



FIRST AMENDMENT ISSUES  
WITH PRIVATE SOCIAL  
MEDIA POSTS OF  
GOVERNMENT EMPLOYEES

## **Educators fired after posting about Charlie Kirk allege in lawsuits that their free speech rights were violated**

The posts were shared on their private social media accounts.

## ***A Broad Wave of Firings Followed Charlie Kirk's Assassination***

More than 145 people in a wide range of occupations have been fired or disciplined after they made statements about the assassination of Charlie Kirk.

## **Republican push for tips on Charlie Kirk posts drives firings of public workers**

Scores of public employees have been terminated, some at the behest of elected leaders.

# SCOPE OF PRESENTATION

Limited to situations where government employers becomes aware that an employee has posted something controversial to private social media account; usually become aware because of public backlash.

Presentation focuses on potential liability from any First Amendment retaliation claim from the disciplined/fired employee.

Practical Tips on real-time handling initial phases of a social media campaign

# OVERVIEW

- Examine First Amendment legal landscape
- Go over examples
- Go over some practical advice
- Prepare for litigation from disciplined employees
- Recommended patches to social media policies

# WHAT EMPLOYEE LITIGATION LOOKS LIKE

- Litigation over discipline/firing for employee speech will come as First Amendment retaliation claim under 42 U.S.C. § 1983.
- Retaliation claim elements:
  - 1) Plaintiff must prove that they engaged in activity protected by the First Amendment
  - 2) Plaintiff must prove that employer took “adverse action”
  - 3) Plaintiff must prove the protected speech was “substantial or motivating factor” in employer’s decision to take adverse employment action.



# WAYS TO FIND IF POST IS PROTECTED UNDER FIRST AMENDMENT

Is the post entitled to First Amendment protection?

1. **Is it the kind of speech that is categorically not entitled to First Amendment protection?**
2. Not protected under circumstances: three-part test under *Garcetti/Pickering*.

# SPEECH CATEGORICALLY NOT PROTECTED BY FIRST AMENDMENT

1. Obscenity
2. Defamation
3. Fighting Words
4. True threats
5. Incitement of imminent lawless action

# TRUE THREATS

“True threats” - **Serious** expressions conveying that a speaker means to commit an act of unlawful violence.

# SERIOUS V NON-SERIOUS THREATS

## Serious

 **Christopher Robbins**  
16 mins · 🌐

PSA!! Yo rt HEB MERCADO!!  
My homeboys cousin has covid19 and has licked every thing for past 2 days cause we paid him too😂😂😂😂....big difference is we told him not to be these fucking idiots who record and post online...YOU'VE BEEN WARNED!!!  
HEB on nogalitos next ;)

 **Christopher Robbins**  
23 hrs · 🌐

Lol..I did try to warn y'all but my homegirl changed my mind...mercado already is, nogalitos location next....



## Non-Serious

12:17 📶 LTE 🔋

 **Waylon Bailey**  
44 mins · 🌐

**SHARE SHARE SHARE ! ! ! !**  
**JUST IN: RAPIDES PARISH SHERIFFS OFFICE HAVE ISSUED THE ORDER, IF DEPUTIES COME INTO CONTACT WITH " THE INFECTED" SHOOT ON SIGHT....Lord have mercy on us all. #Covid9teen #weneedyoubradpitt**  
😞❌

👍 Like    💬 Comment    ➦ Share

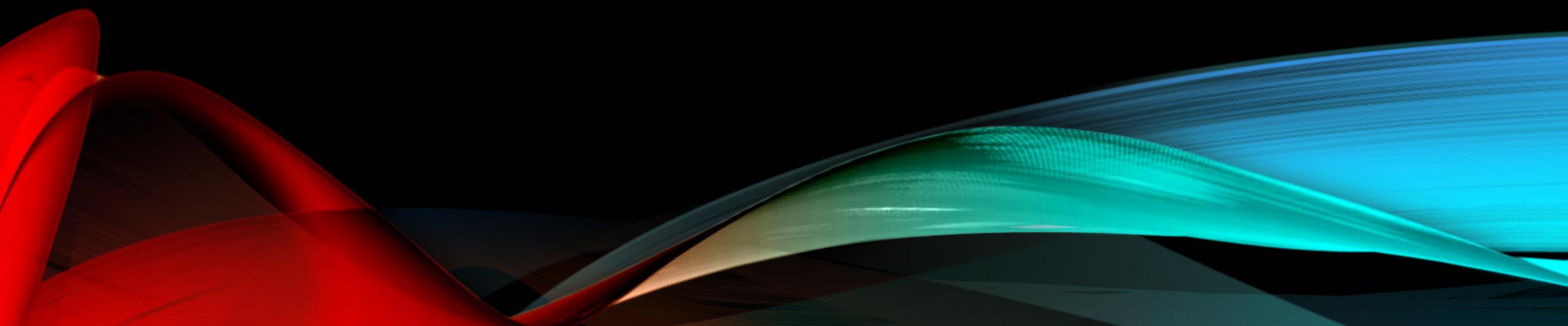
# WAYS TO FIND IF POST IS PROTECTED UNDER FIRST AMENDMENT

Is the post entitled to First Amendment protection?

1. Categorically not protected: post is true threat or other kind of unprotected speech.
2. **Not protected under circumstances: three-part test under *Garcetti/Pickering*.**

“The First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”

*Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (citing *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968))



# THREE-PART TEST TO DETERMINE IF SPEECH IS PROTECTED UNDER CIRCUMSTANCES

1) Did the employee (*Garrett*)

- A) speak as a citizen
- B) On a matter of public concern?

2) If yes, did defendant produce evidence of adverse impact on efficiency of operations?

3) If yes, *Pickering* balancing.

(a) the need for harmony in the workplace;

(b) whether the government's responsibilities require a close working relationship;

(c) the time, manner, and place of the speech;

(d) the context in which the dispute arose;

(e) the degree of public interest in the speech; and

(f) whether the speech impeded the employee's ability to perform his or her duties.

# STEP 1A: “SPEAKING AS A CITIZEN”

- Speaking in Official Capacity → not protected
- Not speaking in official capacity → possibly protected
- Tips:
  - Look employee’s “daily professional activities”; not job description
  - Does employee ID themselves on social media account?
- Note: Independent contractors are entitled to same First Amendment protections.

# STEP 1B: “ON MATTER OF PUBLIC CONCERN”

- Public Concern
  - speech fairly related to a matter of political, social, or other concern to the community; OR
  - Subject is of legitimate news interest
- Almost always will be about matter of public concern.
- Exception: Speech about intraoffice disputes.

# STEP 2: PRODUCE EVIDENCE OF DISRUPTION

- 8<sup>th</sup> Circuit: To trigger *Pickering* balancing, employer must, with specificity, demonstrate the speech at issue
  - created workplace disharmony;
  - impeded the plaintiff's performance; OR
  - Impaired working conditions.
- BUT: Don't have to wait for actual disruption; Courts give substantial weight to government employers' reasonable predictions of disruption.

# EASY CASES: NO EXTERNAL REACTION, EVIDENCE OF INTERNAL STRIFE

- *Palmer v. The County of Anoka*, 200 F.Supp.3d 842 (D. Minn. 2016)
  - Plaintiff: former spokesperson for Anoka County Attorney.
  - Facts: Plaintiff fired after making two posts to Facebook commenting on interaction between poverty, race, and police violence. No public outcry
- Court grants County's 12(b)(6) Motion to Dismiss. Why?
  - Spoke as citizen
  - On matter of public concern
- Evidence of Disruption
  - Alleged that sheriff complained
  - Looked at her job duties

# HARD CASES: EXTERNAL PRESSURE, MINIMAL INTERNAL STRIFE

*Melton v. City of Forrest City, Ark.*, 147 F.4<sup>th</sup> 896 (8th Cir. 2025)

White Fireman, working in majority-Black resident city, was fired after he made post to Facebook.



# MELTON: MAYOR'S PREDICTIONS OF DISRUPTION

- Mayor: “I’m concerned that this post will create a huge firestorm of controversy.”
  - Retired fire department supervisor told mayor he was upset.
  - Fire chief’s phone “blowing up” with angry calls.
  - Several police officers became upset.
  - Several city council members and citizens voiced concerns.
  - Seemingly racist post will affect public’s trust in fire department

# MELTON: 8<sup>TH</sup> CIRCUIT DECISION

8<sup>th</sup> Cir.: genuine issue of material fact of whether city presented sufficient evidence of disruption.

While courts give substantial weight to employers' predictions of disruption, only evidence of workplace disruption was vague and conclusory.

Evidence of no workplace disruption:

- Plaintiff able to carry out his duties;
- Fire department training went unaffected;
- No fire department employee refused to work with plaintiff.

# MELTON: “CONSTITUTIONALIZING A HECKLER’S VETO”

- Eighth Circuit: granting the city summary judgment based off the mayor’s vague and conclusory concerns [about the public reaction], without more, would run the risk of “constitutionalizing a heckler’s veto.”

# WHAT IS A “HECKLER’S VETO”?

Heckler’s Veto: A state actor’s act of stopping or preventing someone’s speech just to prevent or stop disruption of public order constitutes a content-based restriction on speech subject to strict scrutiny.

- Strict Scrutiny = Restriction must be narrowly tailored to be least-restrictive means available to serve compelling government interest
  - Compelling government interest at issue: keeping public order
  - Stopping the speech is not a narrowly tailored action to be the least restrictive means available
  - Other means available: protecting speaker, controlling crowd, etc.

# HOOK V. RAVE: PUBLIC OUTCRY NOT ENOUGH

- First opinion from a case where employee challenged legality of their discipline based on employee's social media post commenting on the assassination of Charlie Kirk.
- Facts: Professor placed on administrative leave after making post

## Post #1



# HOOK V. RAVE (CONT.)

- Professor deleted original post, and made second post →
- Professor sought TRO, court granted it. Why?
  - ALTHOUGH “hundreds of calls and messages” calling for Hook’s firing
  - No evidence of disruption

## Post #2

Apparently my frustration with the sudden onslaught of coverage concerning a guy shot today led to a post I now [sic] regret posting. I'm sure many folks fully understood my premise but the simple fact that some were offended, led me to remove the post. I extend this public apology to those who were offended. Om Shanti.

# EFFECT OF PUBLIC TRUST: *FENICO V. CITY OF PHILA.*

- Facts: 20 current and former city police officers fired or disciplined after news reporting uncovered 500+ controversial social media posts
- Posts are explicitly racist, Islamophobic, sexist, homophobic, transphobic, or xenophobic, or call for, or condone, extralegal violence against protestors, crime suspects, and others.
- Posts garner protestors, local leaders of Islamic, Hispanic, and Black communities meet with mayor's office.
- PD has some internal discussion on how posts affected department.



# EFFECT OF PUBLIC TRUST: *FENICO V. CITY OF PHILA.*

- E.D.P.A. grants city summary judgment. Why?
  - Although very little discussion about disruption within police department itself;
  - Evidence of disruption: reasonably likely that posts would jeopardize relationship of trust between police and communities they serve:
    - Leaders of several minority communities expressed concerns about posts;
    - Possible effects on officer's credibility;
  - Posts suggests that communities would not be policed fairly.



# WHAT'S THE BALANCE?

- “Where a Government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations. “ – *Locurto v. Giuliani*, 447 F.3d 159, 183 (2d Cir. 2006).

# IMPACT OF PUBLIC TRUST

## **Fenico**

- Police need public trust to do their jobs effectively:
  - Investigative reports
  - Eyewitness testimony
  - Work with community leaders
  - Credibility

## **Melton**

- Firefighters do not necessary need public trust to do their jobs effectively
  - Main function: fight fires

# REVIEW: EVIDENCE OF DISRUPTION

- Focus on evidence of disruption *internally*
  - Complaints about post from other employees;
  - Did post affect employee's job duties, as performed (not job description);
  - BUT if employee's job involves public contact, is it reasonably likely that post could cause some erosion of trust with community?

# PICKERING BALANCING

- If court finds sufficient evidence of disruption, then go to *Pickering* balancing
- Note: most circuits conduct the “disruption” analysis as part of *Pickering* balancing, 8<sup>th</sup> Cir. alone in requiring prima facie showing of disruption before getting to *Pickering* balancing.
  - If Court finds sufficient evidence of disruption, almost certainly *Pickering* balance will turn in government’s favor.

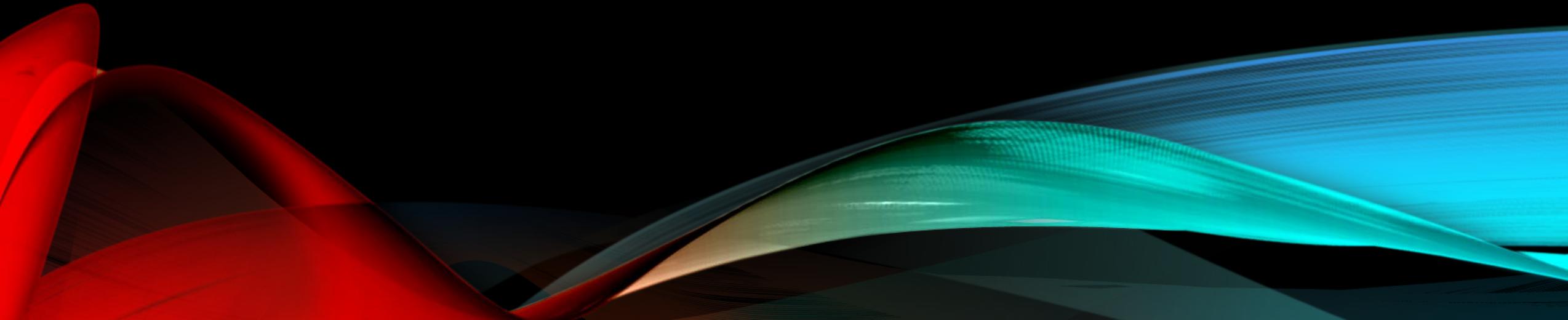
# PICKERING FACTORS CLOSELY RELATED TO DISRUPTION ANALYSIS

- Need for harmony in the workplace
- Whether government's responsibilities require a close working relationship when speech in question has caused or could cause relationship to deteriorate
- Whether the speech impeded the employee's ability to perform their duties

## Evidence:

- Info about functions of office and testimony about how trust is central to mission/function.
- info about how post caused office to expend extra time dedicated to addressing the post and reaction and how it affects office
- testimony from coworkers stating that the employee's speech created tension in the office and a loss of confidence in the employee who made the post.

# OTHER *PICKERING* FACTORS AND RELEVANT EVIDENCE



# TIME, PLACE, AND MANNER

Evidence: did employee identify themselves as an employee on social media account?

1. BUT – online campaigns often find person's employer from matching person's LinkedIn profile.

# CONTEXT IN WHICH DISPUTE AROSE

If the speech arose from “a personal dispute with [the] government employer,” it is entitled to less protection than if it arose from the employee's “purely academic interest” outside of work.

# DEGREE OF PUBLIC INTEREST IN THE SPEECH

This factor looks at whether the speech should receive heightened protection because it has some quality or perspective that gives it “special value” to the public.

Question: does employee’s speech just add to view of countless others? If yes, weighs in favor of employer.

# HYPOTHETICAL #1

Johnny Appleseed, an employee of the town of Apple, makes the following post to his private Facebook account while he is at home after work hours:

The mayor of Apple is a total bozo. I dislike him.

No one comments, no one calls city hall to complain. But the mayor dislikes the post and fires Mr. Appleseed.

## HYPOTHETICAL #2

Johnny Appleseed, a teacher at Apple High School, makes the following post to his private Facebook account while he is at home after work hours:

The parents of my students are total morons!!! One kid's parent, Mr. Shamrock Shake, was at that rally to help flood victims. What a waste of time! Those people were dumb to live in a flood zone!

Most of Mr. Appleseed's students lost their homes in the flood. A wave of calls comes into the school from the students' parents and others demanding that Mr. Appleseed be fired, citing a lack of trust in him to teach their children.

# HYPOTHETICAL #3

Mayor McCheese, mayor of the town of Apple, is assassinated by Grimace. Shortly after the news breaks, Johnny Appleseed, a community liaison employed by the town of Apple, makes the following post to his private Facebook account while at home during off-hours:

I'm glad that bozo Mayor McCheese is dead. I really disliked him.

Thousands of calls flood into city hall demanding that Mr. Appleseed be fired.

# HANDLING THE START OF A SOCIAL MEDIA CAMPAIGN

- Calm down, take a step back
- Put politics to the side
- Determine if posts puts anyone in immediate danger
  - “true threats”
- Set up advanced security measures, if necessary
- Push back (internally) on reacting immediately
- Start documenting evidence of disruption
  - Log of calls, emails, social media posts, etc. received
  - Start internal investigation procedures
  - Communicate to all employees about EAP, contact person to ask questions/voice concerns

# CONSIDERATIONS

- Determine whether the post is real and that employee actually posted it.
- Who reported the post?
- How bad is the backlash?
- When and where did employee make post?
- Does the post address a matter of public concern?
- Where does the employee work?
- What are the employees actual work duties?
- Does the employee's job involve contact with public?
- Is it reasonably likely that the post will cause internal strife? Is it already happening?
- Is it reasonably likely that the post will erode public trust in a specific government function? How important is public trust in that function?

# THINGS THAT DON'T MATTER

**Employee's social media account was set to  
private/restricted**

# PATCHING SOCIAL MEDIA POLICIES

- Be clear as possible that employee's private social media activities can result in discipline or termination of employment if it causes disruption to government functions.
- Just because an employee's social media account is set to private doesn't mean that the speech is private.



QUESTIONS?