PRESENTED AT

40th Annual School Law Conference

February 12-13, 2025
Austin, Texas

Perspectives: When Employees Go Viral

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Perspectives: When Employees Go Viral

In today's digital world, the rapid spread of content on social media can throw public school employees into the spotlight, often with unintended and career-implicating consequences. Virality and viral incidents affect both public school employees and the districts that employ them. This paper consists of both perspectives. The first perspective, that of employee counsel, focuses on the constitutional rights and protections that employees are entitled to when they express themselves online. The second perspective, that from the perspective of district counsel, explores the operational and legal issues that arise for districts when employees go viral. By examining these two perspectives, the paper aims to provide a comprehensive understanding of the issues that arise when employees go viral.

When Employees Go Viral: From the Employee's Perspective

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The notion that school employees don't shed their constitutional rights at the schoolyard gate has been black-letter law since 1968 when the U.S. Supreme Court ruled that Marvin Pickering could not be fired for sending a letter to the editor of the local newspaper. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

Justice Oliver Wendall Holmes had earlier laid out a test for courts to use in determining whether speech is protected by the First Amendment, using his famous example of falsely shouting "fire" in a theatre: "The question is whether the words are used in such circumstances

and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent." *Schenk v. United States*, 249 U.S. 47, 52 (1919). The phrase, "clear and present danger" was given its modern meaning fifty years later when the court held that states could only restrict speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

The defense of free speech was furthered by a famous concurrence authored by Justice Louis Brandeis a few years later. He wrote, "Those who won our independence … believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords adequate protection against noxious doctrine; … that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927).

The difference between (protected) public speech and (unprotected) private speech has been clearly drawn for many years. The case of *Connick v. Myers*, 461 U.S. 138 (1983), made more famous by the well-known name of the son of the petitioner, Harry Connick, Jr., introduced recognition of that difference. Justice Byron "Whizzer" White, himself a person famous before he was appointed to the court with a history of accomplishments as a football player, wrote for the majority; the opinion includes a comprehensive outline of the granting of protections for free speech of public employees. In doing so, it built on earlier cases that spoke to the need of employers to maintain good working conditions in the workplace. "Prolonged retention of a disruptive and otherwise unsatisfactory employee can adversely affect discipline and morale in

Title search: Perspectives: When Employees Go Viral

First appeared as part of the conference materials for the
40th Annual School Law Conference session
"When Employees Go Viral"