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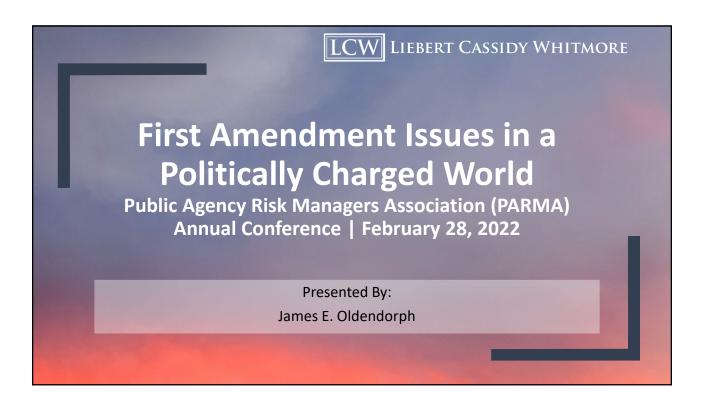
# PUBLIC AGENCY RISK MANAGERS ASSOCIATION (PARMA) ANNUAL CONFERENCE

## First Amendment Issues in a Politically Charged World

2/28/2022

Presented by:

James E. Olderdorph











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- 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



### Forums Where 1<sup>st</sup> 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



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### 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

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### **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"



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### 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)



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### 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. III. (1968) 391 U.S. 563





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### 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)



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### 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 caseby-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



### **Speech as a Private Citizen?**

John Ellins, a police officer for the City, led a noconfidence 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)



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### **Other Cases**

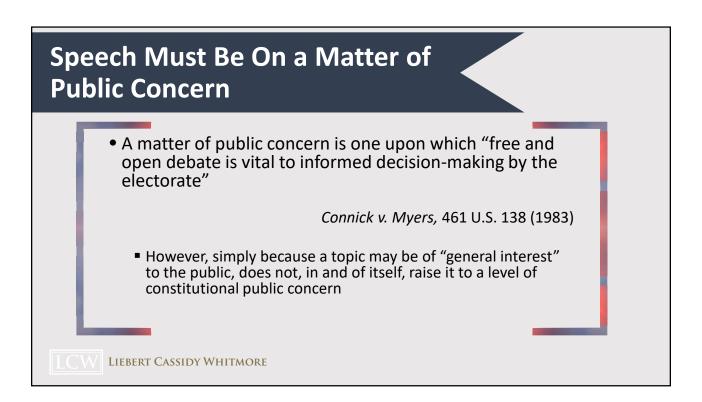
- Kennedy v. Bremerton School District, 869 F.3d 813 (9<sup>th</sup> Cir. 2017)
  - Football coach spoke as public employee when kneeled to pray after football games
- Nixon v. City of Houston, 511 F.3d 494 (5th Cir. 2007)
  - Statements to press criticizing police pursuit
- Young v. Township of Irvington,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

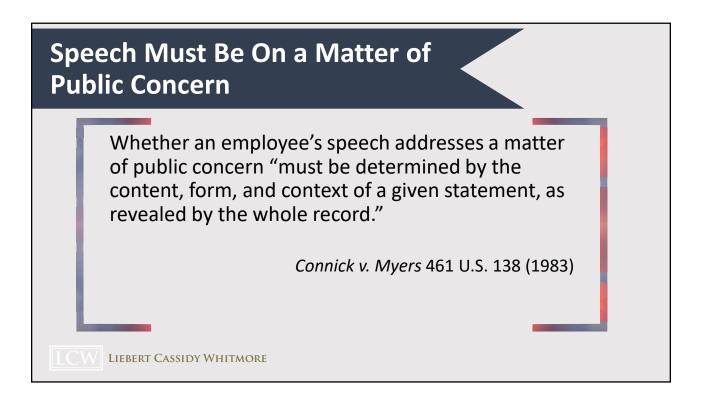


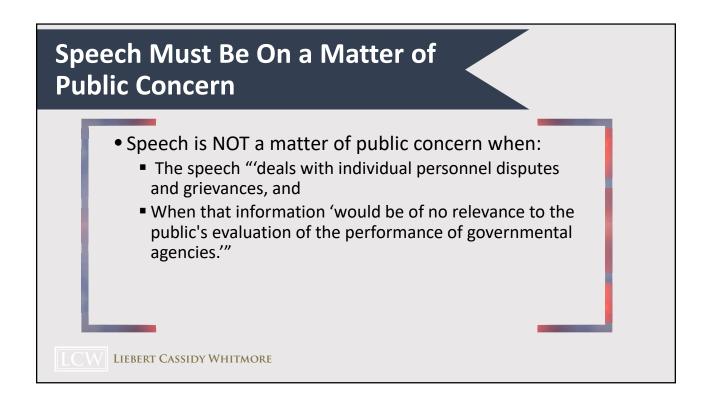
Question No. 2: Was the Speech a Matter of Public Concern?

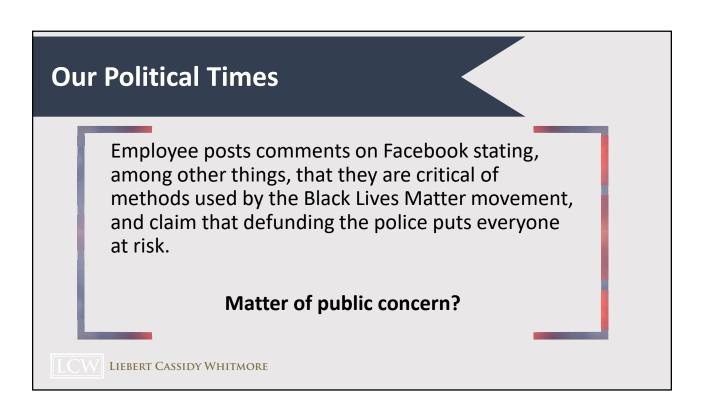
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### Social Media





### **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)



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### Other Cases – Matter of Public Concern or Not?

- Cochran v. City of Los Angeles, 222 F. 3d 1195 (9<sup>th</sup> 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



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

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### The Balancing Test

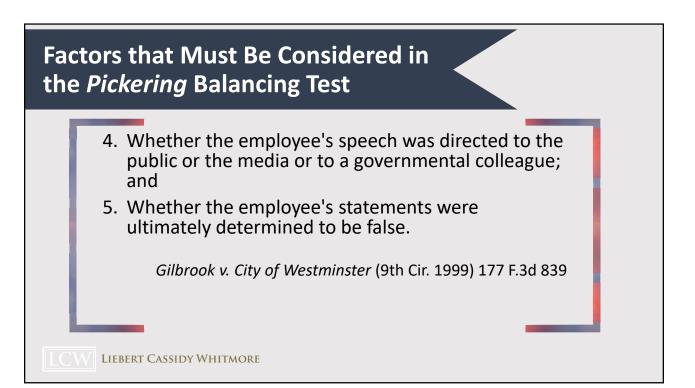
- Must weigh the interest of the employee in free expression versus the need of the government to run efficiently and to provide harassment-free workplace
- If the balancing test weighs in favor of the employee or if the government cannot justify treating the employee differently than a private citizen,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

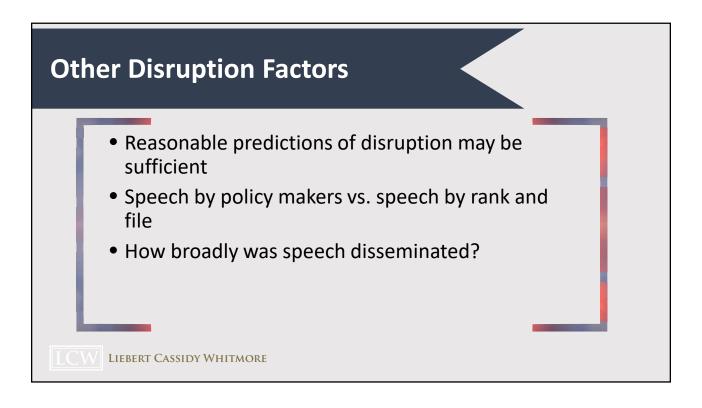


### **Balancing Test Factors**

- 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;







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

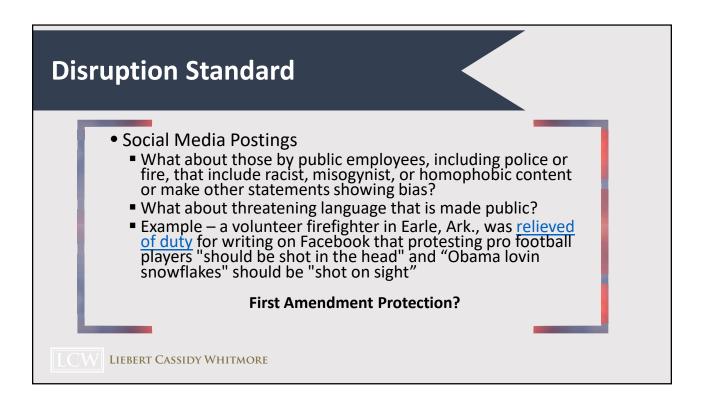
- A split panel of the Ninth Circuit has held that police officer's suit could proceed after he was disciplined for posting that it was a "shame" a suspect had no "holes" in him
- Opinion rendered by U.S. Court of Appeals for the Ninth Circuit on January 12, 2021

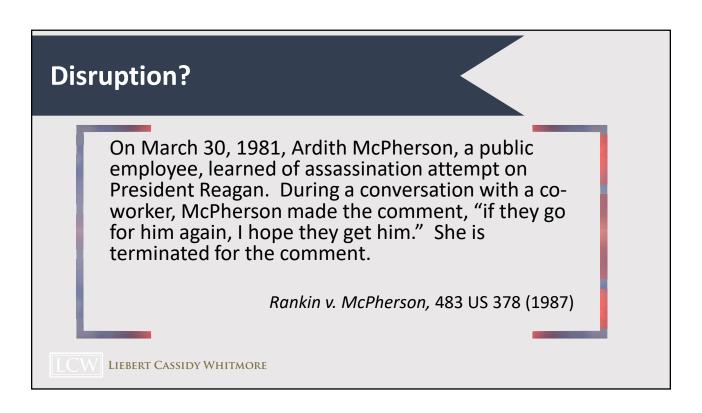


### **Disruption Evidence**

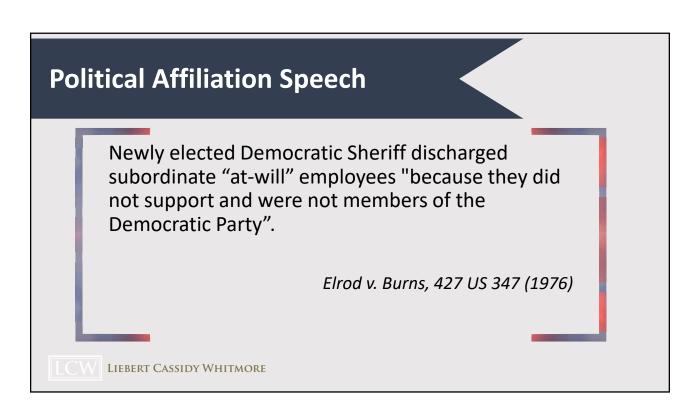
- Media coverage
- Statements from members of public
- Statements from fellow officers/supervisors
- Statements from DA regarding impact of speech
- Actual disruption not necessarily required
- Violation of rules or policies



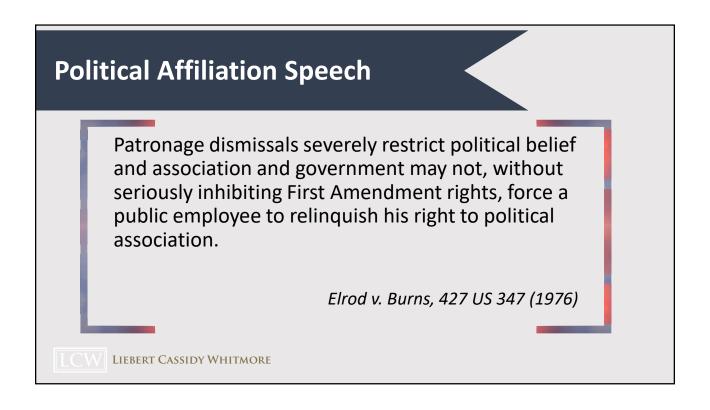














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### **Policymaker Employees – Exception**

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).



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### **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.

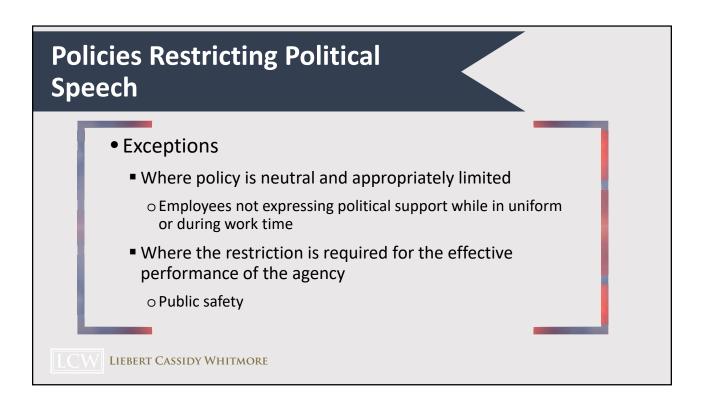
Bland v. Roberts 730 F. 3d 368 (4th Cir. 2013)

 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)

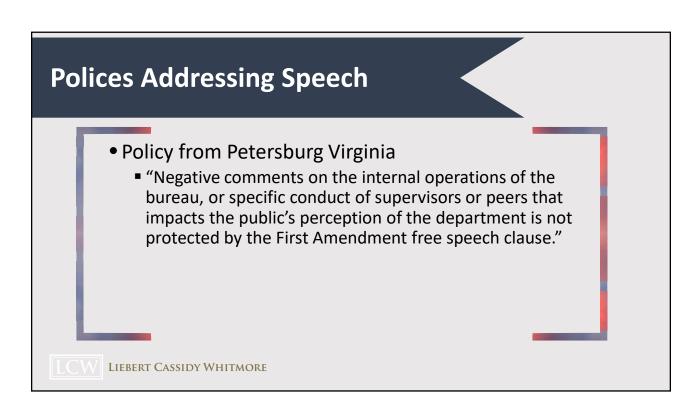












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### **Policies Addressing Speech**

- 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* (4<sup>™</sup> Cir. 2016)



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### **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"



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- 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

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### **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 no post offensive or harassing pictures or content
  - Do not post or allude to confidential information



