A Balancing of 'Incomparable Interests:' The Pickering Test and First Amendment Rights of Government Employees

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Once used mainly to describe a discontinued television show or rained-out event, "cancelled" has now taken on a new meaning. In today's "cancel" culture, "a careless comment can ruin reputations and crater careers that have been built over a lifetime." *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 911–12 (9th Cir. 2021) (Lee, J.). Of course, "for private employers, it is their prerogative to take action against an intemperate tweet or a foolish Facebook comment. But when the government is the employer, it must abide by the First Amendment." *Id*. So what happens when government employees make divisive comments? Well, courts say, "it depends."

One of the best ways to explain this nuanced area of the law is through a current on-point example. In June 2020, a New York City Courts sergeant posted photos on Facebook, captioned "The True American Dream," appearing to depict former President Barack Obama and Hillary Clinton being hanged. Although the post was made on a weekend and while off-duty, its maker was quickly identified as a court employee, appearing on her Facebook page in her court uniform. In a matter of days, the post caused a major uproar at the New York City Courts, and its closeness in time to the death of George Floyd did not help matters. Among other consequences, the sergeant's post forced the court to endure extensive media scrutiny, conduct an internal investigation, and issue a court-wide memorandum condemning the sergeant's statements. For the general public, the post sparked intense discussions of racial bias and prejudice in the criminal justice system. Though the post was of a political nature—and thus would be entitled to First Amendment protection by constitutional standards—it resulted in the sergeant's firing after a lengthy disciplinary hearing. This result is typical in First Amendment cases involving controversial speech by government employees.

Although government employees, like other Americans, have First Amendment rights, government employers are empowered to discipline their employees' speech to ensure the efficient operation of their offices. An employer balancing these interests must weigh them carefully. Indeed, an employer who fails to do so may face a claim under 42 U.S.C. § 1983 for First Amendment retaliation.

Since its seminal 1968 decision in *Pickering v. Board of Education*, the United States Supreme Court has prescribed and refined the legal framework governing section 1983 First Amendment retaliation claims. As it stands today, a government employee claiming First Amendment retaliation must establish protection of the speech, an adverse employment action, and causation between the two. The latter two are often simple; showing First Amendment protection is a bigger challenge.

To prove that the speech was protected, the employee must satisfy three requirements. First, the employee must have spoken as a *citizen* and not in official capacity or in the exercise of government job responsibilities. Second, the speech must have pertained to a matter of *public concern*, meaning a subject of general interest and value to the public—*i.e.*, it may not be a mere employee grievance. If these two requirements are satisfied, the court makes a third inquiry,

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balancing the interests of the employee, as a citizen, “in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 598. Only if the employee’s interest outweighs the employer’s does the employee state a viable claim.

In evaluating a public employer’s interests in promoting efficiency, courts examine several factors, including (1) whether the speech or conduct impaired discipline by superiors or harmony among co-workers, (2) whether the speech or conduct had a detrimental relationship on close working relationships for which personal loyalty and confidence are necessary, and (3) whether the speech or conduct impeded the performance of the speaker’s job duties or interfered with the regular operation of the enterprise. As illustrated by the New York City Courts case, public employers’ efficiency interests have been found to outweigh employees’ First Amendment rights when the speech creates relational tension in the workplace by, for example, requiring employees to field calls from citizens disgruntled by the speech; when the speech necessitates the employer’s response, such as through a press release; or when the speech damages public perception of the office, for instance, by causing the public to question the impartiality of the office. The New York City Courts caused strife in all of these ways, making it an easy determination for the employer.

However, applying the balancing test is not always simple. As many courts have recognized, balancing these interests often proves challenging because it “requires [courts] to compare incomparable interests.” *Bennett v. Metro. Gov’t of Nashville & Davidson Cty.*, 977 F.3d 530, 554 (6th Cir. 2020) (Murphy, J., concurring). In one hand rests the government’s operational interest: as an employer, the government must be able to promote the efficiency of the public services it performs through its employees. In the other rests the employee’s First-Amendment interests: his constitutional right to express his views on his own time and to participate in public discourse. A few recent cases show this balancing test in action.

In *Bennett v. Metropolitan Government of Nashville and Davidson County*, a 911 operator posted comments on her public-facing Facebook profile that listed her employer about the 2016 presidential election. The comments included racial slurs. Several coworkers and a member of the public complained to her employer and to the Mayor’s office, after which she was fired. The operator sued for retaliation and prevailed at trial, but the United States Court of Appeals for the Sixth Circuit reversed. Applying the *Pickering* balancing test, the court concluded that (1) due to inclusion of the racial slur, her speech was not purely political and thus was not in the “highest rung” of protected speech, nor did the public have a strong interest in receiving the information she communicated; and (2) efficiency interests weighed heavily in the employer’s favor, as the operator’s speech disrupted the office’s harmony, undermined necessary teamwork, and was thought to detract from the mission of her employer: to protect all people.

Similarly, in *McCullars v. Maloy*, an employee of a Florida court clerk’s office was terminated after he posted comments on his Facebook account that criticized the state attorney’s decision not to pursue the death penalty in capital murder cases. The employee wrote that the attorney “should get the death penalty” and “be tarred and feathered if not hung from a tree.” The posts went viral, and he was identified quickly as a court employee. Again, although the employee’s comments were made in his capacity as a citizen and pertained to a matter of public concern (the death penalty), his firing was upheld because his employer’s interest in appearing impartial and operating efficiently weighed more heavily.

The perceived invincibility and quick, broad publicity that social-media outlets bring make ill-advised employee posts that reflect poorly on government employers’ integrity or impartiality all too common. In Pennsylvania, a Department of Transportation technician was fired over Facebook

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posts saying she would “gladly smash into a school bus” because buses broke traffic laws so frequently. In Texas, an Assistant Attorney General left his employment after tweeting at work in support of QAnon, a controversial political ideology. And in Maryland, a county firefighter “liked” politically controversial posts on Facebook. He was fired to ensure effective management of the department’s internal affairs.

From these cases, a few general principles emerge to guide government employers and employees as they seek to engage in public discourse. First, posts on public-facing social media profiles are more likely to get government employees into trouble—and this is especially true if the person’s employer is listed or readily ascertainable and the statement is made on the employer’s time. Second, the more related a post’s content is to a public employee’s job responsibilities, the more problematic that post might be to the employer (e.g., the school bus comments made by an employee of the state DOT). Third, courts readily defer to government employers’ efficiency interests if they provide support for their reasonable predictions of disruption in the workplace. First Amendment retaliation claims often end in the government’s favor for this reason.

But the government employer doesn’t always win. In recent years, a growing number of judges have expressed skepticism over the *Pickering* analysis, noting its difficult application and inconsistency with traditional First Amendment analysis. For example, in January 2021, the United States Court of Appeals for the Ninth Circuit reversed a trial court’s summary judgment in favor of the government employer in *Moser v. Las Vegas Metropolitan Police Department*. That case involved alleged First Amendment retaliation against a Las Vegas SWAT sniper who opined on Facebook that it was a “shame” a suspect who had shot a police officer did not have any “holes” in him. When the Police Department learned of the statement, it investigated the incident and demoted the officer. The officer sued Department leadership, alleging the demotion constituted First Amendment retaliation.

Although the parties agreed that the officer spoke as a citizen (*i.e.*, in his off-time, at home, and on his Facebook page), on a matter of public concern, and that his Facebook post caused the demotion, they disputed whose interests prevailed under the *Pickering* test. The trial court granted summary judgment for the Department, but the Ninth Circuit reversed, holding factual issues on both *Pickering* prongs precluded judgment for either party. The majority seemed to give the officer the benefit of the doubt, concluding it could not weigh the statement’s value because it was unsure what the officer’s statement “meant.”

Bennett, discussed above, provides yet another example of courts’ difficulty in using the *Pickering* analysis. Indeed, all *three* opinions issued in the case—one for each panel member—took a slightly different approach, though all opinions end in the employer’s favor. Of particular interest is Judge Murphy’s opinion, which expresses uncertainty as to how courts should use *Pickering* to “compare incomparable interests.” Under the usual First Amendment jurisprudence, he explains, an individual’s speech interest *rises* as the contents of his speech become more controversial. But in the *Pickering* context, an *employer*’s interests are favored when its employee’s speech is more divisive: the more divisive the speech, the easier for the employer to prove that such speech might derail efficient operations.

The *Pickering* analysis certainly is not perfect, but it is the tool in a federal court’s toolbox for the time being. Employees, attorneys, and employers alike are sure to watch eagerly as new cases attempt to clarify its standards. For now, government employers enjoy strong deference when monitoring their employees’ speech. In today’s age of “cancel culture,” current precedent operates as both a cautionary tale and a road map for employees who wish to avoid its snare.

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