Kaepernick in the Classroom?
Employee Speech and the First Amendment

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First Observations

1. Employees communicate with one another in many ways and in many places.

2. Sometimes they communicate to do their job. Other times, it’s just because that’s what people do.

3. Sometimes they speak about matters of public concern. Other times, they’re just saying what’s on their mind.

The relevance of these points will become evident in this presentation.
We’re going to talk about:

- The First Amendment rights of teachers (and all school district employees)
- When a school can control or take disciplinary action because of teacher speech without violating his/her rights
- How to reduce conflict between the school and teacher over troublesome speech
Please remember:

- The sign of intellectual intelligence is mentally holding two opposite points of view simultaneously.

- The sign of emotional intelligence is understanding another’s point of view without condoning it.
Bill of Rights

Congress of the United States,

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
The First Amendment also protects symbols and conduct that constitute “symbolic speech.”
The Supreme Court


“It can hardly be argued that either students or **TEACHERS** shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
“Citizens do not surrender their First Amendment rights by accepting public employment.” *Lane v. Franks*, U.S. Supreme Court (2014)
Limits on Freedom of Speech

Because teachers are government employees, their freedom of speech is different from ordinary citizens. It is limited as a result of three Supreme Court decisions:

• **Pickering v. Board of Education (1968)**
• **Connick v. Myers (1983)**
• **Garcetti v. Ceballos (2006)**
Freedom of Speech of Teachers
Pickering

*Pickering* v. *Board of Education* (1968) – A Balancing Test

The teacher's interest as a citizen in making public comment must be balanced against the State's interest in promoting the efficiency of its employees' public services.
Freedom of Speech of Teachers
Connick

_Connick v. Myers_ (1983) – Public Concern vs. Personal Interest

A teacher’s speech is protected only if it is speech as a citizen on a “matter of public concern.”
Matter of Public Concern

• Look at "the content, form, and context of a given statement, as revealed by the whole record."

• Does it relate to “any matter of political, social, or other concern to the community“?

If so, it’s a matter of public concern.
Freedom of Speech of Teachers

Garcetti


“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.”

Speech that’s an ordinary part of the teacher’s duties is not protected by the First Amendment.
## Applying the Pickering-Connick-Garcetti Standard

<table>
<thead>
<tr>
<th></th>
<th>Public Concern</th>
<th>Private Concern</th>
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</thead>
<tbody>
<tr>
<td><strong>Official Duties</strong></td>
<td>Not Protected</td>
<td>Not Protected</td>
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<tr>
<td><strong>Private Citizen</strong></td>
<td>Protected</td>
<td>Apply Balancing Test</td>
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</table>

The table compares the protection status of public and private concerns in the context of official duties and private citizen actions.
What a Federal Court Considers

(1) Whether the public employee spoke on a matter of public concern

(2) Whether the public employee spoke as a private citizen or public employee

(3) Whether the public employee’s protected speech was a substantial or motivating factor in the adverse employment action

(4) Whether the public employer had an adequate justification for treating the employee differently from other members of the general public

(5) Whether the state would have taken the adverse employment action even absent the protected speech

*Johnson v. Poway Schools*, 658 F.3d 954 (9th Cir. 2011)
Scenario One

- High school math teacher attached two large banners on wall of his classroom.

- One had red, white, and blue stripes and stated in large block type: "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and, "GOD SHED HIS GRACE ON THEE."

- The other stated: "All men are created equal, they are endowed by their CREATOR." The word "creator" occupied its own line, and each letter of "creator" was capitalized and nearly double the size of the other text.

Can the school order the teacher to take down the banners?
Scenario Two

• When it ‘s time for the daily Pledge of Allegiance, a high school teacher tells her students that she will not stand to show solidarity with Colin Kaepernick and the Black Lives Matter movement.

• A parent objects to the teacher’s protest.

Can the school order the teacher to stand for the Pledge?
Scenario Three

• On her personal Facebook page, a teacher identifies her school and allows her comments to be geographically located by followers.

• She posts a photo that shows scantily clad women drinking beer on a beach.

• Another is an image of a billboard that says “Blue Lives Matter. Black Lives Don’t.”

Can the school take action in response to either of the photos?
Scenario Four

- A teacher contacts a “5 On Your Side” TV reporter.
- The reporter’s story says the teacher said her school principal uses marijuana and been “involved” with staff members.
- The story concludes with the teacher’s final comment: “That man is a danger to children. I’ve told the District about him and nobody does anything.”
- The District finds the teacher recently received a very negative evaluation from the principal and that her allegations are not true.

Can the school fire the teacher?
Although it could be true that police departments would operate more efficiently absent inquiry into their practices by the public and the legislature, efficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value.

*Moonin v. Tice* (August 22, 2017)(9th Cir.)
Best Practices to Minimize Conflicts

• Know the basic applicable law
  • Federal constitution
  • Arizona constitution and statutes

• Create and distribute a Guide to Social Media and Digital Communications for School Employees
Best Practices to Minimize Conflicts

• Communicate with the employee first
  • Ascertain the facts, including the “back story”
  • Was the speech/expression about a matter of public concern?
  • Was the speech/expression part of the employee’s duties?
• Communicate with school management before parents or the media
• Consider a conversation with both management and the employee to ascertain any accommodations
• Keep your cool, especially with parents and the media
More Cases

Pre-Garcetti Cases
• West Virginia State Board of Education v. Barnette (1943)
• Hanover v. Northrup (1970)
• Russo v. Cent. School District (1972)
• Palmer v. Chicago Schools (1979)
• Downs v. Los Angeles Schools (2000)
• Lee v. York City Schools (2007)

Post-Garcetti Cases
• Johnson v. Poway (9th Cir. 2011)
• Doe v. Silsbee Schools (2011)
• Agency for Int’l Dev. v. All. for Open Society (2013)
• Moonin v. Tice (9th Cir. 2017)
ANY QUESTIONS ???
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Denise represents employers and employees in employment and labor matters. Denise is a longtime Board member of Girl Scouts – Arizona Cactus-Pine Council. She is a member of the State Bar of Arizona, State Bar of Nevada, American Bar Association, Scottsdale Bar Association, where she serves on the Board of Directors, Maricopa County Bar Association, and the Arizona Employment Lawyers Association. Denise also serves on the Advisory Board for the Honors College of the University of Arizona. She is a mediator for the U.S. Postal Service. Denise is a frequent presenter for government, business, educational and community groups. She was awarded the State Bar of Arizona Employment & Labor Law Section Member of the Year in 2014 and the State Bar of Arizona Member of the Year in 1999.

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Tom has been actively involved in law and policy matters affecting public education for more than 25 years. He often presents to educators and students about public school law.

In 2010, ASBA presented him with the John R. McDonald Award for outstanding service to Arizona’s public schools. The State Bar of Arizona honored Tom with its Public Lawyer Career Achievement Award in 2013.

A native of Arizona, Tom studied at the University of Arizona and the University of Leeds, England, and received his J.D. from Duke University.