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Public employees, social media and the first amendment

Shakespeare's Hamlet mused memorably, "I could be bounded in a nutshell, and count myself a king of infinite space ... ."[1] And so it is in the "Information Age," where even the most bounded among us can rule vast electronic empires staked out on the World Wide Web. The advent of Web 2.0, with its emphasis on user-generated content, has fundamentally redefined users' relationships to the Web. No longer are users mere "surfers" passively consuming electronic information provided primarily by a select few. Instead, Web 2.0 platforms, such as Facebook, MySpace and Twitter, have transformed many users into electronic impresarios who generate content for their social network. Millions of users now spend at least an hour a day sharing and consuming information on social networking sites.[2] One report suggests that users spend more time on Facebook than searching on Google.[3] As Celia said of the Forrest of Arden, she may also have said of Web 2.0: "I like this place and willingly could waste my time in it."[4]

All the world's a stage

Given that a substantial number of social media users are also employees, social media use becomes yet another risk for employers to manage, and that risk continues to grow in complexity. The proliferation of "smart phones" boasting Internet connectivity, as well as picture and video capability, coupled with their increasingly seamless synchronization to Web 2.0, removes many of the few remaining barriers of entry to uploading information to social media sites.

No darkness, but ignorance

The ease and speed with which information can be uploaded from the palms of our hands to the World Wide Web has the potential to deprive us of our discretion's counsel and smooth the path to disaster. Just consider a recent story from the *Los Angeles Times*, which shockingly began:

> The 60-year-old had been stabbed more than a dozen times by a fellow nursing home resident, his throat slashed so savagely he was

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almost decapitated. Instead of focusing on treating him, an employee said, St. Mary nurses and other Hospital staff did the unthinkable: They snapped photos of the dying man and posted them on Facebook.[5]

As a private employer, St. Mary wasted little time in handing out walking papers to its involved employees. But what if the first responders, presumably public employees, had also captured the incident and uploaded it to their social media pages, justifying their actions as commentary on just how stressful and difficult their jobs as police and firefighters are and why more, not less, funding is needed? Would the First Amendment place any limitations on the ability of their government employers to punish them? How have the courts thus far analyzed cases in which public employees have challenged adverse employment actions taken by their public employers in response to their speech on social media platforms?

Unmended speech, marred fortunes

The First Amendment provides, in pertinent part, "Congress shall make no law … abridging the freedom of speech." Facebook, MySpace and Twitter, while ubiquitous, are still relatively new platforms. Facebook, for example, is approximately seven years old, and its widespread use is even more recent. Consequently, there is currently only a handful of cases applying First Amendment principles to social media speech by public employees. However, courts that have addressed the issue have found that the existing analytical framework for analyzing public employee speech travels well into the social media context. As we will see, the First Amendment generally affords public employers substantial latitude in disciplining their employees for speech, including speech via social media platforms. It also does not protect speech made by public employees pursuant to their bona fide job duties, nor does it protect speech on matters not deemed to be of "public concern." Finally, the First Amendment does not prohibit a public employer from disciplining an employee even when he or she speaks as a citizen on a matter of public concern, if the speech's deleterious impact on operations outweighs the employee's interest in making the speech and the public's interest in hearing it.

The above principles are derived from the Supreme Court's decisions in *Garcetti v. Ceballos*,[6] *Connick v. Myers*,[7] and *Pickering v. Board of Education*.[8] In the context of a First Amendment retaliation claim, these precedents require the court to ask: Is the public employee speaking on a matter of public concern? Is the public employee a citizen? If the answer to either of these questions is "no," the claim fails.

In *Connick*, the Supreme Court explained that the question of whether speech touches on a matter of "public concern" depends on its content, form and context.[9] Speech concerning a matter of po-

litical, social or other concern to the community is ordinarily regarded as a matter of public concern.[10] However, generally speaking, employee grievances, personality conflicts and other matters of primarily interpersonal or intra-institutional concern are not. For example, in *Dahl v. Rice County*, the Eighth Circuit affirmed the dismissal of a deputy sheriff's First Amendment retaliation claim based on his complaints about the elected sheriff's interpersonal skills and management style, finding the complaints did not implicate a matter of public concern protected by the First Amendment.[11]

Yet even if a public employee's speech is found to have touched on a matter of public concern, the Supreme Court, in *Garcetti*, affirmed that the First Amendment contains a yawning exclusion for most work-related speech made by public employees. In other words, 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.[12] The Court reasoned that restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen; rather, it simply reflects the exercise of employer control over what the employer itself has commissioned or created. Further, a public employer's ability to regulate the job-related speech of its employees is essential to the efficient provision of government services. For these reasons, the Court rejected a First Amendment claim by Ceballos, an attorney in the Los Angeles County District Attorney's Office, that he had been disciplined in violation of the First Amendment in retaliation for writing an internal memorandum contending that an affidavit used by police to obtain a search warrant contained serious misrepresentations. Concluding it was part of Ceballos's job to write such memoranda, the Court found he was not speaking as a citizen for First Amendment purposes. Thus, Ceballos' job-related speech was not protected by the First Amendment.

Garcetti's near categorical exclusion of public employees' job-related speech from the First Amendment's protective ambit is highly significant in that public employees can be disciplined or discharged for speech related to matters of undeniable public concern. Just as in *Garcetti*, where the Supreme Court found unprotected speech concerning law enforcement's use of a potentially perjurous affidavit, the First Circuit, in *Foley v. Town of Randolph*,[13] turned aside a First Amendment retaliation claim asserted by a fire chief who was disciplined after he complained about inadequate funding and staffing at the scene of a fatal fire. Though emergency service funding and staffing were matters of public concern, the fire chief made his comments while on duty and in full uniform.[14] The court noted that the result would have been different had Foley raised his concerns in a letter to the editor or a statement to the media at a different time.[15]

Even in cases where a public employee speaks in his or her capacity as a citizen on a matter of public concern, a public employer may still premise disciplinary action on the speech if its legitimate interest in the efficient performance of the workplace outweighs the employee's First Amendment interest in the speech and the general public's interest in hearing the speech.[16] So it was in *Richerson v. Beckon*.[17] Richerson, a school district employee, alleged that she was transferred to a less desirable position in retaliation for her blog postings, which were critical of certain co-workers. Assuming that at least some of Richerson's postings were made in her capacity as a private citizen and touched on matters of public concern, the Ninth Circuit nonetheless upheld the transfer. Balancing the interests, the court concluded that Richerson's "highly personal" and "vituperative" criticism of her co-workers, who no longer wished to interact with her, disrupted the functioning of her division to such a degree that the district's interest in transferring Richerson, as a way of restoring order, outweighed her interest in expressing her views (such as they were) and the general public's interest in hearing them.[18]

Unpathed water, wind-reamed shoes

The current arc of precedent suggests that courts will afford public entities broad discretion in restricting employee speech, irrespective of the medium in which it occurs, when they act as employers, as opposed to governmental units. Nevertheless, the rapid evolution of electronic communication modalities and the unstable distinctions between citizen/employee and public/private matters counsel caution. Both public employers and their employees would do well to heed the Friar's admonition to Romeo, "[w]isely and slow; they stumble that run fast."[19] ◆

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Endnotes

[1] *Hamlet*, Act 2, Scene 2.

[2] Facebook alone boasts more than 500 million users, who spend, on average, 55 minutes a day on the site. See www.Facebook.com/statistics;Twitter reportedly has more than 100 million users. See http://economictimes.indiatimes.com/infotech; and MySpace reports more than 122 million users with 100,000 new users each month (www.myspace.com/pressroom?url=/fact+sheet.).

[3] *The Columbus Dispatch*, Sept. 13, 2010, Sec. A8.

[4] *As You Like It*, Act II, Scene IV.

[5] http://articles.latimes.com/2010/08/local/la-meface-book-20100809.

[6] 547 U.S. 410 (2006).

[7] 461 U.S. 138 (1983).

[8] 391 U.S. 563 (1968).

[9] *Connick*, 461 U.S. at 146.

[10] Id.

[11] 2010 U.S. App. LEXIS 19064 (8th Cir.).

[12] Id. at 421.

[13] 598 F.3d 1 (1st Cir. 2010).

[14] Id. at 8.

[15] Id. at 9.

[16] *Pickering*, 391 U.S. at 568.

[17] 2009 U.S. App. LEXIS 12870 (Jun. 16, 2009), as amended by 2009 U.S. App. Lexis 19327 (Aug. 27, 2009).

[18] Id. at 3-5.

[19] *Romeo and Juliet*, Act II, Scene III.