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A Manager's Guide to Free Speech and Social Media in the Public Workplace: An Analysis of the Lower Courts' Recent Application of Pickering

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DATE: September 14, 2020

SUBJECT: UGP Use Of Grant Funding Report 2019-2020

I thank your office for the research support this past year. In finalization of the requirements of the UGP 2019-2020 grant recieved, I provide to you this report which details the work completed in utilization of this funding for research and scholarship.

This funding resulted in the publication of a peer reviewed article in the Journal of Public Personnel Management. The article, titled "A Manager's Guide to Free Speech and Social Media in the Public Workplace: An Analysis of the Lower Courts' Recent Application of Pickering" (attached to this report) serves as a timely piece in the public administration literature and builds on a limited body of research addressing the challenging issue of workplace disruption caused by employee misuse of their personal social media accounts. In doing so, this study analyses the application of free speech precedent by the lower courts to current cases involving public employees and free speech and uses the findings to provide important and much needed guidance to public managers.

The article provides a unique focus on the increasingly relevant public personnel issue of employee personal-use social media and the negative implications on workplace efficiency faced by current public managers. Public employees uniquely have free speech rights—within the context of their employement—not held by their private sector counterparts. The jurisprudence on these rights is well established with the development of the Pickering balancing test by the US Supreme Court. However, cases in the lower courts involving speech and social media and the implications of these decisions on public agencies and public managers are not well understood or explored in the public personnel literature. This study explicitly addressed this gap and provides the public manager with guidance on the matter.

Utilizing assistance from a graduate student supported by the funding, researchers performed content analysis on 33 federal lower court opinions ranging from 2013-2019 involving speech/social media workplace issues. A data set was produced resultant from this analysis

which provided key contributions to the current understanding of how the courts view speech considered to be "a matter of public concern" (MOPC), when speech made on social media disrupts the workplace and the balancing test between when mitigating the disruption outweighs the public employee's rights. The findings suggest that in most cases, the speech of public employees is generally considered to be a matter of public concern and thus constitutionally protected speech. However, the findings also suggest that in many cases, the courts still rule in favor of the public agency when the speech (made on social media both on and off duty) causes substantial disruption in the workplace. On a different point, the findings also demonstrate variation in the application of precedent of the courts when cases involve more public facing civil servants (i.e. emergency personnel and public school teachers).

The article's conclusion details three guideposts for public managers quoted here:

"1. Public managers should ere on the side of caution in cases of employee social media misconduct. If there is one critical finding of this study, it is that the lower courts are rather inconsistent in their application of Pickering. As such, public managers would be wise to avoid knee jerk reactions, honor due process, and consider—but not guarantee—ways of maintaining the employee if the efficient operation of the workplace will not be further disrupted. In contrast, Jacobson and Tuft's (2013) findings indicate that managers likely do the exact opposite. In their research, they find that many public social media policies say nothing with respect to First Amendment rights including speech on a MOPC or the balancing of government rights versus the rights of an individual. However, most policies include First Amendment restrictions. This suggests that public sector social media policies, and thus employment actions in accordance with such policies, inadequately consider the legal perspective from the lower courts. This is particularly relevant on the issue of protected speech (speech on a MOPC) which this study found was the one area where some consistency was prevalent."

"2. Public managers should provide employees with clear guidance regarding their rights under the First Amendments and any restrictions should be in accordance with the Pickering test. Jacobson and Tufts (2013) also note that "for an employee, most policies are confusing or lack clear steps in how they should use social media sites while on-and off-duty" (p. 102). Thus, it is up to the public manager to outline what types of speech are considered a MOPC, which this study found to be a very broad interpretation. Public managers should provide employees training and examples of speech that potentially disrupts the workplace (i.e., speech that incites violence, speech with racial overtones, or speech that targets coworkers or management). Jacobson and Tufts (2013) note that normally guidance is often focused on not embarrassing the organization. Such focus is not informed by court precedent and does not adequately inform employees as to what they should do regarding social media use. In sum, social media policies should be informed by the Pickering test and its application."

"3. Finally, public managers should be aware of the legal risks of employment action taken due to social media misconduct. In this study, all the cases that made it to the third step of the Pickering analysis were ruled in favor of the employee. Thus, if an employee proves their speech was on a MOPC—which seems rather easy to do based on current jurisprudence—and demonstrates that it did not cause substantial disruption—which in this study was about 50/50—then chances of winning the case for the public organization quickly decrease. If termination or

any other employment action is pursued around the same timeframe when the social media post was posted, it becomes increasingly challenging to prove that the action was not taken resultant from the speech. Employment actions must be coupled with clear evidence that the speech caused substantial disruption, or was made based upon performance concerns, and not the speech itself. Even if the speech seemingly targets management, the organization, or disparages any other individual or group, public managers cannot guarantee that the speech will not be considered a MOPC."

In sum, this research supplies managers in the public sector with important guidance as they increasingly encounter instances of employee social media use that potentially violates agency policy, violates code of conduct standards, is offensive, or simply embarrasses management or the organization more broadly. Students of public administration and current practitioners can also benenfit from the practical guidance provided in this research.

As mentioned above, for this research project, one graduate student was hired for research support and mentorship. This student, a joint MPA/Juris Doctorate Graduate, gained extensive experience in social science research methods including study and synthesis of the literature in law and public administration on First Amendment application. I met frequently with this student throughout the Summer and Fall of 2019 to discuss the collection of our data, how to increase the reliability of our data, and how our data translates into findings and tangible application for pracitioners. This mentorship provided this student an important opportunity to engage with this topic, meet deadlines, collaborate, and prepare for extensive research tasks in the practice of law.

Again, I thank your office for the funding request. As noted in the attached article, an acknowledgment of the funding support is provided in the funding section near the bottom of the article.

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