



# Social Media and First Amendment Rights in the Public Sector

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# Social Media

- ▶ As people conduct more business and socializing online, Social Media has become the 21<sup>st</sup> century watercooler.
- ▶ Internet has obscured boundaries between employee personal & professional lives, as more workers “friend” and follow colleagues.



# Social Media

## ► First Amendment Constitutional Protections

- Unlike private sector employees, limiting public employee free speech may violate an employee's First Amendment rights.
- Speech is constitutionally protected when **an employee speaks as a private citizen on a matter of public concern.**
- Speech by a public employee is not constitutionally protected when it fails to satisfy both elements (*Pickering v. Board of Education*, 391 U.S. 563 (1968)).





# First Amendment Constitutional Protections

- ▶ *“As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.*
- ▶ *"I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school? Respectfully, Marvin L. Pickering.”*



# Pickering Balancing Test

- Courts have recognized competing interests between government's need to restrict speech in its role as an employer to ensure the effective functioning of its enterprise and the First Amendment rights of its employees and have applied a balancing test.
- *Pickering Test* weighs an employee's First Amendment interests against the public employer's interest in regulating the employee's speech to promote the efficiency of the public service it provides.

# Pickering Balancing Test

Courts analyze the employer's interest against the employee's interest in speaking out by considering whether the speech would:

- 1) Interfere with the employee's responsibilities or the normal operation of the business
- 2) Impair the working relationship between the speaker and target of criticism
- 3) Create disharmonious relations in the workplace or compromise the loyalty and confidence required of close working employees
- 4) Undermine an immediate superior's discipline over the employee



# Pickering Balancing Test

► Examples:

*Munroe v. Central Bucks S.D.*, 805 F. 3d 454 (3d Cir. 2015)

*DeRitis v. McGarrigle*, 861 F. 3d 444 (3d Cir. 2017)

*Carr v. Commonwealth of PA*, 380 M.D. (Pa. Cmwlth. 2017) (Allocatur sought)

# Protected Concerted Activity Under the PERA

- Section 1201 (a) (1) prohibits employer from interfering, restraining or coercing employees in the exercise of their rights under Article IV
- Seeking mutual aid & protection, sharing workplace grievances & complaints and seeking to improve working conditions is protected activity under Article IV
- Employers cannot have broad policy prohibiting employee private use of social media
- Employees may use social media to:
  - Discuss/complain about terms & conditions of employment (wages, hours, benefits, etc.)
  - Advocate on behalf of other employees
  - Seek to organize a union



# Protected Concerted Activity Under the PERA

In reviewing employer policies, the PLRB will weigh the Employer's interest in controlling its operation and reputation against the employees' rights under the PERA to address workplace grievances, working conditions, controversial matters affecting employees or the public interest in transparency in public employer operations.

▶ PLRB Decisions:

- *Teamsters Local 773 v. Monroe County* (PERA-C-14-110-E, 2016)



# Off-duty Conduct Impacting One's Employment

## Analysis of Nexus

What exactly did they communicate? Did they identify themselves as a commonwealth employee?

Connection between off-duty misconduct & the injurious effect on the business must be **reasonable & discernible**

Discipline for off-duty misconduct can be defended by establishing the conduct's "**relevance or notoriety**"

Public, client and/or community reaction

Does conduct involve the use of commonwealth property or resources?





Should I put my Commonwealth job on my profile?



Do I speak for my agency? (Disclaimer)



Disclosure of Confidential or Work-related Information



Postings that show illegal activity/activity inconsistent with Commonwealth employment



Using Social Media in support of political activity

# Other Considerations

Questions?

