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# FREE SPEECH IN OUR SCHOOLS:
# What are the Rules for Teachers, Principals and Others?

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2020 has been a challenging year in so many ways. When school officials are not dealing with COVID, they are often dealing with significant issues of social justice. In such matters, opinions can differ, competing voices may be heard, and on occasion tempers can flare. It is therefore important to understand the rules regarding employee free speech rights under the First Amendment. School officials must respect the rights of public employees to free expression, but they have the right to maintain order to assure effective school district operation.

In the following, we will pose and then answer ten questions to illustrate common concerns with employee speech and the related legal principles to help school officials navigate through the challenging issues that can arise with employee free speech.

QUESTION ONE:

One of the teachers in my building posted a criticism of her colleagues on social media, complaining that they don't give help to students after school hours. Her colleagues are incensed and want me to do something about her post.

Can I do anything? Should I?

ANSWER TO QUESTION ONE:

This is a classic example of protected speech by a public employee.

Interestingly, public employees did not always have free speech protections. When he served on the Supreme Judicial Court of Massachusetts, the great jurist Oliver Wendell Holmes famously observed:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of this contract. The servant cannot complain, as he takes the employment on the terms which are offered to him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.

*McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (upholding the firing of a policeman for political activity). The rules have changed, however, and since 1968 the United States Supreme Court has interpreted the First Amendment to confer protections on teachers and other public employees who speak out on matters of public concern. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

In *Pickering*, a teacher wrote to the newspaper and was critical of how the superintendent and the board of education had handled past proposals to raise revenue for the schools. When he was fired, the Illinois Supreme Court upheld the action. The United States Supreme Court reversed, however, ruling that teachers (and other public employees) have the right under the First Amendment to speak out on matters of public concern unless such speech disrupts school operation. The protection applies even if the speaker is incorrect in his statements unless there is proof that such false statements were made recklessly or maliciously.

The United States Supreme Court elaborated on the scope of free speech protections for public employees in *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, an assistant district attorney, who was about to be transferred over her objection, circulated a questionnaire about office operations, created a "mini-insurrection," and was fired. With one exception (a question on whether employees felt pressured to work on political campaigns), the Court held that the employee was not speaking on a matter of public concern but rather on a matter of personal grievance (the unwanted transfer), and her actions were not protected under the First Amendment.

In subsequent years, guiding principles have emerged on when speech by public employees will be protected. First, the speech must relate to a matter of public concern; statements on purely private concerns are not protected by the First Amendment. *Compare Rankin v. McPherson*, 483 U.S. 378 (1987) (police department clerk was fired for saying "The next time they go for him, I hope they get him" after President Reagan was shot; comment related to a matter of

public concern, President Reagan's policies toward minorities, and was thus protected speech). In addition, speech arising out of employment responsibilities is not considered speech related to a matter of public concern. *Agosto v. New York City Department of Education*, __ F.3d __, 2020 WL 7086060 (2d Cir. Dec. 4, 2020). *See also Weintraub v. Board of Education of City School District*, 593 F.3d 196 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 444 (2011); *D'Amato v. New Haven Board of Education*, 2020 WL 1656202 (Conn. Super. 2020).

Even if a statement relates to a matter of public concern and would otherwise be protected, speech that is damaging to the operation of the public enterprise is not protected from regulation. In *Connick*, the Court held that the free speech interests of public employees must be balanced against the legitimate interest of public agencies to operate efficiently. If the speech is a serious disruption, the employer can prohibit it and/or take related disciplinary action against the employee. Following *Connick*, courts have identified the following factors that must be considered in determining whether speech by a public employee is protected:

- the need for harmony in the public work place;
- whether there is a need for a close working relationship between the speaker and the persons who could be affected by the speech;
- the time, manner, and place of the speech;
- the context in which the dispute arose;
- the degree of public interest in the speech; and
- whether the speech impeded the ability of the other employees to perform their duties.

*Roberts v. Van Buren Public Schools*, 773 F.2d 948 (8th Cir. 1985).

Applying these factors to various situations, courts have often found speech not to be protected. *See e.g.*, *Tuskowski v. Griffin*, 359 F. Supp. 2d. 225 (D. Conn. 2005) (no free speech right to tell union representative that the supervisor is an "idiot" (or worse), in front of supervisor); *Lewis v. Cowen,* 165 F.3d 154 (2d Cir. 1999) (speech by Director impaired operation of Connecticut Lottery Unit and was not protected); *Sierra v. State of Connecticut*, 2003 Conn. Super. LEXIS 2755, (Conn. Super. 2003) (joking about ethnic characteristics on cable show irreparably damaged relationship of assistant with state comptroller).

Finally, when an employee engages in protected speech, it is often better not to talk to the employee about that speech. Once an employer raises concerns about employee speech, the employer invites a retaliation claim if and when any employment action is necessary, including reassignment or discipline.

QUESTION TWO:

I received an anonymous tip to tell me that a custodian in my school has a vlog (video blog) on YouTube that I should check out. I found the vlog, and I was disgusted to see him and a friend purporting to give graphic advice about sexual matters. Would I violate his free speech rights if I tell him to knock it off?

ANSWER TO QUESTION TWO:

Here, we must ask whether this conduct can affect the employee's ability to do his job, and the answer is that it depends. Creating a vlog outside of work doesn't necessarily affect one's job, but if (1) the vlog is highly vulgar, (2) the custodian interacts with children, and (3) the vlog becomes known in the parent community, it may well cause disruption that is not protected under the *Connick v. Myers* balancing test.

There is a threshold question whether this vlog even meets the first condition for protection under the First Amendment -- does the speech there relate to a matter of public concern? *Compare San Diego v. Roe*, 543 U.S. 77 (U.S. 2004) (erotic video sold by police officer on eBay showing him stripping out of his uniform not entitled to First Amendment protection because video was not expression on a matter of public concern).

Even if one presumes that the speech relates in some way to a matter of public concern, it is clear that the speech is not protected under the balancing test. Vulgarity expressed in the grossest of terms by two adults in a public forum that is accessible to children has no importance and brings discredit to the speakers. By contrast, the impact of this vlog could be significant. Any colleague, parent or community member who watches this vlog may question the employee's fitness for an occupation that brings him into regular contact with vulnerable children. Accordingly, one may reasonably predict prompt and vehement demands that this employee be terminated for his vulgar and offensive public speech.

One case example (albeit extreme) suffices to illustrate the point. In *Melzer v. Board of Education of the City of New York*, 336 F.3d 185 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004), the New York City Board of Education fired a teacher for his work in editing the newsletter for an organization that advocated sexual relations between men and boys. Significantly, there was no evidence of actual misconduct. Nonetheless, the Second Circuit rejected the teacher's claim that his free speech rights were violated, thereby letting his termination stand. The court held that his speech, even though made outside of school, were likely to impair the teacher's effectiveness and to cause disruption.

QUESTION THREE:

One of the maintenance workers in my school is active on Instagram, and he has posted a number of terrible memes, making fun of immigrants, Blacks, women and people with disabilities. I wrote him up and threatened that he will be fired if he keeps it up. However, in response, he filed a grievance claiming he has a First Amendment right to express himself on his Instagram account. Does he?

ANSWER TO QUESTION THREE:

Issues of diversity relate to matter of public concern, and the employee's posts therefore qualify for protection under the First Amendment. However, to determine whether the speech is protected, we must again apply the *Connick v. Myers* balancing test.

On the one hand, we must ask what is the importance of speech contained in the Instagram posts of this maintenance worker, which speech mocks immigrants and other groups protected from discrimination? On the other hand, what is the impact on the school district of public posts by a district employee that contain hateful speech? Applying the test, the answer to this question may depend on whether anyone has noticed and complained about the posts. Absent such complaint, there may be no disruption against which to balance the (minimal) importance of the speech. However, as soon as such posts become a source of complaint and controversy, the balance swings in favor of the employer's right to prohibit the speech and to take discipline if it continues. *See Bennett v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 977 F.3d 530 (6th Cir. 2020).

A more difficult case is presented when public employees express unpopular views in a serious way, without racial disrespect or invective. Speech about topics such as immigration or affirmative action is entitled to protection, even if the speaker's viewpoint is contrary to the majority view. In such cases, employers must carefully consider their action. They may not prohibit the speech because they do not like the message. Rather, to regulate (*i.e.*, prohibit) the speech, they must be prepared to show that they carefully considered the employee's speech and found that the disruption it causes outweighs its importance.

QUESTION FOUR:

We recently had an Open House (remote of course), and a parent just informed me that her son's math teacher candidly told her during Open House that the new curriculum is no good and that he is glad his children do not attend this

school. I confronted the teacher, but he told me that he has the right to express his opinion on matters of public concern. Really?

ANSWER TO QUESTION FOUR:

No. Not really.

Speech expressed as part of one's job duties is not protected by the First Amendment, even if it relates to matters of public concern. In speaking to parents about school operation (including criticism of supervisors), teachers are fulfilling their job responsibilities, and accordingly their speech is not entitled to First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

In *Garcetti*, an assistant district attorney claimed that his free speech rights were violated when he suffered an adverse employment action after an earlier draft of a report he wrote was used to advantage by a criminal defendant. By a 5-4 vote, the United States Supreme Court held that such speech has no protection under the First Amendment: "[W]hen 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."

The concept of speech "pursuant to duty" not being protected has been broadly construed. Earlier this month, the Second Circuit Court of Appeals dismissed a First Amendment claim by a teacher employed by the New York City Board of Education. The teacher had filed a number of grievances under the collective bargaining agreement, and he claimed that the Board of Education retaliated against him for exercising his free speech rights in doing so. However, affirming a previous ruling on the subject of grievances, the Second Circuit ruled that the teacher's grievances under the collective bargaining agreement were not protected speech because it did not relate to a matter of public concern. *Agosto v. New York City Department of Education*, __ F.3d __, 2020 WL 7086060 (2d Cir. Dec. 4, 2020). *See also Weintraub v. Board of Education of City School District*, 593 F.3d 196 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 444 (2011) (filing grievances is not protected by the First Amendment).

Connecticut has a statute conferring First Amendment protections on employees in the private sector: Conn. Gen. Stat. § 31-51q. The Connecticut Supreme Court initially adopted the *Garcetti v. Ceballos* rule in interpreting Conn. Gen. Stat. § 31-51q in a case involving a school principal claiming free speech rights in the school setting. *Perez-Dickson v. City of Bridgeport*, 304 Conn. 483 (2012). *See also Schumann v. Dianon Systems, Inc.*, 304 Conn. 585 (2012). At that time, the court left open the question of whether the free speech protections of the Connecticut Constitution confer any greater protections that those of the

United States Constitution under *Garcetti v. Ceballos*. In 2015, the Connecticut Supreme Court answered that question, holding that the Connecticut Constitution does indeed confer state free speech protections on public employees. *Trusz v. USB Realty Investors, LLC*, 319 Conn. 175 (2015), as discussed below.

In *Trusz*, the Connecticut Supreme Court declined to follow the *Garcetti* rule in interpreting Conn. Gen. Stat. § 31-51q. There, the head of the company's valuation unit concluded that real estate valuations were too high and recommended that investors be so informed. The company disagreed, and ultimately the employee was terminated. He sued in federal district court, and the court certified a question to the Connecticut Supreme Court, namely whether Connecticut courts follow the *Garcetti* rule in considering free speech claims under the Connecticut Constitution. The court answered "no," and it held that a balancing test should be employed, such as that announced in *Connick v. Myers*, 461 U.S. 138 (1983), but modified as Justice Souter suggested in his dissenting opinion in *Garcetti*:

> With respect to the defendants' first claim, that private employers have the right to control their employees' job related speech, we are satisfied that the modified *Pickering/Connick* standard adequately protects this right. Under this standard, if an employee's job related speech reflects a mere policy difference with the employer, it is not protected. It is only when the employee's speech is on a matter of public concern and implicates an employer's ''official dishonesty . . . other serious wrongdoing, or threats to health and safety'' [citation omitted] that the speech trumps the employer's right to control its own employees and policies

Thus, speech that is related to job responsibilities is protected by the Connecticut Constitution and Conn. Gen. Stat. § 31-51q, but only if it relates to official dishonesty, other serious wrongdoing or threats to health and safety. Otherwise, the employer's right to maintain order in the workplace prevails.

QUESTION FIVE:

Our school resource officer recently started wearing a cap with the Thin Blue Line insignia to show support for the police. However, two students have complained to the principal that the cap makes them feel "unsafe," and they and their parents are now insisting that the school resource officer not wear the cap. For his part, the school resource officer has claimed that acceding to the parents' demand would violate his First Amendment rights. Help!

ANSWER TO QUESTION FIVE:

Before we sort out the constitutional issues, we must ask -- if the school resource officer wears a uniform, how is he able to wear a baseball cap that is not part of that uniform? If the school resource officer is breaking protocol by wearing a non-conforming cap, that type of expression may not be protected as an administrative matter.

Once we determine that the Thin Blue Line cap is permitted attire for the school resource officer, we must then determine whether the officer's "speech" is protected. First, has the district created a forum for the speech? Are other employees permitted to display messages through their dress? If not, the district may take the position that wearing the cap is not protected speech.

It may be difficult to establish that employees are not permitted to express their affiliations or viewpoint through their dress, and thus it may be best to go right to the *Connick v. Myers* balancing test. How important is the speech? In considering this matter, the employing school district can take into account the context of the speech. Specifically, in assessing the importance of the speech, we may ask whether there is any need to engage in such expression while on the job. Support for the police certainly relates to a matter of public concern. However, the school resource officer has many other opportunities to express that support, and while the message may be important, it does not seem important that he express this message while on the job.

Conversely, the district must also weigh the disruptive impact of the speech in question. Here, two students have stated that they feel "unsafe" simply because they are exposed to the message of support for the police. That self-reported discomfort may or may not be disruptive to school district operation. School districts will not want to be held hostage to such student reports. However, school officials may consider all the facts and circumstances to determine whether the concern expressed is sincere and serious. There is no certainty in such decision-making, but we may hope that the courts will defer to the thoughtful judgment of the school officials in such a case.

QUESTION SIX:

Some teachers have been displaying Black Lives Matter signs in their classrooms. A parent observed such a sign during a classroom visit, and he angrily claims the teachers are violating the Board policy prohibiting school employees from engaging in political activity while at work. Should I tell the teachers to stop displaying their Black Lives Matter signs?

ANSWER TO QUESTION SIX:

This question raises two separate issues: (1) are teachers who display Black Lives Matter signs or insignia engaged in partisan political activity, and (2) what is the legal impact of permitting teachers to display such signs in their classrooms.

As a threshold matter, your superintendent and your board of education should interpret board policy in defining what activity is and is not partisan "political activity" that would violate the policy.

First, in determining whether displaying BLM signs is political activity, it may be helpful to review a recent analysis of whether support for Black Lives Matter violates the Hatch Act, the federal statute that prohibits federal employees from engaging in political activity. *See* U.S. Office of Special Counsel, "Black Lives Matter and the Hatch Act" (July 14, 2020). Significantly, the Office of Special Counsel has advised that Black Lives Matter is at present a social movement, not a partisan political movement. Accordingly, federal employees are free to display BLM signs and insignia as long as they do not combine such actions with political activity. Given this guidance, it would be reasonable to determine that display of BLM signs by classroom teachers is not political activity.

Second, permitting the display of such signs has legal significance. When a public entity creates a forum for speech, it cannot engage in viewpoint discrimination, *i.e.*, permitting one viewpoint, but not another. Classrooms are not typically considered forums for employee speech. However, when personal expression is allowed, as with the display of BLM signs, a forum is created, and teachers with other viewpoints must be permitted the same opportunity to express themselves.

Finally, there is a significant exception to the rule prohibiting viewpoint discrimination. Under the *Connick v. Myers* balancing test, the expression of differing viewpoints may prohibited when the disruptive impact of any such expression outweighs the importance of the speech, such as speech that would be disrespectful to any group on the basis of race or national origin.

QUESTION SEVEN:

One of the teachers in my school has a blog, and almost every day she posts her account from the trenches as a classroom teacher. Last week, she referred in her blog to one of her students who has an anxiety disorder as a "snowflake" who would benefit from joining the Army. The parent is demanding that we fire this teacher. Does the teacher have a free speech right to post to her blog?

ANSWER TO QUESTION SEVEN:

In this case, it is doubtful that the teacher has a First Amendment right to make such comments on her blog, and you have a mess to clean with the parent. Teacher complaints about colleagues or supervisors are as old as schools themselves. However, when a teacher posts those complaints online (*e.g.*, on social media or a blog), such comments are typically not protected speech either because they do not relate to matters of public concern or, if they do, they are disruptive.

In *Richerson v. Beckon*, 337 Fed. Appx. 637 (9th Cir. 2009), the Ninth Circuit explained why complaints about co-workers may not be protected:

> "Richerson's publicly-available blog included several highly personal and vituperative comments about her employers, union representatives, and fellow teachers. Although Richerson did not refer to these individuals by name, many were easily identifiable by the description of their positions or their personal attributes. When this blog came to light, Beckon received several complaints from teachers and other employees of the District, including at least one person to whom Richerson was assigned as an 'instructional coach' who thereafter refused to work with her. Beckon then transferred Richerson on the ground that her blog had fatally undermined her ability to enter into trusting relationships as an instructional coach.
>
> "That a public employee's speech touches on matters of public concern is a . . . necessary, but not a sufficient condition of constitutional protection . . . . Richerson's speech and Beckon's response are subject to the Pickering balancing test, which includes at least five factors. . . . . Particularly relevant to Richerson's case are the considerations of whether her speech . . . disrupt[ed] co-worker relations . . . erode[d] a close working relationship premised on personal loyalty and confidentiality . . . or . . . interfere[d] with the speaker's performance of her or his duties. . . . Id. It is abundantly clear from undisputed evidence in the record that Richerson's speech had a significantly deleterious effect in each of these ways. Beckon provided testimony, not controverted by Richerson, indicating that several individuals refused to work with Richerson in the future. Common sense indicates that few teachers would expect that they could enter into a confidential and trusting relationship with Richerson after reading her blog. Beckon need only make a 'reasonable prediction' that such disruption would occur; she need not demonstrate that it has occurred or will occur to a certainty. . . . . This standard was clearly met. *See Connick v. Myers*, 461 U.S. 138, 151-52 (1983) ("When close working relationships are essential to

> fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."). Accordingly, the district court did not err in concluding that the legitimate administrative interests of the School District outweighed Richerson's First Amendment interests in not being transferred because of her speech." (Internal quotation marks omitted).

Similarly, in *Munroe v. Central Bucks School District*, 805 F.3d 454 (3d Cir. 2015), a teacher was fired after it was revealed that she had made offensive and demeaning comments on her blog about children with disabilities and her students in general. She brought an action in federal court, alleging retaliation for exercising protected rights under the First Amendment. However, the Third Circuit affirmed a lower court decision, which found her offensive statements unprotected and dismissed her claim.

In yet another case of foolish blogging, a first grade teacher in a district in which the majority of the student body was composed of minority students, referred to her position on social media as "…a warden for future criminals!" *In re O'Brien*, No. A-2452-11T4, 2013 WL 132508, at *4 (N.J. Super. Ct. App. Div. Jan. 11, 2013). In that case, the Superior Court of New Jersey, Appellate Division, considered whether O'Brien was appropriately dismissed from her teaching position for posting such racially charged statements on Facebook about her students. Unpersuaded by her claim under the First Amendment that student behavior was a genuine matter of public concern, the court affirmed the decision of the Acting Commissioner of Education and concluded that the "seriousness of O'Brien's conduct warranted her removal from her tenured position in the district." Id. At 5.

In similar fashion, earlier this year, a California Court of Appeals found a teacher unfit to teach under California law for immoral conduct when she posted racist and critical comments on Facebook about students who were children of immigrant parents and who participated in a nationwide protest in support of "A Day Without Immigrants." *Crawford v. Comm'n on Prof'l Competence of Jurupa Unified Sch. Dist.,* 53 Cal. App. 5th 327, 332, 267 Cal. Rptr. 3d 520, 524 (2020), *review denied* (Nov. 24, 2020).

QUESTION EIGHT:

One of the teachers in my school is constantly in my office complaining that I am not doing enough to promote social justice in my school. Finally, I had enough and told the teacher to knock it off. Two weeks later, I assigned her to outdoor bus duty, and she is threatening to sue me for violating her free speech rights. But we only talked privately. What free speech rights could she be talking about?

ANSWER TO QUESTION EIGHT:

We often think about the exercise of free speech rights as a public event. However, the protections of the First Amendment apply whether one is speaking from a soapbox in a public park or behind closed doors. The teacher still has the burden of providing her claim that your assigning her outdoor bus duty was retaliatory (and presumably you had good reasons unrelated to her speech to you), but it is a claim that she can make.

In 1979, the United States Supreme Court addressed this issue directly in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). There, an English teacher repeatedly expressed concern to her principal that the district was making inadequate efforts to address racial inequities.

At the end of that year, her contract was not renewed, and she claimed that this action was retaliation for her speech. The district defended on the basis that the teacher's speech was private in nature. However, the Court ruled unanimously that First Amendment protections apply to private speech as well.

The decision to defend on that basis is curious, because a favorable ruling would have impelled teachers and others with concerns to raise those concerns publicly in the first instance in order to enjoy the protections of the First Amendment.

While it is now clear that speech does not lose its protection by being expressed privately, it can be challenging to distinguish between private speech on a matter of public concern, which is protected, and private speech "pursuant to duty," which is not, per *Garcetti v. Ceballos*, discussed above. The distinction may be whether the speech relates to job duties (even if not required), which would be considered unprotected speech pursuant to duty, and speech that does not relate to job duties. Bessie Givhan in the case above, for example, was an English teacher who had no job responsibilities related to racial equity.

Finally, we must remember that speech can be protected in ways other than by the First Amendment. Filing grievances, for example, is protected concerted activity under the applicable collective bargaining law. Similarly, advocating for greater gender equity is speech protected under Title IX. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (male coach protected under Title IX against retaliation for complaining about conditions for female athletes).

QUESTION NINE:

I have read enough about employee free speech rights to know that the First Amendment does not protect employee whining. However, when I chastised an employee for complaining about me on social media, the union claimed that I had committed an unfair labor practice. What could the union be talking about?

ANSWER TO QUESTION NINE:

As we have discussed here, matters of personal grievance are not protected by the First Amendment. Unfortunately, there is more to the story than the First Amendment, and this teacher's post on social media about you (and her working conditions) may well be protected by the Teacher Negotiation Act. Based on the original collective bargaining law, the National Labor Relations Act (1935), many states have conferred union rights on public employees, in Connecticut through the Teacher Negotiation Act (TNA) for certified employees and through the Municipal Employees Relations Act (MERA) for non-certified employees. A basic right in such statutory schemes is the right to engage in concerted collective activity without employer interference. In reaching out to her colleagues to see how they have been treated, was this employee simply exercising her rights under the TNA?

While we do not have any school cases on social media as concerted activity, we find a cautionary tale in *Three D, LLC d/b/a Triple Play Sports Bar and Grille v. N.L.R.B.*, 629 Fed. Appx. 33 (2d Cir. 2015). There, the Second Circuit affirmed an NLRB ruling that discipline of employees for "liking" and commenting on a post on Facebook critical of their employer violated their Section 7 rights under the NLRA by restraining the employees from exercising their right to collective, concerted activity. In that case, the NLRB found that the employer's social media policy prohibiting "inappropriate discussions about the company" was overly broad and interfered with employee's protected rights. *Three D, LLC d/b/a Triple Play Sports Bar and Grille and Jillian Sanzone and Vincent Spinella*, 361 NLRB No. 31 (N.L.R.B. 2014).

QUESTION TEN:

One of my teachers has touched many a sore nerve in his regular rants on Facebook about the Board of Education and the Superintendent. My problem is that he is also a poor teacher. I should put him on a plan, but I am afraid that he will claim that we are retaliating against him for exercising his free speech rights. What should I do?

ANSWER TO QUESTION TEN:

You have to do what you have to do. If this teacher is that outspoken, he may well make such a claim. But the United States Supreme Court has addressed this situation, and it has held that a teacher should not be better off for exercising free speech rights, and when there is independent cause for discipline, it may be imposed.

In that case, the teacher called students "sons of bitches," made an obscene gesture at two girls who didn't follow his directives, and even got into an argument over a serving of spaghetti in the school cafeteria. He also went on a radio talk show and criticized the superintendent's new dress code for staff. When his contract was not renewed, he claimed that his First Amendment rights had been violated. The United States Supreme Court determined otherwise, holding that when an employee would have been disciplined without regard to his or her speech, there is no First Amendment violation, even if it is impossible completely to exclude motivation related to the speech. The Court reasoned that the employee should not be better off as a result of the speech, and the employer may act when there are independent grounds for termination. *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

Closer to home, we have *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008). There, a non-tenured teacher at Emmett O'Brien Technical High School created a MySpace.com account. Administrators heard about the account and reviewed it. They concluded that there was inappropriate material and that the teacher had not maintained appropriate boundaries with students. The teacher closed the account, but without telling administrators, he created a new account under a different name. The teacher included similar information on this new account, and several of the friends on the account were students. When school officials discovered these facts, they placed the teacher on administrative leave, and his contract was not renewed.

Spanierman sued, alleging a host of constitutional violations, including a violation of his rights under the First Amendment. The district court dismissed his claims. Little on the MySpace.com pages related to a matter of public concern, and such speech was not protected by the First Amendment. Spanierman claimed protection nonetheless because a poem on the Iraq war did relate to a matter of public concern. However, given the other legitimate reasons for the action taken, the court held that there was no indication that this political statement played any role in the decision.

Given these (and other cases), it is clear that being outspoken and controversial does not insulate a teacher or other public employee from discipline. While any adverse employment action can invite a claim that the action was retaliation for

the exercise of free speech rights, such a claim will be dismissed when the employer can show that the discipline would have occurred irrespective of whatever annoyance the employee's speech caused.

CONCLUSION:

The analytical framework for considering employee free speech claims is well-established, but how we apply that framework in a particular case can be a challenge. Public employees have significant First Amendment rights, but these rights are not without limits. Consider these rules, and make sure you have all the facts before you act.