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Teacher Speech Inside and Outside of Classrooms in the United States: Understanding the First Amendment

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Abstract: Concerns often arise about the First Amendment rights of public school educators in the United States both inside and outside of their classrooms. As such, after setting the legal context, we analyze teachers' free speech rights in a variety of settings. In order to do so, we discuss illustrative cases analyzing the legal landscape of teachers' free expressions rights in U.S. public schools. The purpose of this article is to provide a brief overview highlighting Supreme Court cases and selected opinions from lower courts involving teacher speech impact the expressive rights of educators in public schools rather than serve as a comprehensive analysis of all such speech cases.

Keywords: employee speech; expression; First Amendment; education

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> "I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost."
>
> (Justice Hugo Black in *Wieman v. Updegraff* 1952, p. 193)

1. Introduction

Questions frequently arise in the United States about the First Amendment free speech rights of public school educators both inside and outside of their classrooms. Accordingly, after describing the legal context, we analyze teachers' free speech rights in a variety of contexts, including curriculum-related, political speech, offensive language, preferred pronouns, classroom decorations, school-sponsored activities, and speech made outside of classrooms.

In doing so, we examine illustrative cases to discuss the legal landscape of teachers' free expression rights in U.S. public schools. The purpose of this article is to provide a brief overview highlighting Supreme Court cases and selected lower court opinions involving teacher speech that impact educators in public schools rather than to serve as a comprehensive analysis of all educator speech cases.[1]

2. Legal Context: U.S. Constitution and Supreme Court

According to the First Amendment of the U.S. Constitution (1791), "Congress shall make no law … abridging the freedom of speech … ." With regard to educators' free speech rights, while "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[2] there

[1] When discussing federal district court and circuit court cases, it is important to note that those decisions are only directly applicable to teachers who work in those jurisdictions. Additionally, because each dispute involving teachers' expressive rights have their own set of facts, they should be evaluated on a case-by-case basis.

[2] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). The Court added that "this has been the unmistakable holding of this Court for almost 50 years".

are limits to their rights to free expression in educational settings (Hutchens 2008/2009). To be certain, trying to strike the balance as to the limits of permissible educator speech in public schools is complicated. In fact, educators recently have been under scrutiny for leading class discussions on racial injustice (Schwartz 2021) while others were dismissed for posting offensive commentaries on the Internet about immigration (Zaveri 2019) or race (Will 2020).

The U.S. Supreme Court has recognized that public employees—including public school teachers—have First Amendment rights to speak about matters of public concern (*Pickering v. Bd. of Educ.* 1968). However, the Court acknowledged that these rights are not absolute. In *Pickering*, the Court found that a public school teacher in Illinois had a First Amendment right to write a letter that criticized the school board for spending too much on the athletic program to the editor in the local newspaper. When examining this case, the Court applied a balancing test, weighing teachers' interests in expressing their views on public matters against the interests of school boards in providing efficient educational programs. School boards generally prevail if teachers' speech on matters of public concern jeopardizes any of the following: (1) classroom performance, (2) relationships with their immediate supervisors or coworkers, or (3) the efficiency and effectiveness of school operations. These three considerations have become known as the *Pickering* balancing test. In discussing the balancing test, Justice Thurgood Marshall noted that:

The challenge in case involving educator expressive rights 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 employers (1734–35). Indeed, society's interest in hearing from public employees about matters of importance is central to *Pickering*. Subsequent court opinions have grappled with what issues might be considered matters of public concern.

Eleven years after *Pickering*, the U.S. Supreme Court again held in favor of an educator's right to free expression. The Justices decided that a teacher in Mississippi was exercising her free-speech rights when she spoke about a matter of public concern with her principal rather than in public (*Givhan v. Western Line Consol. Sch. Dist.* 1979). The dispute arose after the teacher made critical remarks in a private conversation with her principal about a school policy, which she believed would further racially segregate the students in her district.

After the principal recommended that the teacher not be rehired, she filed suit alleging that school officials violated her First Amendment rights, among other issues. Applying the *Pickering* balancing test, the Supreme Court unanimously reasoned that it applies to teachers who express themselves during private conversations with their supervisors. On remand as *Ayers v. Western Line Consol. Sch. Dist.*, the Fifth Circuit affirmed that a motivating factor behind the board's choosing not to rehire the teacher was her exercise of protected speech in criticizing school officials. Her rights were violated because the board would not have terminated her contract but for her having spoken out.

Only four years later, the U.S. Supreme Court delivered an opinion indicating that public employee expression that involves a private grievance is not protected under the First Amendment (*Connick v. Myers* 1983). The employee in this case, an assistant district attorney in Louisiana, had distributed a questionnaire around the office after she learned that she was being transferred to another unit. On the questionnaire, she asked her coworkers for their opinions on the transfer policy, office morale, and their confidence about their supervisors. When her supervisor learned about the questionnaire, the employee was fired for insubordination, leading her to file suit alleging that her employer violated her rights to free speech under the First Amendment.

Entering a judgment in favor of the employer, the *Connick* Court rejected the attorney's claim because it did not agree that her speech addressed a matter of public concern. Writing for the majority, Justice Byron White distinguished this case from *Givhan* where the issue of race was "a matter inherently of public concern" (159). Once again, the Court applied a

two-part test. First, the Court remarked that the judiciary must consider whether the speech involved an issue of public concern by examining its content and form along with the context within which it was expressed. Second, the Justices pointed out that if speech does deal with a matter of public concern, the judiciary must balance employees' interests as citizens speaking out on matters of public concern against those of employers in promoting effective and efficient public services.

Lower courts have often relied on *Connick* in broadly interpreting what falls under the category of unprotected private grievances. For example, when determining what might constitute a private grievance, courts have agreed that employees discussing salaries during a break (*Bouma v. Trent* 2010) or commenting about class size (*Cliff v. Bd. of Sch. Comm'rs* 1995) are unprotected private grievances.

In *Waters v. Churchill* (1994), a case from Illinois, the Supreme Court reviewed a dispute involving a nurse who criticized internal policies at her public hospital. A plurality of Justices agreed that governmental employees who openly dispute internal policies not dealing with matters of public concern may lack constitutional protection.

The Supreme Court further restricted the free speech rights of public employees in 2006 in *Garcetti v. Ceballos*, where the plaintiff (*Garcetti*) was a deputy district attorney in California. Garcetti expressed concerns about a supervisor with regard to a disagreement over a memorandum the former wrote claiming a police officer lied in an affidavit to secure a warrant and which concluded that the affidavit made serious misrepresentations amounting to governmental misconduct. The U.S. Supreme Court determined that because the district attorney's expression was directly related to his official job duties, it was not protected under the First Amendment.

Restricting the district attorney's speech in *Garcetti*, which "owe[d] its existence to a public employee's professional responsibilities," (421) did not, in the view of the Justices, violate the employee's rights as a private citizen. There were three separate dissents in this case. Justice Souter's dissent suggested another approach that would protect employees who were speaking out on issues of "unusual importance" (435). He thought that if the issue was unusually important, it could proceed to the balancing stage—even if the speech was related to the employee's official job duties. This approach was not adopted by the majority.

Lower courts have applied *Garcetti* to teacher expression both inside and outside of classrooms. It is worth keeping in mind that in addition to *Garcetti*, courts have relied on the Supreme Court's 1988 judgment in the *Hazelwood v. Kuhlmeier* decision in teacher classroom speech cases, which involved a dispute over a student newspaper published as part of a journalism course. Although the litigation did not involve teacher expression, it is used to regulate the content of school-sponsored speech in classrooms as long as the limitations are reasonably related to legitimate pedagogical concerns. *Hazelwood* underscored that educational institutions have control of curricula and courts have subsequently applied *Hazelwood* to teacher speech occurring inside the classroom.

In 2014, the U.S. Supreme Court clarified *Garcetti* standard to some extent. In *Lane v. Franks*, the Court stressed that "citizens do not surrender their First Amendment rights by accepting public employment" (2014, 2374). In *Lane*, the Court ruled in favor of a public employee who had been fired after testifying about a former colleague's misconduct. The Court distinguished this speech, highlighting that it was not made "in the course of his ordinary job responsibilities" but was made by testifying. In this unanimous opinion, Justice Sotomayor rejected the lower court's decision that Lane had been speaking as an employee. According to the Court, the employee's speech was a "quintessential example of speech as a citizen" (2379). As a result, the speech was considered citizen speech, which was also about a matter of public concern. In *Lane*, then, the Court distinguished between expression related to information acquired on the job—which may be protected if it is about a matter of public concern—from expression made pursuant to ordinary job responsibilities—which is unprotected (McCarthy et al. 2019).

To illustrate, a case from the Third Circuit highlights how *Lane* has been applied to speech beyond compelled testimony (*Dougherty v. Sch. Dist. of Phila.* 2014). In the underlying dispute, a school business officer in Philadelphia was fired after revealing to newspaper reporters and government officials that the superintendent had engaged in unethical behavior. In his suit, the employee alleged a free speech violation under the First Amendment. The court held that the employee's speech concerned his employment duties but was not made in the scope of his ordinary duties. The court lauded the employee's whistleblowing as "the archetype of speech deserving the highest rung of First Amendment protection" (991). Consequently, when analyzing the speech using the *Pickering* balancing test, the court determined the disruption to the school operations caused by the employee's leaks to the press did not outweigh the "substantial public interest in exposing governmental misconduct" (992).

3. Teacher Speech Related to School Curricula

Federal control as it relates to school curricula has been limited; control of education is a right that is generally reserved for the states. States often delegate this authority over curricula to local school boards. Consequently, local boards have the authority to control curricula, and PK–12 public school teachers must adhere to these guidelines. Despite these guidelines, many questions emerge. When questions do arise, courts are sometimes hesitant to interfere with the authority of a local board to control the school curriculum. As the Fourth Circuit recently indicated, "[s]chool authorities, not the courts, are charged with the responsibility of deciding what speech is appropriate in the classroom" (*Wood v. Arnold* 2019). In light of this statement, the following summaries examine disputes wherein state legislatures, parents, and school officials have challenged curricula or teachers' approach to curricula.

3.1. Challenges by state legislatures

Recent media attention highlights that state legislatures are concerned about classroom discussions relating to racism, sexism, and/or other forms of discrimination. Specifically, lawmakers in some states believe that these topics are too divisive in public schools and have therefore tried to pass legislation to limit classroom discussions of topics in these areas. In fact, as of August 2021, 15 states have introduced bills such as these, and in Idaho, Iowa, Oklahoma, and Tennessee, the legislatures passed these proposals into law (Schwartz 2021). Some argue that these laws would have a chilling effect on educators' ability to tackle important issues (Florido 2021). These proposed laws raise questions about the amount of leeway educators have in their classrooms with regard to curricular and other classroom activities. This debate also underscores how educators are often asked to balance the educational needs of a diverse entire student body while maintaining respect for individual rights (Nat'l Coalition Against School Censorship n.d.).

3.2. Challenges by parents

Parents often challenge educators' approaches to teaching or curricula. While parents have a constitutional right to direct the upbringing of their children (*Meyer v. Nebraska* 1923; *Pierce v. Society of Sisters* 1925), they do not have the right to dictate curricula, a situation that has created considerable litigation and tension in schools. To illustrate, widely read books such as *I Know Why the Caged Bird Sings* or *The Catcher in the Rye* have been challenged by parents seeking to have them removed from lesson plans or library shelves. Additionally, these controversies have led to litigation because attempts to remove curricular and/or library materials sometimes have constitutional implications (Fetter-Harrott et al. 2016). Likewise, parents have challenged school boards and individual educators about classroom discussions or activities related to sexuality and yoga (*Parker v. Hurley* 2008; *Sedlock v. Baird* 2015; Russo 2008).

In another recent case from Maryland, the Fourth Circuit (*Wood v. Arnold* 2019) affirmed a grant of summary judgment in favor of a school board, agreeing that educational

officials did not violate a student's free speech rights. The teacher presented materials about Islam during a world history class, to which the student and her parents objected. The court disagreed with the parents' argument that this was compelled speech because the student was only asked to write two words of the shahada as an academic exercise to demonstrate understanding of the lesson and did not require her to profess a faith other than her own.

3.3. Challenges by school officials

At times, school officials have questioned teachers about their curricular choices. In one illustrative case, a teacher in Ohio alleged that officials chose not to renew her contract based on curricular choices relating to her selections of books she used in class. The underlying disputes concerned the books that the teacher used for an assignment in her high school English classes; the teacher had her students examine books that were included on the American Library Association's "100 Most Frequently Challenged Books". The court held for the school officials explaining that the teacher's rights to free expression did not extend to in-class curricular speech in PK–12 schools. The Sixth Circuit reasoned that:

> In the light cast by *Garcetti*, it is clear that the First Amendment does not generally 'insulate' [a teacher] 'from employer discipline,'... even discipline prompted by her curricular and pedagogical choices and even if it otherwise appears... that the school administrators treated her shabbily. (*Evans-Marshall v. Board of Educ.* 2010, p. 340)

School officials also questioned a teacher's lesson on the Central Park Five in New York City, eventually leading to the nonrenewal of her contract (*Lee-Walker v. New York Dep't of Educ.* 2017). The dispute arose when an assistant principal told the teacher not to talk about an incident in which five African American teenage boys were wrongfully convicted of raping a white woman. The teacher was trying to demonstrate that there is sometimes a societal tendency to rush to judgment, but the assistant principal wanted her to deliver a more impartial lesson. After her contract was not renewed, the teacher unsuccessfully alleged retaliation stemming from her lesson. The Second Circuit affirmed the dismissal of the case in favor of the board, agreeing that "[t]he ultimate authority to determine what manner of speech in the classroom is inappropriate properly rests with the school board, rather than with the federal courts" (22–23). The court also noted that school personnel are best situated to ensure students are not exposed to material inappropriate to their developmental level.

More recently, a non-tenured public high school teacher who identified as a non-practicing Muslim of Egyptian descent presented a lesson on the terrorist attacks of 9/11/2001 that included "alternative views" on these attacks (*Ali v. Woodbridge Twp. Sch. Dist.* 2020). The lesson plan, which school officials had approved, required students to read certain online articles translated by the Middle Eastern Media Research Institute ("MEMRI"). The teacher posted links to these articles on a school-sponsored website so students could access them. One linked article was entitled, "Article in Saudi Daily: U.S. Planned, Carried Out 9/11 Attacks—But Blames Others for Them" (178).

The dispute arose when students alleged that the teacher made anti-Semitic remarks. In addition, another teacher at the school reported that she heard students who were enrolled his class questioning different historical accounts of the Holocaust and stating things such as "Hitler did not hate the Jews" (178). One student wrote in his paper in this other teacher's class that "Adolf Hitler... is looked at as a bad guy but in reality brought Germany out of its great depression", and included that "what they claim happened in the concentration camps did not really happen", and that "Jews... had a much easier and more enjoyable life in the camps" (178).

After word spread about these lessons, television reporters began to question the administration, leading officials to ask the teacher to remove the MEMRI links from the school's website. Within a few days of these events, officials terminated the teacher's employment, resulting in his unsuccessfully filing claims against the board, one of which

argued that administrators violated his rights to free speech and academic freedom under the First Amendment. The teacher also claimed that the links he posted that included alternative views of the 9/11 attack were protected by the First Amendment. The courts rejected this argument, commenting that in an earlier case from the Third Circuit, the opinion clarified that teachers do not have carte blanche to decide the content of their lessons or how those lesson might be presented.

The Third Circuit affirmed the grant of summary judgment in favor of the school board. The court agreed that the board's action was not a pretext for discrimination and did not violate the teacher's right to academic freedom where he permitted conspiracy-theorist and Hitler-apologist presentations in his class while encouraging students to develop these opinions, and he did not dispute that he presented sources containing conspiracy-theorist and Hitler-apologist views that appeared in students' work products.

4. Political Speech in Classrooms

In the highly charged political environment in the United States, politics might enter public school classrooms. Educators should understand that in light of *Garcetti* and *Hazelwood*, they need to tread carefully when discussing their own political views in class. In one illustrative case, the Seventh Circuit affirmed that a teacher in Indiana lacked a First Amendment right to say that she "honks for peace" when a student asked her whether she supported Iraq War protestors who assembled downtown each week in her community (*Mayer v. Monroe Cnty. Cmty. Sch. Corp.* 2007).

Upholding her school board's action in not renewing the teacher's contract, the court observed that the First Amendment does not allow teachers to advocate viewpoints to captive audiences or to depart from school-adopted curricula. Relying on *Garcetti*, the panel concluded that "the First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system" (479–80). According to the court:

> [T]he school system does not "regulate" teachers' speech as much as it hires that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high school teacher hired to explicate *Moby Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz (479).

Courts have recognized that PK–12 public school classrooms are captive audiences of impressionable minds and that teachers may not use their public positions to influence their students about political issues. While educators can discuss political and social issues in class, they must be careful not to advocate their opinions in front of their students.

5. Offensive Language in Classrooms

Other legal challenges have involved classroom speech that may not be specifically related to curricula. In a Louisiana case, officials fired a full-time substitute teacher after he used the n-word in an exchange with a student, who maintained that this word is racist when spoken by someone of a different race. The teacher claimed that his dismissal violated his First Amendment right to free speech. In an unpublished order, a federal trial court dismissed the teacher's claim, reasoning that he could be disciplined for this expression because it conflicted with school policy and created a substantial disruption in his classroom (*Brown v. Advocates for Academic Excellence in Educ.* 2018).

In another case involving a controversial classroom discussion originating in the Seventh Circuit held that the Chicago Board of Education could discipline a teacher for giving an "impromptu lesson on racial epithets" to his sixth-grade class (*Brown v. Chicago*

Bd. of Educ. 2016, p. 714). The board suspended the teacher after his principal overheard him trying to instruct his students not to use the n-word. The teacher had intercepted a note from a student that quoted a song that included this odious word. After he read the note, the teacher quickly stopped his grammar lesson to describe just how offensive the term is and why it should not be used. The principal charged the teacher with violating a school policy against "[u]sing verbally abusive language to or in front of students," suspending him for five days, an action the board upheld (715).

The teacher then sued, unsuccessfully arguing that the school board violated his First Amendment rights. The Seventh Circuit, while sympathizing with the teacher, described the incident as "a well-intentioned but poorly executed discussion of why such words are hurtful and must not be used" (714). Even so, based on *Garcetti* and Seventh Circuit precedent, the court agreed that the board did not violate the teacher's free speech rights. The court emphasized that because the teacher spoke in his official capacity, his suspension was constitutional, rejecting his claim that his use of the word in an educational manner in order to explain why it was hurtful was still not protected speech.

6. Free Speech and Preferred Pronouns

A limited number of recent challenges have involved classroom instructors arguing that educational officials violated their First Amendment speech rights when school policy required them to address transgender students by their preferred names and pronouns in class. A 2020 lawsuit in Indiana involved a school board that adopted a policy allowing students experiencing gender dysphoria to change their names in its database; teachers were asked to use these names. A music teacher was allegedly forced to resign after he refused to follow the policy and sued the school board (*Kluge v. Brownsburg Cmty. Sch. Corp.* 2020). The school board moved to dismiss the lawsuit, and the federal district court dismissed 11 of the teacher's 13 claims (see Eckes 2020). The case is ongoing with the two remaining claims.

As to his free speech claims, the teacher in Indiana argued that he was expressing himself about a matter of public concern by refusing to speak about gender dysphoria. The court responded that the teacher never really linked this refusal to a matter of public concern and that the way he addressed students was part of his official job duties as an educator. While applying *Garcetti*, the court was persuaded that although addressing students by name may not be part of the course curriculum, it would have been difficult to imagine how a teacher could perform his duties without a method to address students. The court did specify that public employees must accept certain limitations in the workplace. A similar dispute arose in Virginia, when a teacher refused to refer to one of his transgender students with a preferred pronoun and was dismissed (Vlaming v. West Point Sch. Bd. 2019). This case, which involves state law claims, is also ongoing.

In a case from higher education, the Sixth Circuit addressed the issue of preferred names and pronouns. The dispute arose when a faculty member in the philosophy department at a state university in Ohio challenged an institutional policy requiring him to address transgender students by their preferred names and pronouns. Because the faculty member refused to comply, officials eventually placed a letter of reprimand in his file, leading him to file suit unsuccessfully in a federal trial court. He alleged that the university policy violated his rights to free speech, among other claims.

On further review of a dismissal in favor of the university on the grounds that the faculty member's speech was not protected, the Sixth Circuit reversed in his favor, citing a plausible violation of his First Amendment rights (*Meriwether v. Hartop* 2021). Examining *Garcetti*, the Sixth Circuit found that "the threshold question is whether the rule announced in *Garcetti* bars *Meriwether's* [the faculty member's] free-speech claim. It does not" (506). The court next explained that the First Amendment protects the free speech rights of faculty members at public universities during the core activity of teaching, potentially extending to the plaintiff's use of pronouns in a classroom. The court added that the faculty member's

refusal to use gender-identity-based pronouns during a political philosophy class involved a matter of public concern.

Viewed together, these cases present an emerging legal matter that will be important to watch as it evolves through the courts. In addition to the three legal challenges discussed above, schools in other parts of the country are beginning to address similar questions (Richmond 2020). At the same time, it is important to recall that insofar as faculty in higher education have greater rights to academic freedom under the First Amendment, these cases may reach different results from those in elementary and secondary schools.

7. Classroom Decorations and Speech

Teachers have sometimes argued that school officials violate their free speech rights when they are forced to remove decorations in their classrooms. In an illustrative case, the Fourth Circuit affirmed that school officials in Virginia did not violate a high school teacher's First Amendment rights when they required him to remove religious material from his classroom bulletin board (*Lee v. York Cnty. Sch. Division* 2007). The teacher displayed a poster of George Washington praying, an article highlighting the different religious beliefs of presidential candidates, and another article discussing a student's missionary activities. The court observed that the teacher had no First Amendment rights because the displays constituted school-sponsored speech.

The Ninth Circuit addressed whether a teacher in California who hung religious banners in his classroom was allowed to do so. In *Johnson v. Poway Unified School District* (2011, 2012, *Poway*), school officials permitted teachers to decorate their classrooms with posters that included various messages. The teacher displayed two large banners in his classroom; the first stated "In God We Trust", "One Nation Under God", "God Bless America", and "God Shed His Grace on Thee". The second included a quote from the Declaration of Independence: "All Men are Created Equal, They are Endowed By their Creator" and the word "Creator" in all capital letters. When school officials directed the teacher to remove the banners for fear of religious entanglement, he argued that they violated his free speech rights under the First Amendment, among other claims (Eckes and Russo). Applying *Pickering*, a unanimous Ninth Circuit affirmed that because the teacher was speaking pursuant to his "official duties" as a public employee, he had no First Amendment rights to display these banners.

8. Speech and School-Sponsored Activities

Coaches and others have alleged free speech claims related to their activities at school-sponsored events. For example, a high school football coach in Washington unsuccessfully challenged his being placed on administrative leave after refusing to comply with his school board's directive to cease his practice of leading his players in prayer on the field and delivering inspirational talks with religious themes to his team and others on the field. He argued that his prayer after games in view of students and spectators did not relate to his duties as a coach. In his suit, the coach claimed that they violated his First Amendment rights to free speech. The school board argued that the coach's prayers on the field were delivered in his role as a school employee.

The Ninth Circuit affirmed the denial of the coach's motion for a preliminary injunction because his speech at a school-sponsored event was within the scope of his job duties rather than the speech of a private citizen. Thus, reasonable observers could have perceived that if school officials allowed him to continue to pray, it was providing its imprimatur on his speech, leaving it open to an Establishment Clause challenge (*Kennedy v. Bremerton Sch. Dist.* 2017, 2018). After the Supreme Court refused to hear an appeal (*Kennedy* 2019) and a federal trial court in Washington granted the board's motion for summary judgment (*Kennedy* 2020), the Ninth Circuit again affirmed in favor of the board (*Kennedy* 2021). The court reasoned that because the coach was acting as a public employee rather than a private citizen when he prayed on the field, he was not entitled to First Amendment free speech protection.

9. Educator Speech Outside of Classrooms

Other expression cases involve educators who have challenged disciplinary action for their speech outside of their classrooms, including matters related to whistleblowers or other forms of retaliation and social media.

9.1. Whistleblowers or Other Forms of Retaliation

Courts continue to protect whistleblowers, employees who report employment-related misconduct. There is, for example, the Federal Whistleblower Protection Act of 1989 (5 U.S.C. § 1213 *et seq.*). In addition, some federal laws include anti-retaliation provisions while state statutes may provide protections for whistleblowers.

Despite the presence of federal and state whistleblowing protections, these provisions do not apply in all circumstances. By way of illustration, in his dissent in *Garcetti*, Justice Souter noted the various limitations that exist within whistleblower laws, such as the possibility that speech addressing official wrong-doing may fall outside of the protection of these statutes. Not surprisingly, then, when employees claim retaliation for whistleblowing, courts apply the *Garcetti* standard, namely that expression made pursuant to official job responsibilities is unprotected, and often discover that the expression at issue *was* related to the employee's job. To this end, in *Garcetti*, it was in the course of his employment that the district attorney discovered the alleged misconduct of which he complained (McCarthy et al. 2019).

As a result, whistleblowers have not been as successful in securing legal redress for retaliation as they were prior to *Garcetti*. For example, the Ninth Circuit held that a special education teacher's concerns about her school's special education program were not protected speech because they were made pursuant to her duties as an employee, even though some of her speech touched upon matters of public concern (*Coomes v. Edmonds Sch. Dist. No. 15* 2016). Officials dismissed the teacher after she voiced allegations that her board failed to place some students with disabilities in inclusive placements due to financial considerations.

Likewise, a public school teacher was fired after he made false accusations against fellow educators in an email to the Ohio State Department of Education, alleging improprieties related to state standardized tests (*Fledderjohann v. Celina City Sch. Bd. of Educ.* 2020). The school board investigated and discovered that the teacher made up the accusations. In his suit, the teacher unsuccessfully argued that he was fired for exercising his rights to free speech under the First Amendment by expressing his concerns about the standardized test via email. The Sixth Circuit affirmed a grant of summary judgment in favor of the school board, declaring that because the teacher's email constituted speech made pursuant to his job duties, it was not protected speech under the First Amendment.

Similarly, the Tenth Circuit affirmed that a principal in New Mexico's public opposition to the plans to close down her school was not protected speech under the First Amendment (*Rock v. Levinski* 2015). The court agreed that because the principal was considered to be a part of the district's management team, she had a professional duty to speak publicly in support of the policies of the school board and the superintendent.

A teacher in New York City failed in claiming that he was fired in retaliation for filing a grievance when school officials failed to discipline a student who threw a book at him on two occasions. The Second Circuit rejected the teacher's First Amendment claim, affirming that his speech was unprotected under *Garcetti* (*Weintraub v. Bd. of Educ.* 2010). The court ruled that the teacher's speech was related to his official job duties because he was expected to maintain classroom discipline in his educator role and that filing a union grievance was not a channel of discourse available to non-employee citizens.

Some employees have succeeded in their expression claims in post-*Garcetti* cases. For example, a federal trial court in Tennessee decided that a teacher's speech was protected when she complained to her principal that one of her students was making detailed threats about committing a mass shooting at school (*Ellison v. Knox Cnty.* 2016). Eventually, the teacher missed work because she was physically and emotionally upset about the continued

threats. The court allowed the teacher's claim to proceed because it was convinced that the board illegally retaliated against the teacher for her speech on a matter of public concern.

In a like case, a special educator in a public school in Rhode Island who served as president of her local teachers' union asked the superintendent to engage in bargaining about the board's distance learning plan in response to COVID-19 (*Mullen v. Tiverton Sch. Dist.* 2020). However, the superintendent refused to negotiate, did not allow the teacher to attend a meeting on the distance learning plan, placed her on paid administrative leave, and prohibited her from communicating with parents, students, and staff members of the school district. Ultimately, the board relied on the superintendent's recommendation in voting to fire the teacher.

Claiming that her dismissal violated her First Amendment rights to free speech because she was speaking as a private citizen on a matter of public concern, the teacher sued the board. The board responded that it was free to dismiss the teacher because she spoke in her role as president of the teacher's union as part of her job duties. The federal trial court in Rhode Island rejected the board's motion to dismiss because the teacher's speech as a union official was not related to her job duties, rather, she was a private citizen speaking on a matter of public concern, namely, in response to the pandemic.

9.2. Speech and Social Media

Educators also must walk a fine line when it comes to their use of social media. Specifically, courts are less forgiving of educators who make inappropriate postings on social media sites. In an early, unreported, case, a federal trial court in Pennsylvania upheld the authority of university officials who, acting in conjunction with administrators in a local school district, dismissed a student teacher (*Snyder v. Millersville University* 2008). The officials agreed to end the student's placement because, along with concerns both about her subject area knowledge and commenting negatively about school staff, she violated university policies by posting an inappropriate picture of herself online. The court held that the photograph, captioned "Drunken Pirate", (5) showing the student-teacher wearing a pirate hat, drinking from a plastic cup, on her personal MySpace page that her students accessed, provided ample evidence supporting officials' decision to remove her from her placement.

In a later case from Pennsylvania, the Third Circuit affirmed a grant of summary judgment in favor of a school board in response to a teacher's claim that officials violated her free speech rights for terminating her employment over comments she posted on her blog (*Munroe v. Central Bucks Sch. Dist.* 2015). The court agreed, reasoning that the teacher's having referred to her students as "rat-like", "rude, belligerent, [and] argumentative", and "Utterly loathsome in all imaginable ways" (476) lacked First Amendment protection. She could be fired.

The Supreme Court of New Jersey, in another case on point, upheld the dismissal of a teacher who allegedly transmitted nude photographs of himself electronically while engaging in pervasive misuse of his district-issued laptop and iPad (*Bound Brook Bd. of Educ. v. Ciripompa* 2017). In a similar case, an appellate court in California agreed that a school board could dismiss a teacher who posted graphic photographs of his genitals plus obscene written text on the Internet site Craigslist soliciting sex (*San Diego Unified Sch. Dist. v. Comm'n on Prof'l Competence* 2011) for conduct unbecoming of an educator.

More recently, a teacher received a five-day suspension after her Facebook post was critical of the Black Lives Matter movement (*Tucker v. Atwater* 2017). In her suit, the teacher alleged that her free speech rights were violated. After an appellate court essentially rejected the teacher's claim on the basis that school officials were entitled to qualified immunity, the Supreme Court of Georgia declined to review the case (*Tucker* 2018a). Even so, one of the justices voiced grave concerns about employers' ability to reach too far into the private lives of employees. The judge declared:

> Government employers clearly have authority to control their employees in the course of their employment... But it is something else entirely to hold that gov-

> ernment employers can punish their employees based on viewpoints expressed in private speech, as the school officials did here (795).

The U.S. Supreme Court also refused to hear an appeal in this case (*Tucker* 2018b).

Beyond using social media for personal use outside of school, there have also been attempts by some states or school boards to regulate electronic communication via social media that occurs between students and teachers (Schroeder 2013). This is an issue that bears watching in the future.

10. Recommendations

As litigation in the United States illustrates, teachers should be mindful that their speech, whether in or out of class, can be controversial. To this end, school boards, educational leaders, and their lawyers may want to consider the following suggestions in devising sound policies regulating teacher speech regardless of where it occurs.

First, if boards do not have teacher speech policies in place, they should put together broad-based teams to devise such guidelines for regulating teacher expression. Teams should, at a minimum, include a board member, a building-level administrator, a teacher, a union representative, a staff member, and the board's attorney.

Second, boards and educational leaders should use their policies as "teachable moments" to remind teachers to be careful about what they say in and out of class.

Third, teachers should sign speech policies at the start of each school year. Policies should specify that those refusing to sign or who fail to comply with their provisions may be subject to discipline.

Fourth, policies should identify guidelines concerning teacher speech before, during, and after school time, offering examples of topics, including offering their personal opinions in class discussions, that teachers should avoid in or out of class, particularly when posting on the seemingly ubiquitous social media sites.

Fifth, policies should specify possible sanctions ranging from verbal warnings to written admonitions to suspensions to the risk of dismissal for teachers who engage in more serious offenses.

Sixth, boards should provide regular professional development for teachers to keep them up-to-date on developments on the free speech rights of educators.

Seventh, boards should review their policies annually to keep up with latest developments in both the law and technology.

11. Conclusions

Insofar as free speech is a cherished right of all Americans, school boards, educational leaders, and their attorneys would be wise to keep abreast of developments in this important arena by adopting and enforcing sound, up-to-date policies. While sound policies alone cannot ensure the absence of all conflict, they can go a long way towards helping teachers to be mindful of the need to be careful about what they say in and out of class so as to help ensure smooth school operations and help their boards to avoid unnecessary, potentially costly, litigation.

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