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Freedom of speech: Social media and the public sector

Understanding the legal precedent behind free speech rights and how they apply to on and off-duty first responders

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“Congress shall make no law ... abridging freedom of speech.”

This quotation is from the First Amendment in the Bill of Rights. And while it seems straightforward, consider the words of Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes, thought by many to be one of the finest jurists of all time. In the 1892 case of *McAuliffe v. City of New Bedford*, Holmes wrote that with regard to a police officer’s First Amendment rights, he “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

How do we reconcile these two statements? The answer lies in the dichotomy of the government as a *sovereign* versus the government as an *employer*. The sovereign’s ability to regulate content is subject to the highest level of judicial scrutiny, requiring a compelling government interest to regulate the speech (which is rarely found). The government as employer, however, may regulate the time, place and manner of speech, and thus be subject to a lower level of judicial scrutiny. In such cases, the forum is a factor. As you will see, the judicial pendulum has swung back and forth based upon our social norms at the time.



Off-duty public sector employees have a false sense of security that they can hide behind their keyboards and will be afforded constitutional protection from adverse employment action when they post offensive content. (Photo/Getty Images)

You might be asking yourself, how does the “speech” of a public-sector employee become an issue that winds its way all the way to the U.S. Supreme Court? The quotations are added because speech can take on many forms, from oral assertions to written words to political and other associations, all as ferreted out by voluminous case law.

The answer to how speech makes its way to the Supreme Court starts when a public-sector employee – an EMS provider, police officer, firefighter, corrections officer or a teacher, for example – speaks in a manner that offends his/her employer. As a result, the employer takes an adverse employment decision, usually some form of discipline (a suspension, termination, demotion or lack of promotion). And the employee sues, averring that the employer abridged his/her constitutional right to free speech.

For over a half-century, Justice Holmes’ assertion that public-sector employees had no First Amendment rights was classic authority in the United States. This analysis lent itself to the master/servant relationship that prevailed at the time: Public employment was a privilege bestowed by the sovereign, and therefore not a right protected by the Bill of Rights.

The U.S. Supreme Court followed Justice Holmes’ lead in 1947 in *United Public Workers of America v. Mitchell*, upholding the terminating of a federal employee for violation of the Hatch Act, which regulated political activity by federal employees. The pendulum then, starts at the right.

DUE PROCESS AND THE PICKERING TEST

Things began to change with the emergence of the Due Process Era of the 1960s. Courts began to see the First Amendment as affording limited constitutional protection to certain speech by public-sector employees. In *Pickering v. Board of Education* (1968), the U.S. Supreme Court decided that public-sector employees did not totally relinquish their First Amendment rights at the door. The pendulum swung to the left.

However, while *Pickering* recognized that public-sector employees had First Amendment rights, it did not rule that such rights were absolute. Rather, it adopted the rather nebulous “Pickering Test.” The test has two parts:

1. When a speech case makes its way into a court of the law, the first question to be asked is, “Is the speech on a matter of public concern?” However, the court failed to accurately define what was in fact a matter of public concern, and several Supreme Court

rulings that followed struggled to clarify. Initially, public concern was defined as “any matter of political, social or other concern to the community.” Eventually, the definition narrowed to focus on the question, is the speech a “subject of general interest and of value and concern to the public at the time of the publication?” As you can see, this definition is quite broad, and therefore, not a difficult test to hurdle.

2. The second prong of the Pickering test requires the court to balance the interests of the employee in commenting on matters of public interest versus the government employer in regulating the speech. Remember the dichotomy here, as we are talking about the government as an *employer*, not as the sovereign. As such, this becomes a forum analysis, and not just a content analysis. Context is key.

The government interests often espoused in these cases fall into two broad categories:

- Internal interests, such as detrimental impact on working relationships, impediment to the employee’s ability to perform his/her job, impairment of discipline by supervisors, impairment of harmony among coworkers and interference with the regular operation of the enterprise
- External interests, such as the disruptive consequences on agency activities, intense media coverage and the impact on recruitment effects

THE PENDULUM SWINGS AGAIN: *GARCETTI V. CEBALLOS*

After this paradigm had been established for public employee speech, the pendulum swung back again in the 2006 seminal case of *Garcetti v. Ceballos*. A supervising District Attorney had drafted an internal memorandum questioning the veracity of an affidavit in support of a search warrant. When his concerns were not taken seriously, he testified for the defense. And when he was subsequently transferred and passed up for promotion, the DA sued, avowing his First Amendment rights had been violated.

The court decided the Pickering test was inapplicable to “on-duty” speech and ruled, “When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” The Court stated that the public employees’ rights can be adequately protected by whistleblower statutes. However, those statutes vary widely across the country and can be limited in their protection.

Courts have since struggled with this onerous decision and a few cases have begun to whittle away at the black-letter ruling espoused in *Garcetti*, but it is still the law today.

ON OR OFF DUTY?

The result of *Garcetti* is that the public employment free speech analysis must be bifurcated: Was the speech on-duty or off-duty? If the speech owes its existence to the public employee's employment, then *Garcetti* controls and the employee is afforded no constitutional protection (aside from the limited protections afforded in any applicable whistleblower statutes). If the speech is off-duty, and not made pursuant to the employee's official duties, then the two-pronged Pickering Test applies. In such cases, the court normally balances the employee's interest in public speech versus the government employer's interest in regulating that speech.

It is in this off-duty arena where litigation often arises. We've already established that public-sector employees are afforded limited constitutional protection if they're speaking on a matter of public concern. However, the courts have continually recognized that the effectiveness of government entities may be undermined even when the speech touches on a matter of public concern. This is even more prevalent in law enforcement. In *Breuer v. Hart*, the court ruled law enforcement employers have a heightened interest in maintaining discipline and harmony in the workplace and in fostering a positive relationship with other agencies and the public, stating that there is an "urgent need for close teamwork among those involved in the 'high stakes' field of law enforcement."

And that brings us to the 2nd Circuit Court of Appeals 2002 case of *Pappas v. Giuliani*. The court upheld the termination of a police officer for anonymously disseminating racially offensive material, citing McAuliffe in its opinion. The Court wrote:

"The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias ... If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are the product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from the community will be damaged."

Paramedics, EMTs, firefighters and other public-sector employees, don't think you're off the hook because this decision pertained to law enforcement. *Pappas* was cited in the 2nd Circuit Court of Appeals case of *Locurto v. Giuliani* in upholding the termination of firefighters who had been riding on a racially offensive float in a city parade.

Furthermore, in *Phillips v. Pamplico*, the 4th Circuit Court of Appeals, citing the U.S. Supreme Court in *Rankin v. McPherson*, upheld the termination of a police chief for criticizing his town council, writing that "a public employee who has a confidential, policy making, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee."

FREE SPEECH MEETS SOCIAL MEDIA

So why is the public sector free speech analysis so important and relevant today? Because of the social media explosion! From Facebook to Twitter to Instagram – and in whatever forum going forward – **off-duty public sector employees have a false sense of security that they can hide behind their keyboards and will be afforded constitutional protection from adverse employment action when they post offensive content.**

The country is littered with ex-public-sector employees who thought they could post whatever content they wanted on the internet without ramification, only to find out their employer did not feel the same way. These employees then run the First Amendment protection up the flagpole, only to find it is not there to protect them – because the government’s interest (as an employer) in regulating their speech outweighed their interests in that free speech.

Did Justice Holmes have a crystal ball? In 1892, he declared public-sector employees had little, if any, constitutional protection for their “speech.” Today, social media and the internet have vastly complicated the forms of speech we engage in. But in terms of constitutional protection for that speech, the pendulum has swung right back to where it started.

Watch next: [The First Amendment and social media: What firefighters need to know](#)

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About the author

Rick Bates is a professional services representative for Lexipol. He retired as a lieutenant after a 32-year career with the Worcester (MA) Police Department, serving as a risk manager, accreditation manager, academy director, legal advisor, internal investigator, detective and patrol officer during his time with the department. Rick lectures frequently on risk management for law enforcement, police supervisory liability, and First Amendment and free speech issues for police. He earned his Bachelor’s degree in Criminal Justice from Anna Maria College and his Juris Doctor from New England School of Law. Rick is a 2012 graduate of the FBI National Academy Session 249 and graduated from the Massachusetts Police Leadership Institute.

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Posted by **RobertK52890** Jun 30, 2020 at 5:10 PM

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