LEGAL MAILBAG – OCTOBER 3, 2024

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The "Legal Mailbag Question of the Week" is a regular feature of the CAS Weekly NewsBlast. We invite readers to submit short, law-related questions of practical concern to school administrators. Each week, we will select a question and publish an answer. While these answers cannot be considered formal legal advice, they may be of help to you and your colleagues. We may edit your questions, and we will not identify the authors.
Please submit your questions to: legalmailbag@casciac.org.

Dear Legal Mailbag,

I am looking for some free legal advice regarding staff use of social media and its implications for the district, and I know just where to turn.

I would like to understand what stance the district can take when staff members use social media as a separate business. I have even heard of situations in which a teacher or a principal has a significant online following that could number in the hundreds of thousands.

I know that we can exercise control over employee use of social media. But what regulations or guidelines should staff be aware of in this context?

Signed,
What Can I Do?

Dear What:

As a threshold matter, Legal Mailbag pauses to clarify your statement that you "can exercise control over employee use of social media." To be sure, public employers can exercise control over employee use of social media, but only when they are using social media to fulfill their job responsibilities. In 2006, the United States Supreme Court ruled that public employee speech is

not subject to First Amendment protections when their speech is "pursuant to duty," *i.e.*, speech made to fulfill their job responsibilities. *Garcetti v Ceballos* (U.S. 2006). Thus, as a general matter, employer concerns over employee speech pursuant to duty is a matter of supervision and discipline, not First Amendment rights. There is a complication however, and Legal Mailbag notes that the Connecticut Supreme Court ruled in *Trusz v. USB Realty Investors, LLC* (Conn. 2015) that speech 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. It is unlikely that employee job-related speech on social media would ever fall within that Connecticut exception to the *Garcetti* rule.

When employee speech on social media is the private speech of an employee not related to fulfilling job responsibilities, such speech enjoys some protection under the First Amendment. However, that protection is not absolute.

In 1968, the United States Supreme Court first ruled that the First Amendment confers 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 a letter to the editor of a newspaper that was critical of how the superintendent and the board of education had handled the budget. 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 the operation of the public enterprise. The protection applies even if the speaker is incorrect in his or her 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, creating a "mini-insurrection," and she was fired. The Court announced in that case the framework for determining whether private employee speech is protected by the First Amendment. First, we must ask if the speech relates to a matter of public concern. If it does not, the speech is not protected. If it does, the courts must apply a balancing test to determine whether the importance of the speech outweighs any disruptive impact of the speech. If the disruptive effect of the speech outweighs its importance, the speech is not protected by the First Amendment. In *Connick*, the Court held that when the employee circulated the questionnaire, she was largely speaking on a matter of personal grievance, not on a matter of public concern. Accordingly, her actions were not protected under the First Amendment.

Significantly, the United States Supreme Court has interpreted the scope of "public concern" broadly for this purpose. In *Rankin v. McPherson*, 483 U.S. 378 (1987), for example, the Court ruled that the following comment by a clerk in a police department after President Reagan was shot was protected speech: "The next time they go for him, I hope they get him." On a 5-4 vote, the Court held that the statement related to President Reagan's policies toward minorities, a matter of public concern. Accordingly, the Court ruled that the comment was protected and that her termination for making the statement violated her First Amendment

rights. Given this and other cases, Legal Mailbag suggests that public employers be expansive in considering whether private employee speech relates to a matter of public concern.

When private employee speech does relate to a matter of public concern, such speech is not protected if the damage it causes to the operation of the public enterprise outweighs the importance of the speech. Following *Connick*, one court provided a helpful list of the factors that must be considered in determining whether speech by a public employee is protected under the *Connick* balancing test:

- the need for harmony in the public workplace;
- 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).

Munroe v. Central Bucks School District, 805 F.3d 454 (3d Cir. 2015) is one example of how comments on a blog may result in disciplinary action. There, 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 challenged her termination 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 because they interfered with her ability to work with the students she taught and their families, and the court dismissed her claim.

In short, public employees have free speech rights when they make comments or posts on their blogs in their capacity as private persons. But in so doing, they speak at their own risk. If their speech interferes with their successfully doing their job without countervailing importance, they can be subject to disciplinary action up to and including termination.