



National **School Boards** Association

Council of School Attorneys

2015 School Law Practice Seminar

Facebook Firings: Social Media and Free Speech Entanglements for Public School Employees

Phil Hartley

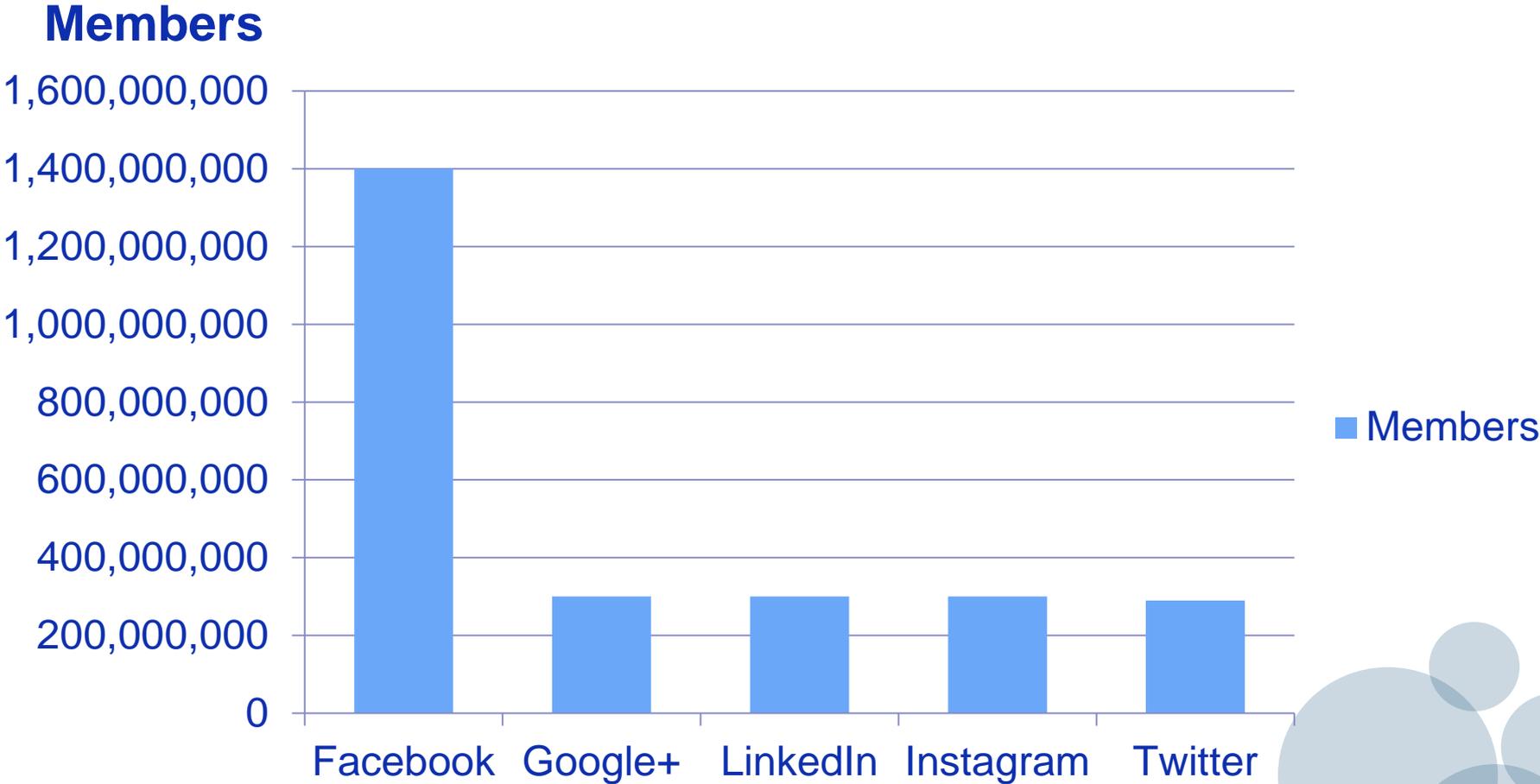
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Social Media Users



How should social media speech be treated



PAGE 26 — THE RIVERTOWNS ENTERPRISE, FRIDAY, SEPTEMBER 5, 2014

Letters to the Editor

Irvington residents urged to educate themselves

To the Editor:
Thank you for giving me the opportunity, as co-president of the Irvington PTSA, to provide some information about the facilities and fields bond that is coming up for vote on Oct 7.
The proposed bond will allow for infrastructure improvements at each school by creating long-term energy efficiency with LED lighting and upgrades to heating systems at Dows Lane, Main Street School and the high school. In addition, the bond would fund a new roof at Main Street School as well as courtyard "dust bowl" and vestibule improvements at the middle/high school campus.
This bond will also pay to protect and improve our four-field system (two at Dows and two at the campus) by restoring East Field so it can be again be used as a practice field and using an organic infill turf for Meszaros Field. In addition, the deteriorated, 25-year-old Oley Track will be replaced.
There are 50 percent more students now and less field space (a practice field was lost to build IMS) then when Irvington High School

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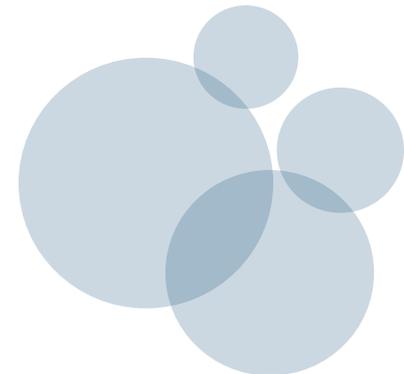
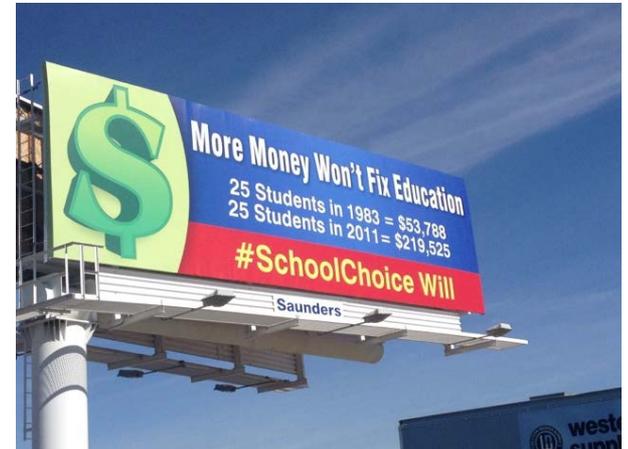
Irvington residents should unite and endorse district's bond referendum

To the Editor:
The upcoming Oct. 7 Irvington school bond referendum is about a commitment to the vitality and value of our schools. The bond pays for needed fixes to all four school buildings, adds energy-efficiency measures, and repairs our failing athletic fields. The school district, with input from residents, has put together a smart plan that will have minimal to no tax impact (because it is timed to replace retiring debt) but significant financial benefits. In the first year only, this will place an added tax burden of \$28 on a house valued at \$700,000. In the second year, the district will likely receive a 24% reimbursement from the State, resulting in only negligible increases in ensuing years. The bond also cuts costs via energy savings.
Finally, with the 15-year bond, the cost is shared with future residents who will also benefit from the infrastructure projects.

A lot of thoughtful effort went into developing the bond. To help inform voters, a group of Irvington residents established a new website to provide a resource for learning about the proposal: irvingtonunitedforeducation.org. The website has detailed, factual information about the bond, as well as photos of the fields and facilities scheduled for repair. Irvington United for Education, or IUE, was created this summer by a fostering a positive, transparent, community-building conversation. You are invited to be a part of it. We welcome you to visit the website where you can learn more about the issues. We believe that the bond is vital to maintaining the excellence of our school district and keeping our village a wonderful place to raise a family.

Erik C. Oley
IUE board member

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Social Media and Controversy

 **Curt Schilling** 
@gehrig38  [Following](#)

The math is staggering when you get to true #'s.



RETWEETS
27

FAVORITES
26



10:55 AM - 25 Aug 2015



The Legal Framework

Pickering v. Bd. of Educ., 391 U.S. 563 (1968):

- Balancing test that weighs the interest of the District in promoting education of students against the First Amendment interest of the employee's speech as a citizen

Rankin v. McPherson, 483 U.S. 378 (1987):

- Clarified the Pickering balancing test
 - Whether the speech impacts: discipline by superiors, harmony among co-workers, close working relationships for which personal loyalty and confidence are necessary, performance of the speaker's duties, or the regular operation of the District
- 



The Legal Framework

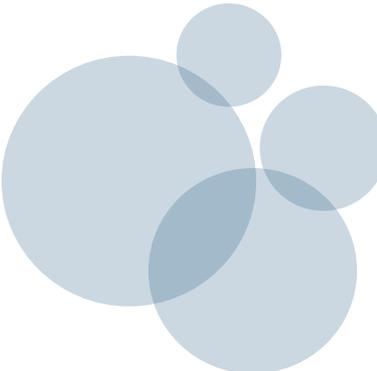
Connick v. Myers, 461 U.S. 138 (1983):

- Employee must first show that the speech involved a “matter of public concern” rather than one of only “personal interest” to the employee
 - The “main thrust” of the speech must relate to a “matter of political, social, or other concern to the community”
 - To determine the “main thrust”: the court will examine “the content, form, and context of a given statement”
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The Legal Framework

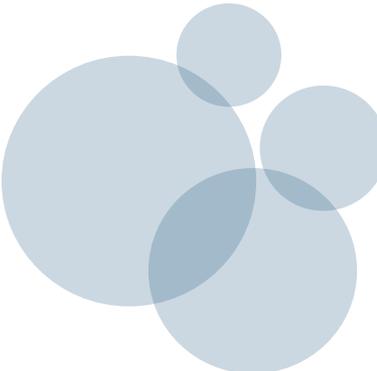
Garcetti v. Ceballos, 547 U.S. 410 (2006):

- “When public employees make statements **pursuant to their official duties**, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”
 - Threshold question is whether the employee spoke **as a citizen** on a matter of public concern
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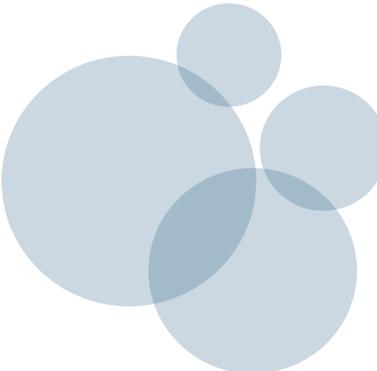
The Legal Framework

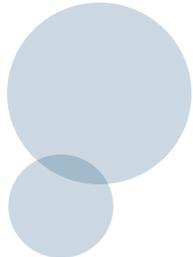
Lane v. Franks, 134 S. Ct. 2369 (2014):

- “the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under Garcetti is whether the speech at issue is itself **ordinarily within the scope of an employee's duties**, not whether it merely concerns those duties.”
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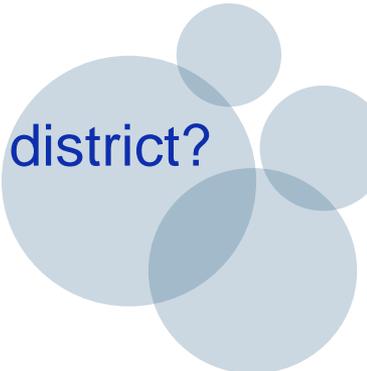


Typical Analysis

- Was speech “pursuant to” or “in the scope of” employee’s duties?
 - Was speech a “matter of public concern” or of personal interest?
 - If speech is a matter of public concern, how does the District’s interest balance against the employee’s interest?
- 



Analysis of Social Media Speech

- Employee's Duties
 - What are the duties?
 - What is the speech about?
 - Where is the speech posted?
 - Public or Private
 - What is the speech about?
 - Where is the speech posted?
 - Balancing Test
 - What and who is the speech about?
 - Who is the speech directed to?
 - What is the effect of the speech on the school or district?
- 

Staff/Student Communications

Teacher

Repko and Ashley
sittin in a tree. K I S
S I N G. 1st comes
love then comes
marriage. HA HA HA
HA HA HA HA HA
HA!!!!!!!!!!!!!!!!!!!! LOL

dont be jealous
cuase you cant get
any lol :)

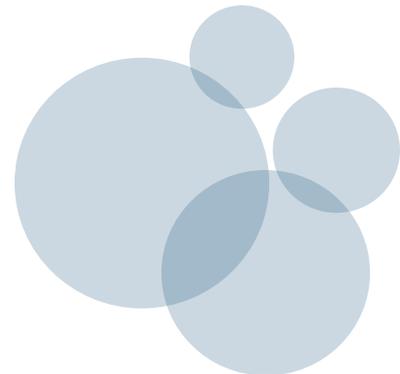
What makes you think
I want any? I'm not
jealous. I just like to
have fun and goof on
you guys. If you don't
like it. Kiss my brass!
LMAO



Staff/Student Communications

- “Peer-to-peer” conversations between teacher and students on MySpace account
- Teacher’s account also had pictures of students at the school located near pictures of naked men

Spanierman v. Hughes, 576 F. Supp. 2d 292 (D. Conn. 2008)





Student Communications in Different Forums

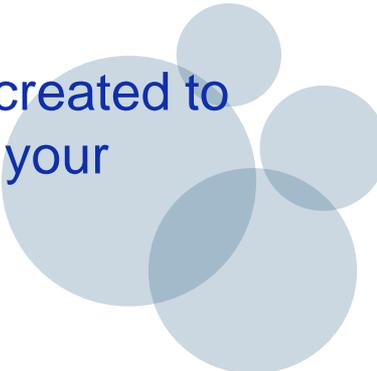
- Teacher has a “class” Facebook page that contains information related to the class; none of it is controversial
- However, it contains links to other sites, most of which are educational:

“The web links provided below is [sic] a good resource for you when doing research for homework assignments or specific class topics. The links are organized by groups for easy reference.”

- However, the first listed “group” is “Mr. C's Favorites” with the following links:

-Mr. C's blog: “This is my blog webpage. If you want to get to know me a little bit better, please feel free to follow along.”

-Solution Ministry: “This is the ministry that my wife and I created to serve the widows and orphans. Please stop by and show your support.”





Mr. C's Personal Favorite Sites

- His blog webpage contains various blogs, including one titled “What is a false religion?”
 - “A few examples of false religions/false teachings that are in the world today: Islam, Hinduism/Buddhism, Illuminati, Jehovah’s Witness, Mormonism, Scientology, Masons”
 - Solution Ministry describes itself as the following:
 - “Solu+ion is about you, and I, united with Christ, BEING the solution. It’s a cold drink of water for a parched throat. It’s about feeding anyone who is hungry. It’s about educating the unlearned. It’s about bringing a smile to a child who has only known tears. It’s about togetherness. It's about celebraton[sic]. It’s ministry. It’s provision. It’s the solution.”
- 

Personal conduct as speech



“Drunken Pirate”

- Told students of her MySpace Page and invited them to communicate through it
- Then used it to criticize her supervisor

Snyder v. Millersville Univ., 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008)

Other Examples



- Nude pictures of high school art teacher, posted by photographer friend—**not** the teacher—on the friend's commercial photography website
- Connick analysis?
- Pickering analysis?

Other Examples



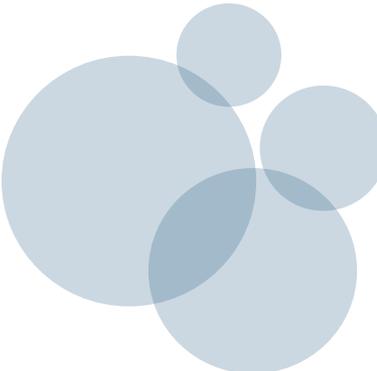
- HS teacher hosted a bachelorette party that was attended by many of the teachers at the school
- Another person at the party posted on Facebook a picture of the teacher with a male stripper
- Picture was up for less than 24 hours; the teacher requested it be removed as soon as she became aware of it
- Connick analysis?
- Pickering analysis?



Criticism as Speech

English teacher had a **private** blog in which she mostly wrote about personal matters

Only nine subscribed readers



Saturday, April 17, 2010

Frustration Incorporation; Irritation Nation

Well, it's paper-grading time again. This is, as a rule, always a bad time. It's feeling lately, though, that these times are getting worse and worse.

"jerk"

er of this school year, when I had a parade of whiny, entitled kids run to the guidance

all on me for giving them the same old, same old, same old shoddy papers, sort of

scared me. I consider myself very fair, but I'm not a saint, and I set forth at the

onset, and I help and guide and confide in the quality that I expect to see

when I collect good copies. When that level is not reached, the grade goes down incrementally based on

just how far off the expectation it is. Then, when kids get their graded papers returned to them, there's a

strange look of "But I worked hard on that!" Well, sorry, but it wasn't hard enough—I don't

"dunderhead"

"rat-like"

This semester hasn't been as bad with the con

a literary analysis on a short story—was a night

they did, for sure. I started by framing each and

standpoint of whatever literary device I knew tr

of course, I knew the paper prompts while we v

examples of how the target device was being u

start writing the papers. I gave them access to

class with them, showed them—step by step an

to interpretation of textual evidence to transitions

"whiny, simpering grade-grubber with an unrealistically high perception of own ability level"

"frightfully dim"

n, after the broken down part, I went through a completed and effectively

them, color-coding it by part (transitions, topic sentences, evidence, etc. each

could see simply by looking at the colors that each paragraph had all the

(and gave them a handout for their future reference) how to incorporate and

properly cite their textual evidence. The

they were headed in the right direction

be sure they were still ok, giving feedba

rough draft edited by themselves and one

articulating what the paper seemed like

sure that what they were meaning to sa

the final paper was due.

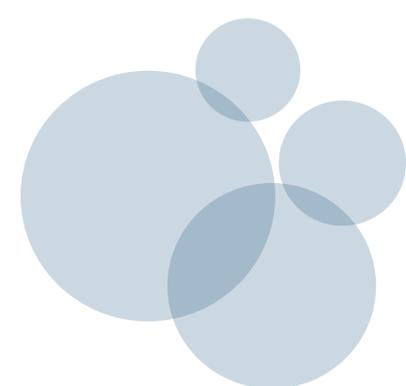
"breeding a disgusting brood of insolent, unappreciative, selfish brats"

One would imagine—and the one in qu

because of all the lead-in work we'd do

them, shaking my head at how they didn't answer the question that was asked, didn't take feedback I'd

offered along the way, didn't make modifications after their reader indicated that their paper needed

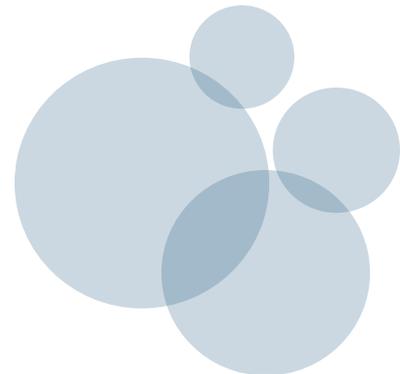




Criticism as Speech

Blog did not state where she worked or lived, but local press and then national press published story and criticism

Munroe v. Cent. Bucks Sch. Dist., 34 F. Supp. 3d 532
(E.D. Pa. 2014)



Criticism as Speech



Johnny Cook

May 21 via mobile



A lil flustered this evening.

A middle schooler got on my bus this evening and said mr johnny im hungry. I said why are you hungry buddy? Didn't you eat lunch ? He said no sir I didn't have any money on my account. I said they would let you charge it? No sir.

Huh! What! This child is already on reduced lunch and we can't let him eat. Are you kidding me? I'm certian there was leftover food thrown away today. But kids were turned away because they didn't have .40 on there account . As a tax payer, I would much rather feed a child than throw it away. I would rather feed a child than to give food stamps to a crack head.

My number is [REDACTED] the next time we can't feed a kid for forty cent, please call me . We will scrape up the money.

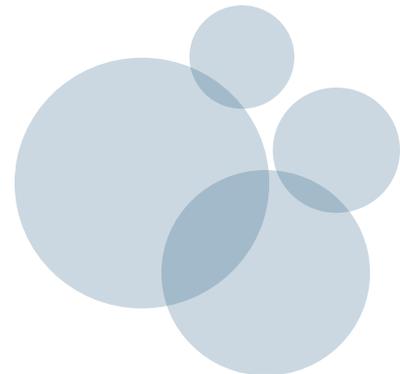
This is what the world has come to

- Bus driver makes Facebook post based on inaccurate information given to him by a kid on the bus
- Terminated when he refused to post an apology and refused to take down original post



Speech about controversial topics

- Teacher posted on Facebook: “Homosexuality is a perverted spirit.....I know sin and it breeds like cancer!”
- “Why parade your unnatural immoral behaviors before the rest of us? YOU ARE WRONG.”
- Impact of “religious freedom” movement on such similar cases?



Other Examples



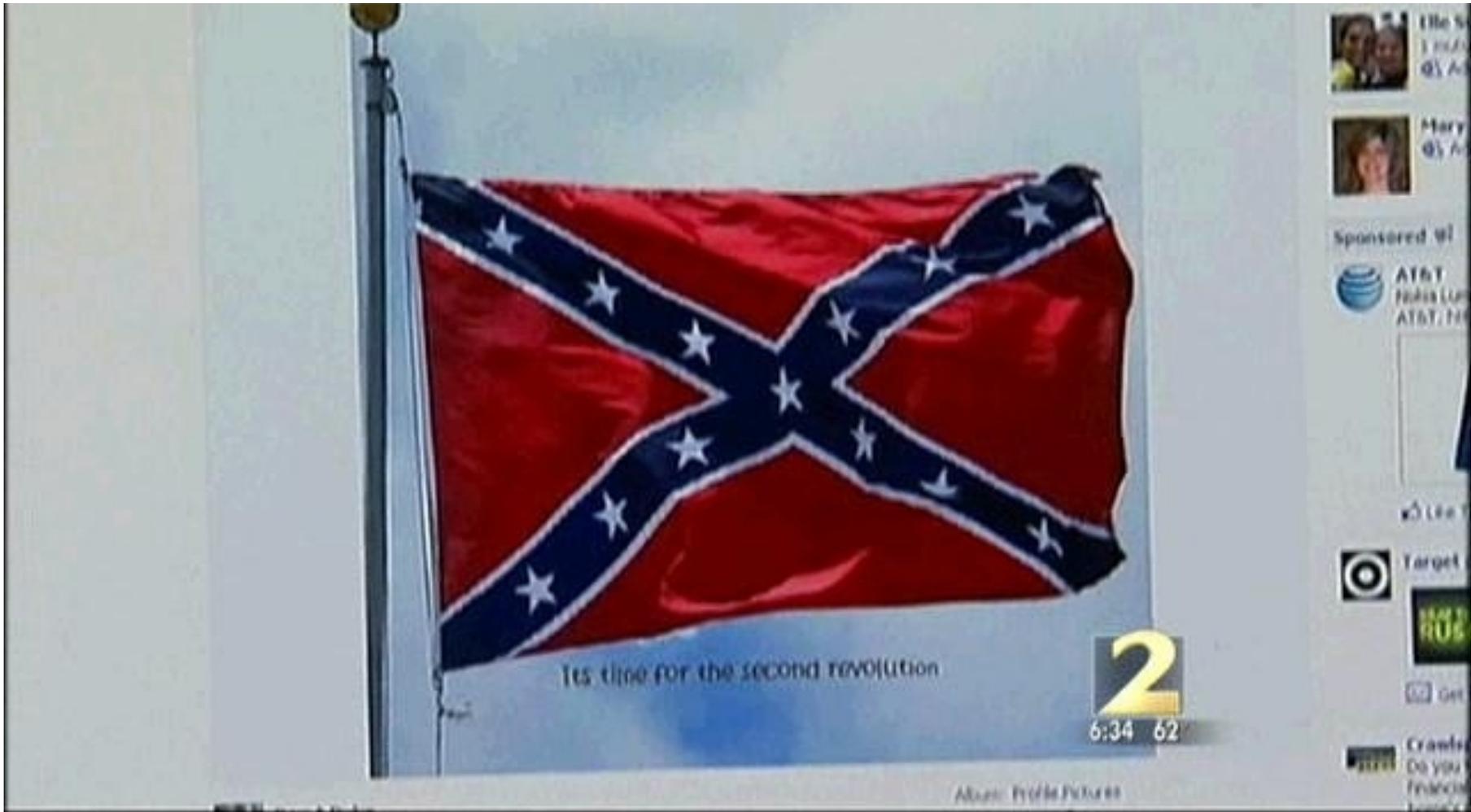
- HS teacher in a "heavy metal" band, which has a “public” Facebook page, as well as website
- Song titles include: “Seance of the Slaves,” “Confederate Soldier” and “Angel Demon Killer Savior”

Sample lyrics:

- “The entire Southern way of life depends on this experiment, succeeding so they know; this is the only way to go, we can’t accept this change, examples must be made; we know the magic of the moment is on our side; **so tie those nooses tight**; the consequences on display, for summoning.”
- “Stand up, everybody stand; President Davis is back in command; Here we’ll make a stand the south will rise again; your liberal lies are freedom’s demise you know you got it coming”

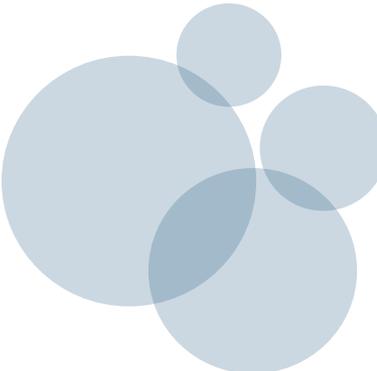
Speech About Public Matters

Duke v. Hamil, 997 F. Supp. 2d 1291 (N.D. Ga. 2014)





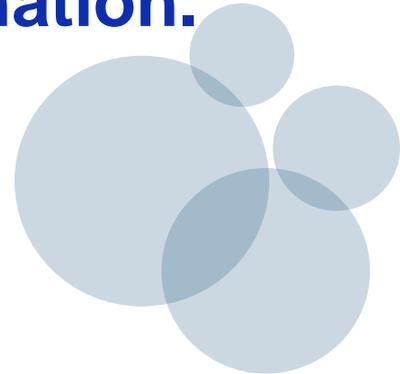
Duke v. Hamil (cont.)

- Personal Facebook page, accessible only by “close friends and family”
 - Facebook profile did not reference his employment at the Clayton State University Police Department or his job as a assistant chief
 - Took down the post within an hour but before he did, someone provided an image of the post to local TV station
- 



The Court's Decision and Advice

- “In addition to possible internal disruption, the public attention the speech received also implicated the Department's reputation and the public's trust.”
- “Yet despite his intentions and his quick removal of it, the post became public after someone provided the image to a television station. **This illustrates the very gamble individuals take in posting content on the Internet and the frequent lack of control one has over its further dissemination.**”





Practice Pointers

- Whether “pursuant to” or “in the scope of,” must fully understand the employee’s duties
 - Do Policies or Acceptable Use Agreements matter?
 - Does the forum (site) matter?
 - Content, form and context
 - Look at all of the circumstances of the post itself, the forum (site) where it is posted, the audience to whom it is directed or that can access it
 - Courts often find some public speech even in the midst of private speech, focus on the right content
 - In applying the Pickering balancing test:
 - Look at the scope of dissemination/public accessibility
 - Focus on impact of the speech on the employee’s ability to carry out duties effectively
 - The importance of timing
- 



More practice pointers

- Make sure the client knows where to focus
 - Make sure you know where the client has already focused and what has already been said or done
 - Thoroughly investigate, as it is rare that an employee has slipped only once, and attitude and behavior during investigation may add valuable information
 - Training of all staff as to expectations and training of administrators on how to respond to controversy when it arises
- 