“Social Media and the Government Employee: Reconciling Our Public & Private Digital Identities”

A case study for the Rutgers-Newark SPAA Case Simulations Portal for Public and Nonprofit Sectors

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Abstract

Ceding a portion of one’s right to free speech has long been an expectation of public service, but social media has facilitated new forms of conflict, testing the bounds of acceptable private behavior. Though technological innovation has far outpaced slowly evolving legal doctrines, a number of precedents may be used as general guidelines as to acceptable forms of employee speech. The U.S. Supreme Court uses the Pickering Balance Test, a proposition by which an official’s speech is defensible if one speaks on an issue of public concern, and such actions do not disrupt the efficiency of agency operations. Garcetti vs. Ceballos (2007) extended this axiom to define that internal processes (particularly personnel matters) do not fit this distinction, and thus speech on these issues may not be afforded protection. This paper provides a brief assessment of these legal doctrines by reviewing three case studies. First, Hispanics United explores the distinction between individual and collective forms of speech online, the latter of which is protected under National Labor Relations Act. Then, we examine two teacher firings that have evidenced an inconsistent application of these doctrines by administrative judges, as detailed within the Rubino and O’Brien cases. The divergent outcomes can largely be attributed to nature of the offending speech, the publicness of the conflict, and the loss of trust between the public employee and the community they serve.
Introduction

Though social media has been a helpful for facilitating new forms of communication, there are some unintended consequences resulting from its use by public sector employees. Contrary to the popularly held belief that the First Amendment of the U.S. Constitution protects all forms of personal speech, the courts have determined there are limits needed to ensure the efficient operation of government agencies. While the use of these technologies has grown, the understanding of the potential for conflict has not. Therefore, this paper seeks to explore the legal doctrines that have defined the limits of public employee speech on social networks by examining a number of recent cases and the premises underlying their outcomes.

In addition to popular networks such as Facebook and Twitter, social technologies include blogs, forums, RSS feeds, podcasts, photo-sharing services, smart phone apps and widgets. They provide a participatory online experience, one that is increasingly real-time and dependent on the use of mobile platforms. As the constant stream of discourse has brought this technology into the workplace, the distinction between the public and private roles of employees has become increasingly fuzzy. Thus, public managers must contemplate the point at which employee speech ends and private speech begins.

Traditionally, public servants enjoy protection for speech that occurs outside of the workplace, particularly on issues of public concern. The spatial separation of a person and the timing of speech outside of normal work hours are often cited as rationales by which to define these roles, but the nature of social media has essentially eliminated this separation. Consequently, the question of employee speech has taken a greater orientation as to defining the publicness of an issue. A number of court cases have highlighted the potential for conflict when an employee speech is disruptive to the efficiency of government operations, or when such behavior can be viewed as conduct unbecoming of a government official.

Before examining the impacts of social media, we briefly review the legal precedents that have been an integral to defining the limits of employee speech rights. Pickering v. Board of Education\(^1\) (1968) established the metric by which the Supreme Court has defined the limits of employee speech. The case involved a teacher, Marvin Pickering, wrote a letter to the editor of a local newspaper to protest the local school board’s handling of a bond issue. As a consequence of his actions, the school board dismissed him from his position, stating that his comments were disruptive to the district’s operation. Upon appeal, the Supreme Court sided with Pickering, citing no support for the school board’s contention that his speech had caused disruption. Furthermore, it asserted that public employees have the ability to speak on issues of public concern. The court acknowledged that there was should be a balance between the need for the efficient delivery of government services and protections of individual speech, a rationale which formed the basis for the Pickering Doctrine.

Garcetti v. Ceballos\(^2\) (2006) further clarified the conditions surrounding the Pickering test by considering the question of what constitutes public speech. Richard Ceballos was an employee of the Los Angeles County District Attorney’s Office. After criticizing a warrant affidavit he felt contained false statements, he experienced a number of adverse personnel actions. This included a transfer to another office and passed up for promotion. He sued,

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\(^1\) Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563

\(^2\) Gil Garcetti, Frank Sundstedt, Carol Najera, and County of Los Angeles v. Richard Ceballos, 547 U.S. 410
claiming a violation of his First Amendment right to free speech. The Supreme Court disagreed, ruling that matters internal to the agency were nonpublic in nature, and thus were not constitutionally protected speech.

Case studies

The following case studies provide a comparative examination of employee speech rights, and entail a discussion about the publicness of the discourse on social networks. In doing so, we examine the differing interpretations of the Pickering and Garcetti rationales by administrative law judges.

Case No. 1 - Hispanics United of Buffalo

We first consider the case of Hispanics United of Buffalo, Inc. and Carlos Ortiz. Mariana Cole-Riviera and Lydia Cruz-Moore were two coworkers employed by Hispanics United, a nonprofit organization tasked with assisting Latinos in Buffalo, New York with a range of human services. The employees communicated frequently with each other by phone and text messages on and after work hours, with Cruz-Moore often criticizing other employees she felt did not provide timely and adequate assistance to their clients. The situation escalated when she contacted Cole-Riviera and stated her intention to discuss substandard employee performance with the agency’s director, Lourdes Iglesias. While at home, Riviera then posted this message to her Facebook page in which she criticized her coworker:

“Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?” (4)

The post was noticed by other employees, who objected to the characterization that their work was substandard. Cruz then complained to the director of the agency, claiming that their behavior constituted defamatory and slanderous speech. The director subsequently fired Riviera and four of her coworkers, stating that their speech amounted to “bullying and harassment” and violated the zero tolerance policy on such behavior. It should be noted the director did not fire her secretary, who had also posted on the thread. (8)

On appeal, the National Labor Relations Board ruled in favor of the fired employees, stating that their speech was protected because it was "for the purpose of mutual aid or protection.” The judge reasoned that employees were engaging in “a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management.” (9) Additionally, the negative nature of these criticisms would have a clearly negative impact on their employment. Therefore, the mutual aid argument provides a basis for considering collective forms of public employee speech on social media, and contrary to the standards of Garcetti, discourse on nonpublic topics was not (in itself) disqualifying for protection. It should be noted that this outcome was premised on standards of the National Labor Relations Act. The subsequent cases offer a focus on individual speech, which is not protected by this law, or the Constitution.

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3 Hispanics United of Buffalo, Incorporated and Carlos Ortiz, (2012) NLRB Case 03–CA–027872
Case No. 2 - Rubino and the NY Department of Education

Christine Rubino was a tenured teaching working for New York City Department of Education, in Brooklyn’s Public School 203. On June 23, 2010, one day after a tragic incident in which a student in Harlem drowned during a field trip, Rubino posted a series of comments on her Facebook page, “venting” her frustrations with her students. During her initial post, she stated:

“I am thinking the beach sounds like a wonderful idea for my fifth graders! I HATE THEIR GUTS! They are all the devils (sic) spawn!”

When one of her contacts followed up with a comment about a particular student, she responded:

“I wld (sic) not throw in a life jacket for 1 million!!”

This post was noticed by one of her colleagues on her “friends” list, who contacted the school’s assistant principal. This information was then forwarded to the principal, who approached the school district’s Special Commissioner of Investigation (SCI). After completing an investigation, and a hearing was held. Subsequently, the Department of Education terminated her employment, charging her with “misconduct, neglect of duty and conduct unbecoming of her profession.”

Ms. Rubino was eventually reinstated after an appeal. The judge detailed several arguments that provided context for the decision. First, the petitioner had a long employment history without any recorded incident, and her conduct constituted an isolated error of judgment. Second, there was no evidence that her posts had harmed her students, or did she intend any injury. Furthermore, she expected that her communications would only be transmitted among the friends on her contact list. As the behavior occurred off school grounds and after operating hours, it did not impact her ability to teach, and could not be considered misconduct. Finally, the judge felt the termination of an employee was a disproportionate response and perhaps contrary to the nature of a free society, and thus was an excessive burden on one’s right to express themselves freely among friends.

Case No. 3 - O’Brien and Patterson School District

Jennifer O’Brien was a tenured teacher in Patterson, New Jersey, who was also dismissed for comments that she posted on her Facebook page. She had been recently assigned to teach elementary students at Public School No. 21, which was comprised of a majority of African-American and Latino students. On March 28, 2011, she posted:

“I’m not a teacher-I’m a Warden for future criminals!” and “they had a scared straight program in school-why couldn’t I bring first-graders?”

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The next day, principal Frank Puglise received an email from Carlos Ortiz (unrelated to party of the same name in the *Hispanics United* case), the principal of O’Brien’s former school, who forwarded her Facebook postings, noting that he was “appalled” by her statements. He confronted O’Brien, who mentioned that she did not intend the comments to be offensive, but was “otherwise unrepentant.” (3)

While O’Brien was initially suspended with pay, the postings went viral and were spread throughout the school district. Angry parents began calling Puglisi, which led to a protest at the school. Reporters from major news organizations showed up, which led to higher attendance at a *Home School Council* meeting, where parents further expressed their outrage. On April 14, 2011, the deputy superintendent of schools filed a formal complaint, charging Ms. O’Brien with conduct unbecoming of a teacher. Upon her appeal to the New Jersey Office of Administrative Law, she testified that her comment on her students being “future criminals” was a criticism of their behavior, not their race or ethnicity. She mentioned that she had been previously struck by a student, and that others had stolen from her and had hit one another. Furthermore, she felt her referrals for disciplinary action had not been addressed. To clarify her statement about *Scared Straight*, she noted the program had presented at her school on the day of her postings, though this assembly was targeted towards students in grade 6 and above.

A New Jersey administrative law judge rejected O’Brien’s contentions that her speech was protected by the First Amendment. In the opinion, the judge mentioned that O’Brien’s remarks were not statements towards an issue of public concern but were rather “a personal expression” of dissatisfaction with her job (6). The judge also noted that her views directly impinged on the district’s ability to operate its schools efficiently, noting:

> it becomes impossible for parents to cooperate with or have faith in a teacher who insults their children and trivializes legitimate educational concerns” (6), and

> “thoughtless words can destroy the partnership between home and school that is essential to the mission of schools” (7).

Consequently, he rejected her claim that her speech was protected under the First Amendment, as it failed a number of the conditions that were protected under the Pickering Test.

**Themes within the Hispanics United, Rubino and O’Brien Cases**

It is interesting to note that despite similar circumstances, these cases had divergent outcomes. The *Hispanics United* case evidences that there can be distinctions between individual and collective forms of employee speech and that the use of social media can be used as a means to organize collective responses to internal (nonpublic) issues, which somewhat contradicts the premise established and *Garcetti v. Ceballos*. As previously noted, employees enjoy greater protections on collective speech than individual speech due to the *National Labor Relations Act*. Thus, we might not be able to compare the Hispanics United and teacher cases due to the differing units of analysis and protections.

We also consider the “publicness” of the dialogue, which may lead to an escalation of conflict. In the Rubino case, there was not any evidence that her comments had caused injury, and the process of accountability had occurred mostly within an interagency context. In the O’Brien case, when her comments went viral, it became a wider form of political conflict, and
thus it was difficult to control the nature of the dialogue. Additionally, the question of damage to public trust was inarguable, as the outrage that ensued was clear and immediate from the protests and media coverage that ensued.

Finally, it is important to note that in each judge’s opinion, they cited the level of remorse displayed by each of the teachers as a means of establishing the premise of patterns of behavior. Ms. Rubino profusely apologized at all stages of the process, which helped lead to the determination that this was an isolated incident, and not indicative of a teacher with otherwise unblemished record in the classroom. Ms. O’Brien did not offer an apology for her behavior, with Principal Frank Puglisi testifying that she remained unrepentant throughout the process, firmly believing that she was within her First Amendment right to free speech. Though she also had a long and unblemished record of performance in the classroom, the judge rejected her assertion that this was a momentary lapse in judgment. The opinion mentions that the judge “expected to have heard more genuine and passionate contrition” in her testimony and that she “remained somewhat befuddled by the commotion she had created, and that while she continued to maintain that her conduct was not inappropriate, she was sorry others thought differently.” Additionally, the judge concluded that with sensitivity training and time for reflection, she might be able to return to the classroom, but her relationship with the community had been irreparably damaged.

Conclusion

While agencies may adopt policies that regulate the use of social media during work hours, few have considered the potential impact of their employee’s speech on agency operations. The First Amendment offers little constitutional protection and is insufficient guidance. Thus, it is imperative that public employees understand the potential for conflict that exists when one publicly criticizes their employer, political leadership or client groups online.

These cases provide evidence that the standards by which speech is judged is often relative to the contexts and political considerations inherent in public service, but there are a number of guidelines we offer to inform employees of government agencies and nonprofits:

- Speech about an employer should be constrained to topics of public concern. There are no constitutional protections afforded to individual forms of employee speech on issues internal to the agency.

- The National Labor Relations Act may protect some forms of speech online, particularly those used for the purpose of facilitating “mutual aid” towards collective goals.

- For those in fields where community trust is essential (education, law enforcement, social work, etc.), there is a heightened public expectation of self-restraint. We encourage additional training to reduce the likelihood of such conflicts.

- Content is easily transmitted through social networks, potentially beyond the scope of its intended audience. Account security settings (i.e. sharing controls) are insufficient to prevent this.
- Displaying intent to harm is not needed for one's speech to result in adverse personnel actions.

- Separation of a person from their work environment (posting from home, or after work hours) is not justified as a strategy to assert that one’s speech is private.

**Relevant Links**

Hispanics United of Buffalo, Inc. and Carlos Ortiz (*National Labor Relations Board*)

Matter of Rubino vs. City of New York (*State of New York*)
[http://www.courts.state.ny.us/reporter/3dseries/2012/2012_50189.htm](http://www.courts.state.ny.us/reporter/3dseries/2012/2012_50189.htm)

Matter of Jennifer O’Brien vs. City of Patterson, NJ (*New Jersey Law Archive*)

Fading Privacy Rights for Public Workers (*Harvard Law & Policy Review*)

Is Facebook “speech” protected? (*Washington Post*)
[http://www.washingtonpost.com/opinions/is-facebook-speech-protected/2012/08/10/13155ac6-e309-11e1-ae7f-d2a13e249eb2_story](http://www.washingtonpost.com/opinions/is-facebook-speech-protected/2012/08/10/13155ac6-e309-11e1-ae7f-d2a13e249eb2_story)