PRESENTED AT

School Law Conference

February 22-23, 2018
Austin, Texas

What Happens In Vegas Stays In Vegas?

Presented By
S. Anthony Safi
Giana Ortiz

Author Contact Information:
Giana Ortiz
The Ortiz Law Firm
Arlington, Texas 76013

gortiz@ortizlawtx.com
817-861-7984

In today's world, our principles around speech, morality, and ethics are shifting and seem to be more polarizing than ever before. And the use of social media including Facebook, Twitter, and Snapchat have given the entire world a glimpse into the private lives of individuals. When those individuals are teachers, when is an employer's obligation triggered? And when the individuals are students, when is the school district bound to act?

This Article examines caselaw and board policy around some areas of lawful teacher and student conduct which has been or may be considered "immoral," or "unseemly," but not unlawful.

1. Texas Teachers and Freedom of Speech.

In the seminal case on teacher speech, *Pickering v. Board of Education*, 391 U.S. 563 (1968), the U.S. Supreme Court held that in the absence of proof of false statements knowingly or recklessly made by the teacher, his right to speak on issues of public importance could not furnish the basis for his dismissal, and that under the circumstances of the instant case, his dismissal violated his constitutional right to free speech. Here, the teacher submitted a letter to the editor of the local paper in response to a series of articles in the same paper supporting the passage of a tax increase made to build new schools. In his letter, Pickering attacked the school board's handling of the bond issue and the allocation of funds in the bond as between educational and athletic purposes. The letter further criticized the superintendent for attempting to prevent teachers from opposing the bond. The teacher was fired for writing the letter and, in particular, for publishing false and unjustifiably impugning the motives, honesty, and integrity of the board which was disruptive of faculty discipline.

Claiming First Amendment protection, the teacher appealed his termination to the courts and the Illinois courts rejected Pickering's claim. The U.S. Supreme Court held that where, as here, the public employee shows (1) he suffered an adverse employment action; (2) his speech dealt with a matter of public concern; (3) his interest in his speech outweighs the government's interest in efficiency; and (4) his speech led to the adverse employment action, then such speech is entitled to constitutional protection. In this case, Pickering's speech was protected.

In *Salge v. Edna Independent School District*, 411 F.3d 178 (5th Cir. 2005), the Fifth Circuit extended this protection to a school secretary who alleged she was fired for communicating with the local newspaper. In *Salge*, the long-time school secretary happened to answer the phone when the newspaper called the school to learn more about a high school principal's retirement. Although her statements to the paper were disputed (as to whether she shared that the principal's contract had been "nonrenewed" or "not

extended"), she claimed that those statements ultimately led to her termination. The U.S. District Court in the Southern District of Texas granted the secretary's motion for summary judgment on the issue of First Amendment retaliation and the district appealed. The court held that under either version of what was shared with the reporter, the secretary's speech involved a matter of public concern and that the district had failed to show sufficient disruption to the working environment to defeat her claim.

In considering whether the speech is a matter of public concern, the Fifth Circuit considers the content, context, and form of the speech. In *Wetherbe v. Texas Tech University System*, 699 Fed. Appx. 297 (5th Cir. 2017), the court recently applied these factors to hold that while a professor's speech on his own tenure may not be a matter of public concern, the professor's speech related to the tenure process and effect generally was of public concern. The Fifth Circuit noted that the fact that a newspaper published the professor's statements weighed in favor of finding that the speech was made against a backdrop of ongoing public conversation about the issue, which indicated public concern.

Where there is a factual dispute as to what the speech was, how it was delivered, and the reaction of the listener, the Fifth Circuit has stated that a deferential approach where the decision to terminate was formed after an objectively reasonable investigation into the contents of the speech even where the ultimate decision to terminate the employee was wrong. In *Cutler v. Stephen F. Austin State University*, 767 F.3d 462 (5th Cir. 2014), the Fifth Circuit examined the reasonableness of the employer's conduct in terminating the employee after the employee told the staffer of a local U.S. representative that the representative was a "fear monger." The district court denied the employer's motion for summary judgment on qualified immunity and the Fifth Circuit affirmed. The Fifth Circuit noted that the employer should have been on notice that terminating the employee on the basis of his speech would violate his First Amendment rights where, if the terminated employee's version of the conversations were credible, his speech was not within his job requirements, but rather citizen concerns. The employer should have known that the investigation conducted was inadequate, as no report was generated and a decision had been made to fire the employee before he was interviewed.

Where the speech is made in the course of official duties, however, that speech will not be entitled to protection. In *Garcetti v. Ceballos*, 547 U.S. 410 (U.S. 2006), a deputy district attorney reported inaccuracies in an affidavit supporting a search warrant to his supervisor, and recommended that the office refrain from prosecuting the case. The deputy claimed adverse employment action in retaliation to this inner-office speech. The U.S. Supreme Court held that the First Amendment did not protect the employee from discipline for speech made pursuant to his official duties.

Title search: What Happens in Vegas Stays in Vegas?

Also available as part of the eCourse
2018 School Law eConference

First appeared as part of the conference materials for the
33rd Annual School Law Conference session
"What Happens in Vegas?"