Because of My "Status," My Status is Unemployed: Recommendations For Implementing Regulations on Social Media Use by Public Elementary and Secondary School Faculty

I. INTRODUCTION

The use of social media in America today has reached staggering proportions. Recently, Facebook, arguably one of the most recognized social media platforms in the world, reached one billion users.1 Users on Twitter, another frequently used social media platform, send out an average of over 250 million "tweets" per day.2 Social media have become a tool with which we identify ourselves as individuals, network with colleagues, and keep in touch with family and friends. However, a status update, "check in," or other notification being shared with family and friends can potentially be seen by anyone, including employers.

This note will address the concerns facing elementary and secondary public school officials in their attempt to both implement regulations on the use of social media by teachers and other school employees, and as they consider utilizing information obtained through social networking sites in hiring or termination decisions. Specifically, this note will focus on the development of First Amendment case law regarding protection of speech by elementary and secondary public school employees and how these developments can aid in guiding school officials in their implementation of social media use policies. Most importantly, this note

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will attempt to differentiate social media speech that is protected by the First Amendment from that which is not protected to help guide public elementary and secondary school officials in implementing regulations and policies on social media use by employees.

II. ESTABLISHED CASE LAW

In beginning to analyze specific restrictions on the use of social media by public secondary school educators, it is constructive to look to the Supreme Court's authoritative decisions on the matter. However, this analysis only helps so much. In recent years, the Court has specifically avoided directly discussing the protections afforded to public elementary and secondary school educator speech. Therefore, it is only through appellate court decisions that have more directly discussed public educator and administrator free speech rights and limitations that we find answers.

A. Establishment of the Pickering-Garcetti Test

The Supreme Court generally addressed First Amendment protections for public employee speech in *Pickering v. Board of Education of Township High School District 205.* A There, the Court explicitly declined to "lay down a general standard against which all statements may be judged." Rather, the Court focused on the subject of the speech and the balancing of interests between those of the employee in commenting on an issue and the public employer in preventing statements harmful to the operation of the school.

In 2006, the Supreme Court more fully established the current standard used to determine the First Amendment speech protections afforded to public employees, known commonly as the *Pickering-Garcetti* test, in its decision in *Garcetti v. Ceballos.* There, Richard Ceballos was employed as a deputy district attorney at the Los Angeles County District Attorney's office. Ceballos was informed by defense counsel that inaccuracies existed in an affidavit, which had been sworn to by a

4. Id.
5. Id. at 568.
7. Id. at 413.
deputy sheriff in order to secure an arrest warrant. After looking into the alleged misrepresentations and being unconvinced of the warrant’s complete accuracy, Ceballos informed his supervisors of the discrepancies and followed up his findings with a memo to them. In the memo, he advocated the dismissal of the case based on his concerns that the information used to substantiate the affidavit was inaccurate. Despite Ceballos’s reservations, the District Attorney’s office chose to proceed with the case, and Ceballos was subsequently called as a witness for the defense. Following this incident, Ceballos was reassigned to a different position and later denied a promotion.

Ceballos filed a claim in District Court against the District Attorney’s office, in part asserting a violation of his First Amendment right to free speech. Specifically, he claimed that his employer subjected him to retaliatory actions as a result of his memo and testimony in aid of an opposing party’s legal position. Ceballos claimed that he had been reassigned and denied a promotion for which he was qualified, because he disagreed with the view of the District Attorney’s office and stated so in his memo. He claimed this was retaliatory behavior, and that in retaliating, the District Attorney’s office had violated his First Amendment right to free speech.

The Supreme Court disagreed. It ruled against Ceballos in a five-to-four decision, holding that “when public employees make statements pursuant to their official duties they are not speaking as citizens for First Amendment purposes” and their statements are not insulated from employer discipline. The Court used the basis of its decision in *Pickering* to create the five-part *Pickering-Garcetti* test now used to determine when constitutional protections are to be afforded to public employee speech, emphasizing “the importance of the relationship between the speaker’s expression and employment” in determining whether such speech will be protected.

8. *Id.* at 414.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 415.
13. *Id.*
14. *Id.* at 410.
15. *Id.*
B. The Five Parts of the Test

Importantly, the Court clarified that, although a government employer may have broad discretion to restrict speech, any restrictions imposed by government employers “must be directed at speech that has some potential to affect the entity’s operation.” Specifically, courts must determine whether:

1. the speech was pursuant to official job duties;¹⁶

2. the subject of the speech was a matter of public concern;¹⁷

3. the employee’s interest in commenting on the issue outweighs the interest of the state as an employer;¹⁸

4. the speech was a substantial or motivating factor in the alleged retaliatory action;¹⁹

5. and the employer would have taken the same action in the absence of the speech at issue.²⁰

The first part of this extensive test looks at whether the government employee’s statements were made pursuant to his or her official job duties.²¹ If they were, then there is no constitutional protection for that speech. The Court made clear that the government’s restriction of speech that is made pursuant to official job duties “simply reflects the exercise of employer control over what the employer itself has commissioned or created.”²²

Second, if the speech was not made pursuant to official job duties, and the individual is instead speaking as an individual citizen, the court must then ask whether the speech is a matter of public concern.²³ If a court

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16. Id.
18. Id. at 417.
19. Id. at 421.
20. Id. at 423.
22. Garcetti, 547 U.S. at 421.
23. Id. at 422.
24. Id. at 418.
determines that the speech did not address a public matter, then again, no First Amendment protection will be afforded.\(^\text{25}\)

Third, if a court determines that the employee's speech does concern a public matter, the employee's interest in commenting on the issue must outweigh the employer's interest in restricting it.\(^\text{26}\) Further, the employee must also show that the public employer used the speech as a substantial or motivating factor in the detrimental decision against the employee.\(^\text{27}\) Importantly, even if all of the above can be shown, the employer must still be able to establish that, even without the speech at issue, they would have taken the same action against the employee.\(^\text{28}\)

Perhaps one of the most troubling parts of the decision for educators and administrators, however, was the Court's specific side-stepping of First Amendment issues as they pertain to scholarship or teaching.\(^\text{29}\) Because the Court declined to establish whether or not the rule would apply to public educators, trial and appellate courts have been left with the task of applying the *Pickering-Garcetti* test to determine how the speech of public primary and secondary school employees will be evaluated for purposes of First Amendment protection.

### C. Recent Developments

Recent case law has refined the limitations on school teachers using social media as a way to express their personal beliefs while employed by a public employer, specifically primary and secondary public schools. Although the Supreme Court has not further elaborated on the *Pickering-Garcetti* test, nor taken up the specific issue of the regulation of speech by public educators and administrators in primary and secondary education, several appellate and district court decisions have provided insight as to how the issue may be dealt with under American jurisprudence.

1. **Snyder v. Millersville University**

   In 2008, the district court for the Eastern District of Pennsylvania decided the case of *Snyder v. Millersville University*.\(^\text{30}\) Snyder attended

\(^{25}\) Id.
\(^{26}\) Id. at 419.
\(^{27}\) *New Five-Part "Garcetti-Pickering" Test*, supra note 21.
\(^{28}\) Id.
\(^{29}\) *Garcetti*, 547 U.S. at 425.
Millersville University seeking a degree in secondary education. As part of the education curriculum, Snyder was required to complete a student teaching program, during which she observed teachers at area public secondary schools and taught mini-lessons. During her student teaching, Snyder made reference to her MySpace page in class discussions and communicated about personal matters with the students through the social networking site. Her MySpace page included pictures Snyder had posted of herself drinking alcohol. In addition, during her student teaching period Snyder made a comment on her page referencing her dislike of a supervising teacher at the secondary school where she was completing her requirement.

After the university decided not to grant Snyder's degree in secondary education, she filed suit. One of her claims was that the school's use of her MySpace information and posts in making its decision not to grant her degree violated her First Amendment free speech rights.

The court determined that, although Snyder was merely a student at Millersville University, because she was working in a public secondary school, ultimately her position as a student teacher was "akin to that of a public employee" and therefore, her speech on MySpace was not entitled to First Amendment protection. Specifically, Snyder argued, to the detriment of her First Amendment claim, that her MySpace page and posting were strictly personal. As a result, the court found that Snyder's posts did not address a matter of public concern, and thus concluded that her claim failed the second prong of the Pickering-Garcetti test. Accordingly, the court held that the First Amendment did not protect her speech, and the University could use her MySpace posts and comments as determining factors in their evaluation and subsequent decision to deny her application for a degree.

2. Spanierman v. Hughes

Spanierman was an untenured English teacher at Emmett O'Brien High School, a public high school in Connecticut. He maintained a

31. Id. at *1.
32. Id. at *2.
33. Id. at *5.
34. Id. at *1.
35. Id. at *15.
36. Id. at *16.
37. Id.
MySpace account and used his account to talk with students about homework and learn more about them in general. However, Spanierman also used his MySpace account to conduct discussions with his students that were unrelated to school. In addition to his conversations with students, Spanierman had personal pictures and comments on his MySpace page that school officials considered inappropriate.

Although Spanierman had used his account to discuss homework with students, the court found that the MySpace communication was not required to fulfill Spanierman’s job duties. Thus, Spanierman could not prove he made his statements pursuant to his official duties.

However, Spanierman did have a poem posted on his profile about the Iraq war, and the court found that under the Pickering-Garcetti test, the poem addressed a public concern. However, because Spanierman presented no evidence to show his termination was directly, or even indirectly, related to the political view he expressed in his poem, he failed in his claim of a First Amendment violation. The court found that the three- to five-month interval between the posting of the poem and Spanierman’s termination was too great a time span to demonstrate that his termination was related to the posting.

III. DISCUSSION AND PROPOSAL FOR EMPLOYMENT REGULATIONS

In light of the established case law, in forming social media regulations for the public school sector, the main concern for school officials should be to avoid litigation over termination, disciplinary actions, and other actions they take in response to evidence obtained through social media platforms. Accordingly, school systems should carefully develop and implement official statements on restrictions of employee social media speech to comply with the Pickering-Garcetti test.

39. Id.
40. Id. at 298.
41. Id. (The trial court record does not note what type of language these specific “inappropriate” comments contained).
42. Id. at 309.
43. Id. at 310.
44. Id. at 311.
45. Id.
Specifically, it would be wise to point out that any speech that an employee may perceive to be personal in nature could be used in termination decisions as allowed by law. Further, school administration could point out that discussion with students through social media networks pursuant to official job duties, such as communications about homework or class matters, along with personal communication not of this type should remain appropriately focused on education and any deviation from this may be considered by the administration in a disciplinary proceeding.

These types of clarifying statements would aid greatly in informing educators and employees of the possible effects of their social media communications. Guidelines such as these would make clear to the employees that it is not only their communications with staff and students that could be examined, but also the personal information, comments, and photos that they make available on social networking sites.

**IV. CONCLUSION**

By its very terms, social media interaction includes a personal element and, as evidenced by the cases discussed above, courts can easily find that social media do not address matters of public concern and are thus not eligible for First Amendment protection in public elementary and secondary school employment settings.46 Messages, photos, tweets and 'likes' can all be monitored by a public employer and possibly used in employment decisions, regardless of the privacy that the individual attaches to these activities.47 Although each instance comes with its own unique circumstances that must be analyzed on a case by case basis, greater awareness on the part of school systems and educators that social media information may be used in hiring and employment decisions may lead to fewer instances of dismissal or disciplinary proceedings based on this type of information.

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47. Snyder, 2008 WL 5093140, at *16.