



LIEBERT CASSIDY WHITMORE

6033 WEST CENTURY BOULEVARD,
5TH FLOOR
LOS ANGELES, CALIFORNIA 90045
T: (310) 981-2000
F: (310) 337-0837

135 MAIN STREET,
7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
T: (415) 512-3000
F: (415) 856-0306

5250 NORTH PALM AVENUE,
SUITE 310
FRESNO, CALIFORNIA 93704
T: (559) 256-7800
F: (559) 449-4535

401 WEST "A" STREET,
SUITE 1675
SAN DIEGO, CALIFORNIA 92101
T: (619) 481-5900
F: (619) 446-0015

400 CAPITOL MALL
SUITE 1260
SACRAMENTO, CALIFORNIA 95814
T: (916) 584-7000
F: (916) 584-7083

PUBLIC AGENCY RISK MANAGERS ASSOCIATION (PARMA) ANNUAL CONFERENCE

First Amendment Issues in a Politically Charged World

2/28/2022

PRESENTED BY:

James E. Olderdorph

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

LCW LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA)
Annual Conference | February 28, 2022

Presented By:
James E. Oldendorph

Controversial News Events



LCW LIEBERT CASSIDY WHITMORE

LCW LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

Our Political Times

- Vaccine Mandates
- COVID Information and Mis-information
- Black Lives Matter
- Aftermath of Trump Presidency
- #MeToo
- Critical Race Theory
- Mid-Term Elections
- Monuments and School Re-naming
- Debates Over “Cancellations”

 LIEBERT CASSIDY WHITMORE

Our Political Times & the Workplace

- Votes of no confidence
- Derogatory statements about supervisors/managers on social media
- Employees engaging in “free speech”
- Heated feelings around national politics bleeding into the workplace

 LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

Social Media → Discipline of Law Enforcement Personnel

- Stories that made the news before or during the June 2020 protests:
 - January 2020: Seattle police officer fired over profane social media posts
 - May 2020: a Greenbrier, TN, officer resigned after local news investigation uncovered his Facebook posts, including an inflammatory post about George Floyd
 - June 2020: four San Jose PD officers placed on admin. leave pending investigation into racist and bigoted anti-Muslim posts leaked anonymously from a private Facebook group

 LIEBERT CASSIDY WHITMORE

Forums Where 1st Amendment Rights Are Implicated

- The public sector workplace
- Open session meetings of governing bodies
- Political activities outside the workplace that employees participate in when on or off duty
- Social media

 LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

Social Media & SCOTUS: *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)

- Social Media Is:
 - The “modern public square”
 - Represents a revolutionary space for civic discourse
 - Provides “the principal sources for...current events...and otherwise exploring the vast realms of human thought and knowledge”
 - Provides the “most important places...for the exchange of views” today

LCW LIEBERT CASSIDY WHITMORE

Public Scrutiny

- “The Plain View Project” – Watchdog group has monitored social media in several Police Departments since 2017
- Revealed thousands of social media posts that are now publicly available
- Examples of released posts/comments from The Plain View Project:
 - “It’s a good day for a chokehold”
 - Reply to a video post of how the individual “[c]an’t wait to plow through” the anti-Trump protestors shown in the video
 - Comments about how apprehended suspects “should be dead” or “should have more lumps in the head”

LCW LIEBERT CASSIDY WHITMORE

The First Amendment Balance

“The problem in any case is to arrive at a balance between the interests of the [employee], 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 (1968)

LCW LIEBERT CASSIDY WHITMORE

The Parameters of First Amendment Speech

How do Courts “strike the balance”?

1. Did the employee speak as a private citizen or a public employee?
2. If private citizen, is the speech a matter of public concern?
3. If yes, is the employee’s First Amendment right outweighed by injury the speech can cause to the government agency?

Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty. Ill. (1968) 391 U.S. 563

LCW LIEBERT CASSIDY WHITMORE

Question 1: Was the Speech Made As a Public Employee or as a Private Citizen?



Speech Must Be Made in Employee's Role as a Private Citizen

- To be protected by the First Amendment, speech must be made in the employee's role as a **private** citizen; not as part of the officer's **official** capacity.
- If the speech is made in an official capacity, such as comments as part of official duties, the speech is not protected by the First Amendment.

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006)



LIEBERT CASSIDY WHITMORE

Speech as Private Citizen? Look to “Official Duties”

- Formal job descriptions are helpful but not dispositive
- Scope of the employee’s job duties requires a case-by-case evaluation
- Speech often outside “official duties”
 - To elected officials and outside agencies
 - To media
 - On behalf of a union
 - Testifying in court or at a deposition

 LIEBERT CASSIDY WHITMORE

Speech as a Private Citizen?

John Ellins, a police officer for the City, led a no-confidence vote of the police officers' union against the Chief of Police. The Chief subsequently delayed signing an application for a certification that would entitle Ellins to a five percent salary increase.

Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2012)

 LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

Other Cases

- *Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. 2017)
 - Football coach spoke as public employee when kneeled to pray after football games
- *Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007)
 - Statements to press criticizing police pursuit
- *Young v. Township of Irvington*, 2015 WL 6123228 (3rd Cir. 2015)
 - Police officer complained internally about Chief of Police's sexual favoritism



LIEBERT CASSIDY WHITMORE

Question No. 2: Was the Speech a Matter of Public Concern?



Speech Must Be On a Matter of Public Concern

- A matter of public concern is one upon which “free and open debate is vital to informed decision-making by the electorate”

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

- However, simply because a topic may be of “general interest” to the public, does not, in and of itself, raise it to a level of constitutional public concern

Speech Must Be On a Matter of Public Concern

Whether an employee’s speech addresses a matter of public concern “must be determined by the content, form, and context of a given statement, as revealed by the whole record.”

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

Speech Must Be On a Matter of Public Concern

- Speech is NOT a matter of public concern when:
 - The speech “deals with individual personnel disputes and grievances, and
 - When that information ‘would be of no relevance to the public's evaluation of the performance of governmental agencies.’”

Our Political Times

Employee posts comments on Facebook stating, among other things, that they are critical of methods used by the Black Lives Matter movement, and claim that defunding the police puts everyone at risk.

Matter of public concern?

Social Media



LIEBERT CASSIDY WHITMORE

Matter of Public Concern

- Officer files a grievance against this supervisor asserting the supervisor should get interpersonal skills training, is a bully and is incompetent. The officer then claims retaliation after he is given “undesirable” assignments and low level discipline.

First Amendment violation?

Desrochers v. San Bernardino, 572 F.3d 703 (9th Cir. 2009)



LIEBERT CASSIDY WHITMORE

Other Cases – Matter of Public Concern or Not?

- *Cochran v. City of Los Angeles*, 222 F. 3d 1195 (9th Cir. 2000) peace officer disputes with superior officer involving among other things supposed race and gender bias
- *Eng v. Cooley*, 552 F. 3d 1062 (9th Cir. 2009) deputy DA told newspaper that a colleague's representation to IRS about school lease
- *City of San Diego v. Roe*, 543 US 77 (2004) police officer's sale of sexually explicit videos on-line

 LIEBERT CASSIDY WHITMORE

Question 3: Does the Government's Interest Outweigh the Employee's First Amendment Rights?



The Balancing Test

- Must weigh the interest of the employee in free expression versus the need of the government to run efficiently and to provide harassment-free workplace
- If the balancing test weighs in favor of the employee or if the government cannot justify treating the employee differently than a private citizen, then the speech will be protected
- If the balancing test weighs in favor of the employer, then the speech will not be protected

Balancing Test Factors

1. Whether the employee's speech disrupted harmony among co-workers;
2. Whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful;
3. Whether the employee's speech interfered with performance of his duties;

Factors that Must Be Considered in the *Pickering* Balancing Test

4. Whether the employee's speech was directed to the public or the media or to a governmental colleague; and
5. Whether the employee's statements were ultimately determined to be false.

Gilbrook v. City of Westminster (9th Cir. 1999) 177 F.3d 839



LIEBERT CASSIDY WHITMORE

Other Disruption Factors

- Reasonable predictions of disruption may be sufficient
- Speech by policy makers vs. speech by rank and file
- How broadly was speech disseminated?



LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

Moser v. Las Vegas Metropolitan Police Department, No. 19-16511 (9th Cir. 2021)

- A split panel of the Ninth Circuit has held that police officer's suit could proceed after he was disciplined for posting that it was a "shame" a suspect had no "holes" in him
- Opinion rendered by U.S. Court of Appeals for the Ninth Circuit on January 12, 2021

 LIEBERT CASSIDY WHITMORE

Disruption Evidence

- Media coverage
- Statements from members of public
- Statements from fellow officers/supervisors
- Statements from DA regarding impact of speech
- Actual disruption not necessarily required
- Violation of rules or policies

 LIEBERT CASSIDY WHITMORE

Disruption Standard

- Social Media Postings
 - What about those by public employees, including police or fire, that include racist, misogynist, or homophobic content or make other statements showing bias?
 - What about threatening language that is made public?
 - Example – a volunteer firefighter in Earle, Ark., was [relieved of duty](#) for writing on Facebook that protesting pro football players "should be shot in the head" and "Obama lovin snowflakes" should be "shot on sight"

First Amendment Protection?

Disruption?

On March 30, 1981, Ardith McPherson, a public employee, learned of assassination attempt on President Reagan. During a conversation with a co-worker, McPherson made the comment, "if they go for him again, I hope they get him." She is terminated for the comment.

Rankin v. McPherson, 483 US 378 (1987)

Political Patronage Speech

Can the government make personnel decisions based upon an employee's political beliefs?



LIEBERT CASSIDY WHITMORE

Political Affiliation Speech

Newly elected Democratic Sheriff discharged subordinate "at-will" employees "because they did not support and were not members of the Democratic Party".

Elrod v. Burns, 427 US 347 (1976)



LIEBERT CASSIDY WHITMORE

Political Affiliation Speech

Patronage dismissals severely restrict political belief and association and government may not, without seriously inhibiting First Amendment rights, force a public employee to relinquish his right to political association.

Elrod v. Burns, 427 US 347 (1976)



LIEBERT CASSIDY WHITMORE

Political Affiliation

Promotions, transfers, and recalls after layoffs based on political affiliations or support were impermissible infringements on the right to free expression of public employees.

Rutan v Republican Party of Illinois, 497 US 62 (1990)



LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

Policymaker Employees – Exception

For key high-level employees at the agency, i.e., “policymaking” employees, the agency can make politically motivated employment decision. Identifying factors for these employees include:

- “Vague or broad responsibilities,”
- “Relative pay,”
- “Technical competence,”
- “Power to control others,”
- “Authority to speak in the name of policymakers,”
- “Public perception,”
- “Influence on programs,”
- “Contact with elected officials,” and
- “Responsiveness to partisan politics and political leaders.”

Fazio v. San Francisco, 125 F.3d 1328 (9th Cir. 1997).

 LIEBERT CASSIDY WHITMORE

Social Media Examples

- Six deputies not reinstated after the town election for Sheriff. Each claimed termination was in retaliation for supporting rival candidate. Some deputies had expressed support by “liking” rival’s campaign page on Facebook, putting bumper stickers on cars and making statements in favor of rival.

Bland v. Roberts 730 F. 3d 368 (4th Cir. 2013)

- Police officer alleged that department’s failure to promote was retaliation for her Facebook comment criticizing another law enforcement officer.

Gresham v. Atlanta, 542 F. App’x 817 (11th Cir. 2013)

 LIEBERT CASSIDY WHITMORE

Policies Restricting Political Speech

- Exceptions
 - Where policy is neutral and appropriately limited
 - Employees not expressing political support while in uniform or during work time
 - Where the restriction is required for the effective performance of the agency
 - Public safety

Political Affiliation

- What if City terminated employee based on mistaken belief that officer endorsed a particular candidate?

Heffernan v. City of Paterson, 136 U.S. 1412 (2016)

Policies to Restrict Speech

- Can a public entity restrict speech through implementation of a policy?



LCW LIEBERT CASSIDY WHITMORE

Polices Addressing Speech

- Policy from Petersburg Virginia
 - “Negative comments on the internal operations of the bureau, or specific conduct of supervisors or peers that impacts the public’s perception of the department is not protected by the First Amendment free speech clause.”

LCW LIEBERT CASSIDY WHITMORE

Policies Addressing Speech

- 2 officers disciplined under the City of Petersburg policy for saying:
 - “There used to be a time when you had to earn a promotion or a spot in a specialty unit . . . but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been ‘devalued.’”

Liverman v. City of Petersburg (4TH Cir. 2016)



LIEBERT CASSIDY WHITMORE

Policies Addressing Speech

- Policy prohibited right to speak on matters of public concern
- “The restraint if a virtual blanket prohibition on all speech critical of the government employer”
- While social media may “amplify” expressions of “rancor and vitriol” such sites “have emerged as a hub for sharing information and opinions with one’s larger community”



LIEBERT CASSIDY WHITMORE

Common Policy Restrictions

- Outside the Workplace – can warn employees:
 - Use of Internet generally private if usage not made public
 - If using a social media site that is not private then communications not private
 - Agencies can typically discipline employees for Internet usage that creates liability for the agency



LIEBERT CASSIDY WHITMORE

Common Policy Restrictions

- Common restrictions set forth in social media policies:
 - Do not post images of crime scenes
 - Do not engage with victims, witnesses or defense attorneys
 - Do not “friend” or follow minors encountered on the job
 - Do not post pictures “in uniform” except for ceremonial activities
 - Do not post pictures of other employees, or “tag” other officers in pictures
 - Do not post offensive or harassing pictures or content
 - Do not post or allude to confidential information



LIEBERT CASSIDY WHITMORE

First Amendment Issues in a Politically Charged World

Public Agency Risk Managers Association (PARMA) Annual Conference | February 28, 2022

Presented by: James E. Oldendorph

Final Considerations Re Employee Speech

- Hit the pause button when speech is involved and evaluate whether the speech is protected
- First Amendment claim only one type of potential liability
 - Labor Code 1102.5
 - PERB claim for interfering with “concerted activities”
 - FEHA retaliation claim

 LIEBERT CASSIDY WHITMORE

Thank You!

James E. Oldendorph

Partner | Los Angeles Office

310.981.2000 | joldendorph@lcwlegal.com

<https://www.lcwlegal.com/people/james-oldendorph/>

 LIEBERT CASSIDY WHITMORE