members are not merely outsiders heckling the teacher into silence but, in the court's view, are "participants in public education, without whose cooperation public education as a practical matter cannot function."

In a decision closer to home, our own state appeals court upheld the termination of a Paterson first grade teacher at a heavily-minority school who posted on her personal Facebook page, "I'm not a teacher—I'm a warden for future criminals!", and "They had a scared straight program in school—why couldn't [I] bring [first] graders?" The teacher claimed that her comments were protected by the First Amendment because she was speaking as a private citizen about a matter of general public concern – students' classroom behavior. The court didn't buy that because these comments were so likely to impair the teacher's effectiveness with her students and their parents that the district's interests took precedence in any event, and her termination was upheld.

Although the courts are generally sympathetic to K-12 school districts' operational needs, whenever judges are required to apply any sort of balancing test some amount of subjectivity inevitably comes into play. And since courts usually don't need to reach the undue-disruption balancing test unless they are first satisfied the employee was speaking as a private citizen on a matter of public concern, districts may reach that final stage of the analysis with sympathies already weighing in the employee's favor. What's more, First Amendment cases are typically brought under a federal statute entitling plaintiffs to reimbursement for counsel fees and other money damages if they win, which ups the ante considerably for districts betting on a favorable result.

For these reasons, there is always legal risk in disciplining staff members or otherwise attempting to suppress their statements. To help with that risk assessment, there are some take-aways for districts considering consequences for employees who, as private citizens, may offend the school community with statements on matters of public concern:

1. Even if an employee's speech is not covered by the First Amendment, there may be other laws, such as New Jersey's Conscientious Employee Protection Act (our state's whistle blower statute), or contractual provisions, that insulate the employee from discipline. Be sure you've explored the full range of available legal protections before taking action.

2. Be mindful that offensiveness in itself is not enough to impose discipline. The U.S. Supreme Court has made clear that government may not engage in "viewpoint discrimination," that is, suppression of speech because government disapproves of the positions expressed. As the Court succinctly put it in a case involving an application for a racist trademark, "[g]iving offense is a viewpoint." What's relevant is the disruption to school operations caused by the offensiveness, not the insensitivity of the message in the abstract.

3. Consider how the statement relates to the employee's role or ability to perform his job duties in the district. Does it single out and demean segments of your school community with whom the employee regularly interacts? Is the position one requiring public trust

and confidence to be effective? The closer these connections, the more likely a disciplinary action will stick.

4. School staff, on their own time, enjoy considerable freedom to speak their minds on controversial events playing out on the world stage, political issues or other hot-button topics far removed from the day-to-day operation of the districts. Their speech on such matters generally receives the highest level of constitutional protection in the balancing test, and may require greater proof of disruption to justify discipline.

5. Before taking an action that may be hard to walk back, think through what a hypothetical court case would look like if the matter were litigated. Reality is one thing, but the rules of evidence may limit how much reality you can prove in a courtroom. Since judges will only consider competent evidence, not hunches, or other information outside the record, consult with legal counsel about whether you have enough to support your position.

6. The "heckler's veto" doctrine may have more limited applicability in the public school setting, but it's still unwise to base disciplinary decisions on who complains the loudest at school board meetings. Those voices may not reflect widespread community sentiment, and personnel decisions should never be driven by popularity contests.

7. This Alert assumes that the employee is speaking as a private citizen on a matter of public concern. But sometimes it's not clear whether that's the case. The courts have developed analytical tools for determining whether these conditions are in place, so if it looks like a close call, consult with legal counsel to be sure you're aligning with the latest rulings on these issues.

8. Since the outcome of a First Amendment challenge will always be a crapshoot regardless of the strength your case, consider whether non-disciplinary alternatives, such as sensitivity training or allowing the employee to apologize and make amends, would accomplish your objectives.

9. Not to belabor the obvious, but since First Amendment litigation is a high-stakes affair financially, review your insurance coverage to be sure you have adequate protection from an adverse result if you decide to pursue a disciplinary course of action.