

“But I Posted It on *My* Personal Page!”

Limits to Free Speech for Staff and Faculty in the
Social Media Age

Overview

- ▶ Free speech basics
 - ▶ Social Media...Alike and Different
 - ▶ Free speech of university employees
 - ▶ *Pickering-Connick-Garcetti*
- ▶ Other policies and considerations

First Amendment

- ▶ Congress shall make no law...abridging the freedom of speech



- ▶ Protected speech
 - ▶ includes offensive speech
- ▶ Unprotected speech
 - ▶ Incitement, true threats, “fighting words,” obscenity, illegal harassment, defamation, etc.
 - ▶ **Speech by public employees**--special category
- ▶ Other provisions of First Amendment:
 - ▶ no establishment of religion
 - ▶ free exercise of religion
 - ▶ freedom of the press
 - ▶ right for people to peaceably assemble

Public v Private

▶ Public

- ▶ Speech protected by First Amendment
 - ▶ Bound by the Constitution

▶ Private

- ▶ Speech not protected by First Amendment
 - ▶ Not bound by the Constitution
 - ▶ May subject themselves to certain standards through contract
 - ▶ Subject to state and federal laws regarding corporations and non-profits status which have implications on employment rights, discrimination, etc.

Governmental Action

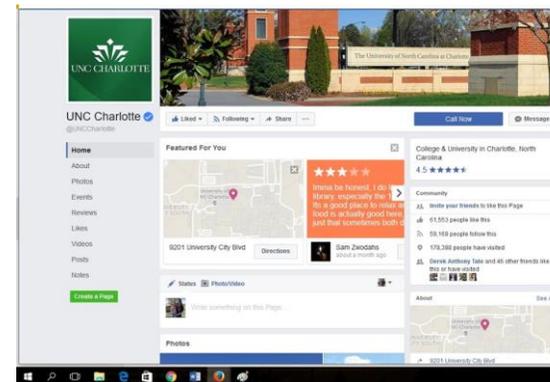
- ▶ Any action we (the government) take that may abridge fundamental rights (e.g., free speech)→ subject to **strict scrutiny**
 - ▶ Necessary to achieve compelling interest
 - ▶ Narrowly tailored
 - ▶ Not overbroad/vague
 - ▶ Least restrictive means
 - ▶ ample alternative channels for communication



Social Media

- ▶ Just a new platform for speech to take place
- ▶ Widely used
- ▶ Exposure can be instant
- ▶ Often being posted outside of the office and on personal page

- ▶ What we are not talking about (for the most part)
 - ▶ Speech in the classroom
 - ▶ Student speech



How often do you use social media?

All day, every
day

Once a day

A few times per
week

On occasion

SnapBook,
FaceGram,
InstaCh

What is the

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Your First Amendment Rights As An Employee

- ▶ You don't lose those rights just because you work at a public institution
 - ▶ First Amendment protects those rights...in certain circumstances...
- ▶ Supreme Court has found “considerable value” in “encouraging, rather than inhibiting speech by public employees”

The University

- ▶ Supreme Court has also recognized that public employers have a strong interest in having some control over how their workplace operates



Employees at Public Institutions

- ▶ Still maintain fundamental free speech rights
- ▶ However, speech is subject to Pickering-Connick-(Garcetti) balancing test
 - ▶ Are you speaking pursuant to your job duties?
 - ▶ If yes, then not protected...but “scholarship and teaching”
 - ▶ Are you speaking as a **citizen** on a matter of **public concern** ?
 - ▶ If no, then not protected
 - ▶ Does your interest to speak and the public’s interest to hear what you have to say outweigh the University’s interest?
- ▶ Retaliation claims: Was the speech a substantial factor in the adverse employment decision
 - ▶ *McVey v Stacy* (4th Cir. 1998)



What the Court had to say...

- ▶ The controversy in *Pickering*:
 - ▶ teacher wrote letter to the newspaper complaining about fund allocation by the Board of Education
- ▶ “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*

- ▶ The controversy in *Connick*:
 - ▶ Dealt with personal grievances
- ▶ “When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Connick*

What the Court had to say...

Garcetti

- ▶ The controversy in *Garcetti*:
 - ▶ employee in District attorney's office claimed he didn't get promoted because he had criticized whether a warrant had been properly issued
- ▶ “The Court’s decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions...Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance.’ *Connick*, 461 U. S., at 154.”
- ▶ We hold 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.

Pursuant to job duties?

- ▶ Speech made by public employees in performance of their duties is not protected
 - ▶ *Garcetti*
 - ▶ Even if speaking on “matter of public concern”, if pursuant to job duties, not protected
- ▶ Things to consider:
 - ▶ What are the job duties
 - ▶ What is the speech about
 - ▶ When and where did it occur--On duty? Off duty?
- ▶ Online speech
 - ▶ not often as connected to job duties
- ▶ Does not mean employer is insulated from criticism and grievances
 - ▶ Whistleblower laws and policies

Susie Sunday works as a recruiter in admissions at Niner State University. In fulfilling her role as recruiter for the University, Susie uses social media to communicate with potential students. Her Twitter handle is @NinerAdmissionsOfficer and she often tweets fun facts about the institution from her account and is connected on Twitter to many high school students in the state who are interested in attending Niner State. Recently, however, Susie has become frustrated by her job and the direction of the University. When high school students tweet at her asking questions about the admission process and the highlights of the school she begins to share some of the less favorable facts such as tuition increases and what she sees as failures by the administration. Susie's supervisor demands that she remove the posts and cease from sharing that type information. Is Susie's speech protected?

Speaking as a citizen?

- ▶ Are you speaking as a private citizen?
 - ▶ Or are you speaking pursuant to your employment? ...See, *Garcetti*...
- ▶ Does your employment position allow for the separation?
- ▶ May depend on context in which you are speaking and the content about which you are speaking

The College Republicans are hosting a controversial speaker on campus. In response to the upcoming visit, the College Democrats have led a protest involving many students, faculty, staff, and local community members outside of the reservations office because they believe the reservations office should have denied the request. The Director of Campus Reservations posts an article about the protest on her coworker's Facebook wall and includes the following comment, "These idiots should be stopped and let our office do our job. We're a college campus, you crazy liberals, and our office is honored to host this speaker." The post stirs up the protestors even more. University administrators request that she remove the post and offer an apology. She argues that she is exercising her own right to free speech.

Is her speech protected?

Yes

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No

I have
no idea

Total Results: 0

Matter of Public Concern?

- ▶ Are you speaking on a matter that the public is concerned about or one that is important to the public?
 - ▶ Courts look to “content, form, and context” of the speech (*Connick v. Myers*)
 - ▶ examples: government corruption, racial discrimination, allocation of funds
- ▶ What is the public’s reaction to the issue?
- ▶ Letters to the editor about political or social issues→ typically considered to be matter of public concern
- ▶ BUT personal grievances, non-political personal expressions→ typically NOT considered to be matter of public concern

The Facebook Campaign

Niner County announces that it plans to implement a 3% tax increase to help pay for a project to improve the recreational park near Niner State University. The county allows the University to use the park for student organization activities and student research projects. The University is hoping for these improvements as it would allow for more space for these activities. Many residents of the county are unhappy about this tax increase for what they see as unnecessary improvements. Mr. Saturday, an employee in the facilities department at Niner State, is one of those unhappy residents. As part of his job in facilities, he has spent time discussing University use of these parks. He participates in a Facebook campaign to oppose the tax increase, which includes sharing the posts of the campaign, liking the posts of others who oppose the hike, and changing his profile picture to a “Just Vote No” logo. The group opposing the increase plans to use this Facebook campaign to provide evidence to the County commissioners that this is not supported by the people of Niner County.



Saturday speaking as a citizen on a matter of public concern?



Yes

No

There is no
speech involved
in this scenario

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Total Results: 0



Fiona Friday works in Human Resources at a public institution. She does not like her supervisor and the way she manages affairs at work. Fiona shares her thoughts on Facebook about how incompetent her supervisor is and how poorly she manages her unit.

Is this a matter of public concern?

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Total Results: 0

Balance of Interests



- ▶ Interests of the employer:
 - ▶ workplace harmony
 - ▶ preventing insubordination
 - ▶ protecting confidentiality
 - ▶ client relations
 - ▶ effective performance

- ▶ Is there a disruption?
- ▶ Do free speech interests outweigh employer's efficiency interests?
- ▶ Does it impair discipline or harmony among coworkers?
- ▶ Does it have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary?
- ▶ Does it interfere with the normal operation of the employer's business?

**Social media→ widespread, instant

It's My Facebook and I'll Rant If I Want To

Mr. Monday is the women's golf coach at Niner State University and is a frequent Facebook user. He often posts photos of his dog, checks in at famous restaurants during his recruiting trips, comments on recommendation requests from friends, and overshares about his family life. He has a son who attends That Other State University, where he is a member of the men's golf team. Recently his son was accused of sexual assault by multiple females on the women's golf team. That Other University interimly suspended the son from the University and removed him from the men's golf team. Mr. Monday believes his son is innocent and That Other University is overreacting. As his frustration grows he takes to Facebook to share that frustration with the world. At first, Mr. Monday shares articles about the Title IX process on college campuses and his personal frustration with the process for his son. As the process continued, however, and his frustration grew, he began to craft his own statements ranting against That Other University, calling out administrators, and ultimately bashing Title IX and making jokes about sexual assault on college campuses. Near the end of the season, Mr. Monday added posts that included statement in which he claimed that the push to protect drunk, flirty women and blame men is out of control on college campuses. Soon after the season, Mr. Monday was fired as the women's golf coach.

Does Mr. Monday have a First Amendment claim?



The Disgruntled Director

Ms. Wednesday is the Associate Director of Student Life at State University. She has been in her current role for 7 years and before that served in an Assistant Director role for 7 years. A new Director was recently hired and began to make changes in the unit, including promoting a few assistant directors to associate director roles. Ms. Wednesday was unhappy with these changes. The unhappiness started with her not being named to the director role and continued when the new director failed to offer her a raise. But Ms. Wednesday also believed that the individuals named to associate director roles were unqualified and would not serve the students well, particularly based on their prior performance in the mere 3 years they had been on campus. Ms. Wednesday took to Twitter to let off some steam. She tweeted about the poor service she believed the University was offering to students, the wasting of resources she had witnessed, and called out the Director by her Twitter handle to encourage students to reach out to the Director and demand better service from their Student Life team. Ms. Wednesday was asked to remove the tweets and her employment was temporarily suspended.

Is this action appropriate from a free speech perspective?

An employee in student affairs serves as the advisor for a student organization on campus. As the advisor, he has friended many of the members on Facebook to get to know them better, invite them to events, and share photos. A student complains to the Dean of Students about the advisor's Facebook activity. She shares that he often "likes" memes, articles, and other posts from his friends, which she perceives to have homophobic undertones. She says seeing this makes her uncomfortable with him serving as advisor for their group that prides itself on diversity. The Dean meets with the employee and suggests that he be mindful of what his students can see on his Facebook and that perhaps he should refrain from such activity. A few weeks later several more students from this student org complain to the Dean and request that he be removed as their advisor. The Dean decides this is the best course of action and the employee is not happy about it. He argues that this is a violation of his free speech rights. Thoughts?

Academic Speech--“Scholarship and Teaching”

- ▶ The Court declined to address “speech related to scholarship and teaching” in *Garcetti*
 - ▶ “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”
 - ▶ Fourth Circuit--Adams v. Trustees of UNCW
- ▶ What qualifies as “speech related to scholarship and teaching”
 - ▶ Not entirely clear



Dr. Week is a scholar on climate change and a faculty member at Niner State University. Recently, the University accepted a gift from an energy company that has been severely criticized for the damage it has caused to the environment. Environmentalist groups strongly opposed this decision by the University. Dr. Week was one of those and decided to write a post on his department's blog about the damage caused by this energy company. In the post he included an argument based on his research but also went on to call the University's acceptance of the gift "disgraceful and jeopardizing to the well-being of our community." He then tweeted the link to the blog from his personal account and encouraged fellow faculty members to join him in protesting this decision. It was retweeted several times. Dr. Week was asked to remove the post from the blog and delete the tweet or else face disciplinary action.

Other Policies and Implications

▶ Policies

- ▶ FERPA
- ▶ Confidentiality
- ▶ Use of University Resources
- ▶ Political Activity
- ▶ Non-discrimination

▶ Other implications

- ▶ Impact on your students
- ▶ Impact on your co-workers
- ▶ Impact on future endeavors



A Photo Bomb



Dr. Tuesday is a drama professor at a public university. As part of her Drama 201 class, she begins each day asking students to perform a small skit on a specific topic in current affairs. Dr. Tuesday loves to watch and see what her students come up with and she believes their talents should be shared with the world. She also believes this is a great way to bring attention to the current affairs of our society. Each day of class she chooses a winning group and snaps a photo of their skit. Dr. Tuesday posts that photo to her personal Instagram often with a caption that reads, “Today’s winners of the Drama 201 Showdown...performing _____” and includes a brief description of their performance and a further blurb with her thoughts on that particular topic. She usually tags the students depicted. Dean Friday finds out about this practice and meets with Dr. Tuesday to demand she stops doing this.

Wasting Time



Fred LOVES Facebook. He spends hours of his life scrolling through his newsfeed, clicking on links shared by friends, commenting on posts, and adding clever posts to his friends' walls. Fred often checks Facebook during the workday and can get distracted from the tasks he needs to complete for the day. A co-worker becomes frustrated with Fred not meeting deadlines and after she reads a post on Fred's wall bashing her choice for President and calling all supporters "idiots," the co-worker decides she's no longer covering up for Fred and informs their supervisor of Fred continuously missing deadlines, that she is offended by Fred's numerous rude comments towards her in regards to the Presidential campaign, and that she has noticed Fred spends a lot of time staring at his iPhone instead of his computer screen. This supervisor decides to ask Fred does with his time and Fred openly admits he spends a lot of his "down time" on Facebook. The supervisor gives Fred a written warning and threatens that if he continues to be on Facebook all the time then he may face more serious consequences.

Back to the basics...

An employee adds a photo of a swastika to his Instagram with the caption “All my fellow Niner State Nazis, let’s go after these Jews on Monday in the quad.”

For several weeks an employee continuously tweets at her co-worker asking sexual questions. The co-worker complains to his supervisor.

An employee is an avid supporter of a candidate running for President. He shares articles about the candidate with his friends on Facebook, posts comments about the positive attributes of his candidate and the negative attributes of the opposition, and changes his profile picture to a support sticker of his candidate.

But I can't believe she said that...

- ▶ The University may not be able to take adverse action
- ▶ But you, as the co-worker, can let them know you find it offensive
 - ▶ supervisors, administration→ may not be appropriate
- ▶ Combat speech with more speech

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the right side of the slide, creating a modern, layered effect.

Questions??

#thanksfromOLA