



# M *School* Management *News*

Ohio School Boards Association

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## School employees and the First Amendment

by Sara C. Clark, chief legal counsel

In today's climate, as political and social debates find their way into school communities, school officials face the challenge of balancing the constitutional rights of employees with their responsibility to maintain workplace integrity. While there are an infinite number of factual scenarios in which a public employee could raise a First Amendment claim, typically cases arise in schools when an employee contends that he or she has suffered an adverse employment action, such as a dismissal or demotion, in retaliation for First Amendment-protected speech. Using a recent case from the U.S. District Court of Appeals for the Sixth Circuit as an example, this article provides background on the legal framework that applies to school employees under the First Amendment.

### Imagine a not-so-hypothetical hypothetical

On the night of the presidential election, a district employee posts from her public-facing social media page an image of the electoral map that reveals the candidate who won the election earlier that night. Shortly thereafter, she receives a notification from an individual she does not know, who uses derogatory terms to talk about the individuals who voted for each of the candidates. The employee responds, using the same derogatory terms used by the stranger in her response. The next day, the district receives several complaints about

the post from the employee's co-workers and members of the public. The district places the employee on paid administrative leave while it conducts an investigation and, ultimately, terminates the employee. Following her termination, the employee sues, alleging that the district retaliated against her in violation of the First Amendment.

### Who wins?

Courts typically employ a three-part test to determine whether a school employee's speech is protected by the First Amendment.

First, school employees are protected by the First Amendment only when they are speaking as private citizens. The Supreme Court of the United States has stated that when public employees make statements pursuant to their official duties, they are not speaking as private citizens for First Amendment purposes, and their comments are not isolated from regulation by their public employer. For example, a teacher who makes statements during instructional time is speaking pursuant to his or her official duties as a teacher, so the First Amendment does not protect those comments. As a result, school boards may adopt and enforce policies that prohibit employees from discussing their personal political views with students during instructional time. In our hypothetical, the employee is not making statements pursuant to her official duties, so we move on to the next part of the test.

Second, courts will review whether the employee's speech was regarding a matter of

public concern. Speech is considered to regard a matter of public concern if it relates to a social, political or community issue. The Supreme Court of the United States has held that the question of whether an employee's speech addresses a matter of public concern should be determined by looking at the content, form and context of a given statement, as revealed by the whole record. If the employee wasn't speaking on a matter of public concern, and the speech is characterized as more of a private grievance, the First Amendment does not protect his or her speech. In our hypothetical, the employee's speech related to the recent political election and would be considered a matter of public concern. As a result, we move on to the next part of the test.

Finally, courts will review whether the employee's interests in commenting upon the matters of public concern outweigh the interest of the employer in promoting the efficiency of the public services it performs through its employees. Courts will analyze a public employer's interest by considering whether the employee's statement:

- impairs discipline by superiors or

harmony among co-workers;

- has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary;
- impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise;
- undermines the mission of the employer.

The facts of our not-so-hypothetical example come from the recently decided case *Bennett v. Metro. Govt. of Nashville & Davidson Cty.* In that case, the court found that a social media post by employee **Danyelle Bennett** significantly disrupted the harmony of the office. The post promoted "nonstop conversation" in the office that lasted for days, and the public employer brought in a counselor to facilitate conversations on diversity, the background of the derogatory terms used and why people might be upset about their use. There also was evidence that if Bennett had returned to work, her presence would have continued to exacerbate the disharmony of the office. These factors, the court said, weighed heavily in favor of the employer regulating the employee's speech.

The court in *Bennett* also found that the employee's speech had a detrimental impact on close working relationships for which personal loyalty and confidence were necessary. Bennett fielded emergency calls and was certified in emergency medical and fire dispatch. The decision emphasized the importance of close working relationships among the employees of her unit and the need for collaboration and communication. The employee's comments made her co-workers question whether they could rely on her in their work and "trust that the person beside you is making good decisions."

Although the court found that there was little indication that Bennett's speech would impact the way she did her job, the court stated that it was possible that the damaged relationships with her colleagues might affect the quality and quantity of her work.

Finally, the court focused on the agency's mission and held that in order for the agency's mission to be advanced, it was vitally important that all department employees conduct themselves in a manner free of bias and demonstrate unquestionable integrity, reliability and honesty. The public perception of a "bias free" environment was central to the public employer's mission. Bennett's public-facing comments discredited the employer because they displayed racial bias without a disclaimer that the views were hers alone.

In *Bennett*, the court found that the public employer's interest in promoting the efficiency of the public services it performs through its employees outweighed the employee's interests in commenting upon the matters of public concern. As a result, the employee's speech was not protected speech, and the employer did not retaliate against the employee in violation of the First Amendment.

The balancing test for government employee free speech rights requires a thorough examination of the many facts typically at play in these cases. As a result, school boards and district administrators are encouraged to work through the three-part test with their



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board counsel. The slightest change to the facts may drastically alter the district's ability to regulate the

expression of their employees. If you have general questions about the First Amendment, the three-part framework

or the case referenced in this article, please reach out to OSBA's Division of Legal Services at (855) OSBA-LAW.