Express yourself! Understanding the legal and practical limits of patron and librarian conduct on social media platforms

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Outline

• Legal framework: Supreme Court case law.
  – Is the employee speech made in their role as a public employee or made as a private citizen on a matter of public concern?
  – If public concern, are speech rights outweighed by employer-library need to maintain a workplace free from disruption.

• Library cases related to “speech.”

• Public employee speech on social media:
  – First responders.
  – Public school teachers.

• Application: social media and the public library employee.
Public Employee Speech

• Before discipline or restricting public employee speech, consider whether the speech is constitutionally protected.
  – There may also be protection from whistleblower (M.S.A. §181.932) or labor laws, e.g. National Labor Relations Act.

• If speaking in capacity as a public employee, the First Amendment does not apply, e.g., internal office dispute.

• If speaking as a private citizen in order to be protected the public concern in the speech must outweigh the government’s operational interest in the restriction.

• This determination triggers a balancing known as the Connick—Pickering—Garcetti test.
Employer Interests

• M.S.A. § 181.932 Disclosure of Information by Employees.
  – Prohibits “discharge, discipline, threaten, otherwise discriminate against, or penalize” in any of the following circumstances:
    • good faith, report of “violation, suspected violation, or planned violation,”
    • “participation in an investigation, hearing, inquiry,”
    • refuses to perform, “objective basis” to believe violates law or regulation,
    • “good faith” reports violation of law or clinical/ethical health care standard that “places the public at risk of harm,”
    • reports finding of scientific/technical study, “good faith” is accurate,
    • “good faith” in accuracy “that relates to state services, including the financing of state services” reports to legislator, legislative auditor or constitutional officer by “employee in the classified service.”
Case Law

  – **Protected Speech**: An Illinois public school teacher was dismissed for writing a *letter to the local newspaper* criticizing the board but not anyone with whom the teacher worked. The Court held that the exercise of the “right to speak on *issues of public importance* may not furnish the basis for ... dismissal from public employment.” Id. at 574.

  – **Not Protected Speech**: Termination of an ADA prosecutor who refusing a transfer distributed an *intra-office questionnaire* that her supervisor viewed as an “act of insubordination.” Id. at 141. The Court denied the ADA’s § 1983 claim regarding the internal office dispute finding only “limited” public issues and that the plaintiff’s supervisor was not required to “tolerate action which he reasonably believed would disrupt the office.” Id. at 154.
Case Law

  – **Not Protected Speech**: Court did not reach the *Pickering* balancing test and upheld the reassignment and transfer of Richard Ceballos, a deputy district attorney (DDA), which Ceballos argued was in retaliation for a *memo* he had *written on the job* alleging *prosecutorial wrongdoing*.
  – DDA required to make this sort of communication to superiors: Court held that when making “statements pursuant to their *official duties*, [public] employees are *not* speaking as *citizens* for First Amendment purposes.” *Id.* at 421.

• *Lane v. Franks*, 136 S. Ct. 1412 (2016):
  – **Protected Speech**: College administrator improperly dismissed for *testifying* at a criminal trial about financial dealings between the administrator’s employer and a state official casting the college in a negative light. Court concluded that the employee’s testimony addressed a matter of *public concern*. 
Case Law

– Offering testimony: an employer cannot tell employees what to say in court or attempt to prevent an employee from testifying against it. Lane v. Franks, 134 S. Ct. 2369, 2379 (2014).

– “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes…That is so even when the testimony relates to his public employment or concerns information learned during that employment.” Id at 2378.

• Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016).

  – Protected Speech: The Court held that when a public employer demotes an employee “to prevent the employee from engaging in” protected speech, the employee can bring a § 1983 challenge even if the employer was mistaken in its belief “that the employee had engaged in protected speech.” Id. at 1418.
Public or Private Speech

• **Mixed Speech**: If speech relates to a matter that would be of *public concern* but is *communicated* solely for *personal reasons* the *First Amendment* will not apply.
  – Personal reasons motivated police officer’s discussion of fellow officer’s claim on television news was not protected because purpose of his remarks was to further his *own goal of expressing displeasure or disagreement* with the police chief. *Kokkins v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999).

• **Mixed Speech**: Speech need not be void of any personal motivation: “speech which touches on matters of public concern does not lose protection merely because *some personal concerns are included*.” *Hulen v. Yates*, 322 F.3d 1229, 1238 (10th Cir. 2003).
Employer Interests

• *Garcetti* dictates that public employees who speak “pursuant to their *official duties* ... are *not* speaking as *citizens* for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti v. Ceballos*, 457 U.S. 410, 421 (2006).

• Employees speak in a public capacity when they do so in the *course of* performing their *official duties*.
  
  – *Not Protected*: Speech *solely about or occurring within* the government workplace is usually that of a public employee.
  
  – *Protected*: Speech *made to members of the public* or in a *public forum* (via the newspaper or at public board meetings) is the protected speech of a private citizen.
Public or Private Speech

• Malfeasance, misconduct, criminal activity, police protection, and public safety are matters of public concern. Spiegla v. Hull, 371 F.3d 928, 937 (7th Cir. 2004).

• Speech must relate to matters in which the “public might be interested, as distinct from wholly personal grievances ... [which are] not protected by the First Amendment at all.” Dishnow v. School District of Rib Lake, 77 F.3d 194, 197 (7th Cir. 1996) (internal citation omitted).

• Likewise overall issues of inequity in salaries say between male and female employees would be a matter of public concern but not a matter of an individual employee pay grade.
Balancing Interests

• The **person to whom** the employee’s **speech** was **directed**. *Vose v. Kliment*, 506 F.3d 565, 569 (7th Cir. 2007).

• Whether the speech resulted from **special knowledge** gained through the employee’s employment. Id.

• The **subject matter** of the employee’s speech. *Brady v. City of Suffolk*, 657 F. Supp. 2d 331, 352 (E.D.N.Y. 2009).

• Whether the **speech occurred** in the **place of employment** or **during** the employee’s **working hours**. Id.

• Whether the speech was in **reaction to events** occurring in the **course of** employment (e.g., threats of discipline, departmental changes, the accident he was investigating, etc.). Id.
Balancing Interests

- **No bright line test:** Speech does not automatically lose First Amendment protection merely because it occurs at the workplace or addresses the subject matter of the employee’s job. *Chrzanowski v. Bianchi*, 725 F.3d 734 (7th Cir. 2013).

- **Public speech:** Raising “*complaints or concerns* up the chain of command” regarding job duties is considered speech “undertaken in the course of performing his job.” *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

- **Public Speech:** An employee speaks as a public employee when they find *no relevant analogue* to speech by citizens who are not government employees. *Weintraub v. Board of Education of City of New York*, 489 F. Supp. 2d 209, 214 (E.D.N.Y. 2007).
Case Law: Public Libraries

- **Lambert v. Richard**, 59 F.3d 134 (9th Cir. 1995).
  - Librarian improperly **reprimanded** after she spoke at a city council meeting on behalf of the employees’ **union** criticizing the library director.
  - Court ruled that statements about the direction of the public library under its current director’s leadership involved a “public concern,” **comments to the city council** were protected speech.

  - Librarian improperly dismissed for **wearing a cross at work** for violating a dress code (“no clothing depicting religious, political, or potentially offensive decoration is permitted”).
  - Court concluded the library’s “**efficiency interests**” in preserving impartiality did **not** outweigh free speech right.
  - **Inconsistent** as **policy** ignored verbal religious expressions.
First responders on Social Media

- *Dibble v. City of Chandler*, 515 F.3d 918, 922 (9th Cir. 2008). Police officer properly **terminated** for running a commercial sex website.


Teachers on Social Media

- **Munroe v. Central Bucks School Dist.** 805 F.3d 454 (3rd Cir. 2015). Teacher *demoted* back to classroom from role as instructional coach after *derogatory blog posts* regarding teachers and students; eventually fired. Teachers acts in *loco parentis*; in a position of trust.

  - Book subject matter (“adult relationship dynamics”) was a matter of *public interest*, so *Pickering* was applied.
  - School district “*reasonably predicted*” the book would disrupt the learning environment as students who learned of the book’s content would be *reluctant to seek* advice from him.
Teachers on Social Media

  – The district argued the posting jeopardized her role as an “unbiased arbiter of student or staff misbehavior.”
  – Court agrees the interest in “avoiding the perception of racial bias and maintaining security.”

• Courts note disruption to effective workplace and a “reasonable concern” for anticipated loss of “community’s trust in its public institutions” outweighs employee free speech rights.

• Is the role or position of a public librarian more, or less like first responders or teachers?
Application: Librarians & Social Media

• First, decide whether the employee speech
  – is made in their capacity as a public employee
  – or as a private citizen on a matter of public concern.

• Second, balance whether the interests of the employer in maintaining disruption free workplace outweighs the speech rights of the employee.
  – First responder and teachers are in positions of trust; librarians?
  – Greater ability to discipline insensitive speech: multicultural communities and providing a “safe place” for diverse inquiry.

• Be cognizant of other protections such as state whistleblower or federal concerted activities (union) laws.

• Political speech is sacrosanct to many courts; do not prohibit employees from after-work speech that expresses candidate or referendum support.
Questions and Answers now or later . . .

THANK YOU!

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GRRL social media policies

Personal Use of Social Media

• The following rules and guidelines, in addition to the rules and guidelines set forth in the General Rules and Guidelines above, apply to employee use of social media on the employee’s personal time whether using the employer’s equipment on the work site or using non-employer owned equipment on or off the work site. Violation of the rules and guidelines under this section may lead to disciplinary action, up to and including termination from employment.

• Employees must abide by GRRL’s policies and procedures concerning personal use of GRRL’s computer and related equipment.

• Employees who utilize social media and choose to identify themselves as employees of GRRL are strongly encouraged to state explicitly, clearly, and in a prominent place on the site that their views are their own and not those of GRRL or of any person or organization affiliated or doing business with the GRRL.

• Employees cannot use GRRL’s logo or trademarks or the name, logo, or trademarks of any business partner, supplier, vendor, affiliate, or subsidiary on any personal blogs or other online sites unless their use is sponsored or otherwise sanctioned or approved by the owning entity.

• Employees cannot post GRRL’s copyrighted or confidential information or library-issued documents bearing GRRL’s name, trademark, or logo.

• Employees cannot post photographs of library events, other employees or representatives engaged in GRRL business or library products/services, unless employees have received GRRL’s written permission.

• Employees are prohibited from discussing non-public, private or confidential, work-related matters through the use of social media. Employees also have a duty to protect employees' non-public personal information and the confidentiality of GRRL or vendor proprietary and non-public library information.

• Employees are not permitted to discuss or display online information, statements, comments, or images that violate GRRL’s Discrimination and Offensive Behavior policy or general personnel policies.
GRRL social media policies

Employer-Sponsored Social Media

- GRRL maintains a presence on social media sites that are deemed appropriate for marketing the organization. These pages are maintained by the GRRL Patron Services Department. Employees are encouraged to participate on these pages while representing themselves personally, following the guidelines above.
- GRRL sponsored social media is used to: convey information about library products and services; advise patrons about library updates; obtain patron feedback; exchange ideas or trade insights about library trends; reach out to potential new markets; provide use and marketing support to raise awareness of GRRL's brand; issue or respond to breaking news, or respond to publicity; brainstorm with employees and patrons; and discuss library and department specific activities and events.
- All such GRRL-related social media is subject to the following rules and guidelines, in addition to rules and guidelines set forth above:
  - Only employees designated and authorized by GRRL can prepare content for or delete, edit, or otherwise modify content on employer-sponsored social media.
  - Employees cannot post any copyrighted information where written reprint permission is not obtained in advance.
  - Designated employees are responsible for ensuring that the employer-sponsored social media conform to all applicable library rules and guidelines. These employees are authorized to remove immediately and without advance warning any content, including offensive content such as pornography, obscenities, profanity, and/or material that violates employer's EEOC and/or anti-harassment policies.
  - Library employees who want to post comments in response to content must identify themselves as employees and be consistent with applicable GRRL policies and procedures and related rules/guidelines.
Additional Resources

• ALA Social Media Guidelines for Public and Academic Libraries: http://www.ala.org/advocacy/intfreedom/socialmediaguidelines

• 10 Must-Haves for Your Social Media Policy: https://mashable.com/2009/06/02/social-media-policy-musts/#39xf3ajnX8qu

• Creating a Social Media Policy: What We Did, What We Learned by Elizabeth Breed, Information Today, Inc.: http://www.infotoday.com/mls/mar13/Breed--Creating-a-Social-Media-Policy.shtml

• Social media, Data Practices and Open Meeting Law – Minnesota Department of Administration: https://www.youtube.com/watch?v=WYvQ79jxaa8&feature=youtu.be