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Employee Free Speech Rights

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As the United States Supreme Court has observed, employees do not shed their First Amendment rights at the schoolhouse gate. Nevertheless, when employees' communications are work related, school employers may exercise a high degree of control. Whether the First Amendment protects employees' work and personal expression depends primarily on the capacity in which the employee is speaking. When an employee's speech is protected by the First Amendment, a public employer (including a public school district) may not retaliate against the employee due to the speech. On the other hand, when an employee's speech does not have First Amendment protection, the employee may receive a reprimand, change of assignment, or even dismissal as a result of the speech, in accordance with other law and policy.

Work-related speech: A public employer may regulate employee speech that an employee does in the course of his or her job. In the words of the Supreme Court, "Official communications have official consequences." *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). Consequently, when an employee speaks as a school representative, personal free speech rights are not implicated.

In determining whether speech is work-related, factors include

- the scope of the employee's job responsibilities as indicated in policies or job descriptions created by the employer,
- any statutory authority which assigns particular job responsibilities to the employee,
- whether speech was directed within the employee's chain of command,
- as well as evidence that the employee did or did not engage in certain activity as a result of his or her job, regardless of formal responsibility or authority.

Van Deelen v. Cain, 628 F. App'x 891 (5th Cir. 2015) (per curiam) (upholding termination of teacher who complained multiple times about student conduct before being fired for use of excessive physical force).

For example, relying on the Supreme Court's decision in *Garcetti v. Ceballos*, the Fifth Circuit determined that a Dallas athletic director was not entitled to free speech protection after he sent an internal memo about athletic funds because the memo was sent in the course of his employment. *Williams v. Dallas Indep. Sch. Dist.*, 480 F. 3d 689 (5th Cir. 2007) (per curiam).

However, for speech to fall within the control of a public employer, the speech must arise directly from the daily, official duties of the speaker. Concluding that any employee's speech is not protected merely because it concerns facts that the employee happened to learn while at work would severely undercut First Amendment rights. The Fifth Circuit has noted that in many public employee First Amendment cases there is less tolerance for restriction on the speech of a lower level employee (like a technician), as opposed to someone in a position of trust and confidence (like an administrator). *McKay v. Dallas Indep. Sch. Dist.*, Civil Action No. 3:06-CV-2325-O, 2009 WL 530581 (N.D. Tex. Mar. 3, 2009) (denying summary judgment on First Amendment retaliation claim by community liaison employee who reported alleged racial segregation in school).

Classroom instruction: What a teacher says in the course of instruction is work-related speech, subject to the school district's direction. Instruction is not the teacher's personal expression, regardless of the degree of public concern surrounding the topic and regardless of whether the instruction is required curriculum or spontaneous conversation. *See, e.g., Melnyk v. Teaneck Bd. of Educ.*, Civ. Action No. 16-0188 (D.N.J. Nov. 22, 2016) (upholding reprimand of creative writing teacher who spontaneously showed students photograph of individuals in black face during class discussion). Schools have broad discretion in curriculum and teaching methodologies and may regulate classroom instruction for legitimate pedagogical purposes. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). A public school classroom is not open for public discourse, and therefore is reserved for its intended purpose of imparting relevant instruction. *See, e.g., Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991) (concluding that First Amendment did not prevent reprimand of high school government teacher who complained to class about how discipline was enforced at school).

Non-work related speech on public concern: If an employee's expression is not part of the employee's job duties, but relates to a matter of public concern, a public employer must balance the employee's right to free speech with the employer's interest in maintaining the efficiency of its operations. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). Whether speech is a matter of public concern should be determined by the content, form, and context of a given statement. *Connick v. Myers*, 461 U.S. 138 (1983). The most famous example comes from the 1968 Supreme Court case *Pickering v. Board of Education of Township High School District 205*, in which a teacher successfully challenged his dismissal after he wrote a letter to the newspaper criticizing the school board.

Workplace grievances: Interestingly, internal workplace conflict is not considered a matter of public concern, even if the workplace is a public entity, where theoretically all business is of some interest to the public. When an employee expresses dissatisfaction with how his public employer operates, the speech is generally considered a personal matter and not one of public concern, even if the information is shared publicly. "The right of a public employee under the Petition Clause is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 399 (2011). Consequently, most workplace complaints and grievances are not protected by the First

Amendment. *See, e.g., Compton v. Port Arthur Indep. Sch. Dist.*, NO. 09–15–00321–CV, 2017 WL 3081092 (Tex. App.—Beaumont July 20, 2017) (mem. op.) (determining that speech language pathologist's complaint about location of printer related to her job duties and was not protected speech, even though student privacy is potentially a public concern). State law and local school district policy, however, prevent retaliation against employees who file grievances through the appropriate chain of command. Tex. Educ. Code § 11.1513(i); Tex. Gov't Code § 617.005. See TASB Policy DGBA.

Personal matters: If the speech involves a matter that is of private, not public, interest, the employee will not be entitled to First Amendment protection. *Connick v. Myers*, 461 U.S. 138 (1983). Generally, a school district has little reason to regulate an employee's personal expression if the communication is strictly private, does not violate state or federal law, and does not interfere with the employee's ability to effectively perform his or her job. However, when an employee communicates publicly—such as posting an editorial comment on a newspaper's web page defending disciplinary action against a student—the district may have a legitimate interest in the employee's activities.

Most school districts understand that employees are entitled to some privacy regarding their personal lives. Occasionally, however, private communications or conduct will become known in the community and threaten the employee's effectiveness in the workplace. The commissioner of education has long recognized that educators are role models for students. *See, e.g., Moten v. Dallas Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 131-R2-399 (May 13, 1999) (upholding termination where teacher was convicted of aggravated assault of his spouse); *Morris v. Carthage Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 263-R2-495 (Jan. 7, 1997) (upholding termination where teacher admitted to shoplifting, although no criminal charges were filed). Similarly, courts have held that the position of teacher, by its very nature, requires a degree of public trust not found in many other positions of public employment. *See, e.g., Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185 (2d Cir. 2003) (upholding termination of teacher based on his association with the North American Man/Boy Love Association). Each situation must be evaluated based on its own circumstances. The key question for consideration is whether the school district would be reasonable in punishing an employee for non-work related, private expression, which often depends on whether and how significantly the employee's work has been impaired by the personal expression. *See, e.g., Esparza v. Edinburg Consol. Indep. Sch. Dist*., Tex. Comm'r of Educ. Decision No. 017-R2-01-2017 (Mar. 17, 2017) (upholding contract termination of campus principal whose private nude photo was hacked and shared publicly based on the school board's determination that the publicity surrounding the photo diminished the principal's ability to perform her job).

Social media posts: School districts often ask if employees are subject to discipline for their social media posts. TASB Policy Service's base versions of policy DH(LOCAL) set out the general rule that employees' use of electronic media is subject to the same professional standards as communications by employees through other means. TASB HR Services' sample Model

Employee Handbook further states that an employee is responsible for the content on any social network site the employee maintains and for choosing privacy settings appropriate to the content. Moreover, employees must comply with federal and state law, local policy, and the Code of Ethics and Standard Practices for Texas Educators, regardless of whether the employee is using private or public equipment.

As with other communications, whether an employee's use of social media is subject to discipline depends on the capacity of the employee and the content of the posts. If an employee makes social media posts in the course of his or her employment, the district can control the message and can discipline the employee, as appropriate. On the other hand, if posts are unrelated to an employee's job, the district must determine if the posts were spoken by the employee as a citizen on a matter of public concern. If so, the district must apply the *Pickering* balancing test to determine if the district's governmental interests outweigh the employee's interest in the speech. If the district's interests do outweigh the employee's interest, then the district may discipline the employee. The district may also discipline the employee if the matter is not of public concern, and the district has a rational basis for imposing the discipline.

Texas school districts are required to adopt a written policy concerning employees' use of electronic media with students. The policy must include provisions designed to prevent improper electronic communications between school employees and students and must allow a school employee to elect not to disclose to students a personal telephone number or e-mail address. The policy must also include information about how an employee should notify appropriate local administrators when a student engages in improper communications with the employee. Tex. Educ. Code §38.027. For more information about employees' use of social media and other electronic communications with students, see TASB Legal Services' article School District Employees' Use of Social Media and Electronic Communications with Students.

Political speech away from work: An employee expressing personal political views away from the workplace has free speech protection, as most expression in the area of politics involves matters of public concern. An employee's job should not be affected by off-duty political speech unless the employee's right to expression is outweighed by the school's legitimate interest in orderly operations. This free speech protection means that employees can participate fully in the political process as citizens, using their free time and their own resources. For example, if an employee weighs in on the merits of a candidate for the state legislature, the employee is engaging in political speech on a matter of public concern. The district would have to express a compelling governmental interest that outweighs the person's right to speak before the district could take action against the employee due to the speech. *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016).

Political speech at work: State laws prohibit the use of public funds for *electioneering* and *political advertising.* Tex. Educ. Code § 11.169; Tex. Elec. Code § 255.003. In addition, state law prohibits *lobbying* through the use of state funds. Tex. Gov't Code § 556.0055(a). The Texas Ethics Commission, which interprets campaign finance laws, has adopted a broad understanding of

what constitutes a use of public funds. This can include the use of school employee time; equipment such as computers, printers, and copiers; materials such as paper; facilities; and more. As a result, school districts prohibit the use of employee work time and school district resources for campaigning, and many limit other political advocacy at work as well.

Religious speech at work: Employees' statements in their official capacity are attributed to the school district, and consequently, employees are not at liberty to express their personal religious beliefs in a way that violates the constitutional prohibition on an establishment of religion. *See, e.g., Doe ex rel. Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding that teachers can neither participate in student-initiated prayer nor supervise students in prayer, because participation improperly entangles state representatives in religion and serves as a signal of state endorsement that would violate the Establishment Clause). Whether an employee's religious expression can be attributed to the school district is a complex question that often hinges on the context of the expression.

Religious expression in the classroom: Prior to the *Kennedy* case, below, federal circuit courts in multiple cases upheld the authority of public school employers to limit teachers' religious expression in the classroom. *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011) (finding no free exercise violation where teacher was told to take down banners in the classroom that read "In God We Trust," "God Bless America," and "God Shed His Grace on Thee" when they served no pedagogical purpose); *see also Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (holding that school district could require teacher to stop reading the Bible silently and displaying religious items in his classroom).

Religious expression after a football game: In *Kennedy v. Bremerton School District*, the U. S. Supreme Court applied a *Pickering*-based test and determined that a Washington school district violated an assistant football coach's First Amendment rights to free exercise of religion and free speech when he was put on administrative leave after he refused to stop kneeling to pray on the 50-yard line immediately after football games. The Court emphasized that Kennedy's prayers, which the Court characterized as private, personal expressions of gratitude, took place when his students were otherwise occupied and "when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415 (2022).

A court applying *Pickering* after *Kennedy* might find that a school district's interest in regulating classroom instruction outweighs a teacher's right to religious expression, at least while the teacher is speaking in a more regulated environment than the aftermath of a high school football game. On the other hand, personal religious expression or observance may constitute protected free exercise of religion if students are not a captive audience or coerced to participate. For more information, see TASB Legal Services' FAQ Employee Religious Expression.

Personal expression in the workplace: A delicate balance is required when employees seek to share personal views at work, but not as school representatives. While First Amendment protection most often attaches to speech away from the workplace, the First Amendment may also protect some workplace speech that occurs when the public employer has created limited windows of opportunity for free expression within the workplace. Such opportunities may arise when an employee has free time at work (like a lunch break) or a free space for expression (like decorations inside a cubicle), and circumstances make it clear that the employee is expressing personal, not district, views. Nevertheless, while a district employee is at work, whether in an instructional, administrative, or auxiliary capacity, the employee's speech is subject to the regulation of the school district.

School employers may adopt viewpoint-neutral regulations on employee dress (like restricting messages on t-shirts and buttons), use of school communication systems (like prohibiting personalized email tags), and classroom or office decorations (like posters and banners). Most school employers recognize that limited, non-disruptive, and clearly personal expression (like bumper stickers on employees' cars) does not interfere with school operations. However, the school district can step in if an employee goes too far. For example, the Ninth Circuit ruled that a school district had not violated a math teacher's free speech rights by requiring him to remove signage with religious and patriotic slogans from his classroom. *Johnson v. Poway Unified Sch. Dist*., 658 F.3d 954 (9th Cir. 2011). *See also Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (declining to conclude that Spanish teacher's classroom decorations with religious and historical content were protected personal expression).

Key factors include whether: the employee's speech involves a matter of public concern, the school has a legitimate interest in regulating the speech, and the school has applied its regulation in a reasonable, viewpoint-neutral manner. Ideally, administrative regulations will direct employees' choices about common issues like personal dress, decorations, and online communications in the workplace with reasonable, viewpoint-neutral guidance before situations arise.

Participation in labor organizations: Employees' participation in labor organizations varies based on local laws and practices. Remember that the First Amendment protects employees' freedom of association; however, unless a local provision specifies otherwise, schools are not required to grant employees special opportunities (like release time) to discuss organization business. If meeting places or means of communication (like email or school mailboxes) are open for employees' communication about non-work matters, then meetings and communications about organization business should be permitted on an equal basis. *See Communications Workers of Am. v. Ector County Hosp. Dist.*, 467 F.3d 427 (5th Cir. 2006) (en banc) (upholding requirement to remove union badge based on hospital policy of non-adornment).

Employee Free Speech Rights

Employee's speech relates to internal affairs of government employer, including employee's own job	If only "private concern," balance will weigh in favor of legitimate government operational need—no First Amendment protection.	*Connick v. Myers*, 461 U.S. 138 (1983).
Employee's speech is in course and scope of employment, even if on matter of public concern	When government employer is in control of speech, employee lacks First Amendment protection.	*Garcetti v. Ceballos*, 547 U.S. 410 (2006).
Employee's speech is not directed by the government employer and is on a matter of public concern	Employee will have First Amendment protection unless the government's interest in controlling the speech outweighs the public's interest.	*Connick v. Myers*, 461 U.S. 138 (1983). *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).
Employee's speech is not directed by the government employer and is not on a matter of public concern	Employee will not have First Amendment protection, and employee is subject to discipline on a rational basis.	*Connick v. Myers*, 461 U.S. 138 (1983). *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).
Employee grievance regards employee's own employment	No First Amendment protection. State law requires district to have grievance process, and local policy says no retaliation.	*Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011). Tex. Educ. Code § 11.1513(i); Tex. Gov't Code § 617.005. TASB Policy DGBA.
Employee grievance does not involve own employment and is a matter of public concern	Employee will have First Amendment protection.	*Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011).

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