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February 2024 MPT-2 Item

Randall v. Bristol County

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Randall v. Bristol County

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Law Offices of Michael Carter

1300 W. Cherry St.
Derby, Franklin 33205

MEMORANDUM

To: Examinee
From: Michael Carter
Date: February 27, 2024
Re: Randall v. Bristol County

Our client, Olivia Randall, has worked for the Bristol County Library for 10 years. Last October, Randall's employer, the county, suspended her without pay for two weeks for "insubordination." The suspension followed Randall's making two posts on her Facebook page criticizing the county executive's decision not to seek a renewal of grant funding for a workforce-development program Randall directed.

I filed a lawsuit against Bristol County in US District Court, pursuant to 42 U.S.C. § 1983, alleging that the county had violated Randall's First Amendment rights. Although Randall has already served the suspension, the complaint seeks relief in the form of restoration of her pay and expungement of the suspension from her employment record. A successful suit would help repair Randall's reputation and deter the county from future retaliatory actions.

Both Randall and Marie Cook, the county executive, have been deposed for this case. The facts are undisputed, and the county has conceded that Randall was suspended because of her Facebook posts. I am now drafting a Motion for Summary Judgment.

I need you to prepare the section of the supporting brief that argues that the county violated Randall's First Amendment rights by suspending her. In making the argument that Randall engaged in protected speech, be sure to address all elements of her claim. In addition, you should anticipate and respond to the arguments that the county may make. In drafting your argument, follow the attached guidelines. Do not draft a separate statement of facts but be sure to integrate the facts into your argument.

Law Offices of Michael Carter

OFFICE MEMORANDUM

To: All associates
From: Litigation supervisor
Date: September 5, 2020
Subject: Persuasive briefs

The following guidelines apply to briefs filed in support of motions in trial courts.

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

Your legal argument should make your points clearly and succinctly, citing relevant authority for each legal proposition. Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client.

Use headings to separate the sections of your argument. Headings should not state abstract conclusions but should integrate the facts into legal propositions to make them more persuasive. An ineffective heading states only: "The underlying facts establish the plaintiff's right to due process." An effective heading states: "Upon admission, the plaintiff acquired a property interest in education, thus entitling the plaintiff to due process prior to dismissal."

You should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Do not assume that we will have an opportunity to submit a reply brief. Be sure to anticipate and respond to opposing arguments. Structure your argument in such a way as to highlight your case's strengths and minimize its weaknesses.

Personnel Office of Bristol County
450 Main St.
Derby, Franklin 33201

October 27, 2023

Ms. Olivia Randall
610 Surrey Lane
Derby, Franklin 33203

Sent by certified mail

Dear Ms. Randall:

I have been directed by the County Executive to inform you that you have been suspended without pay for 14 calendar days from your job as Workforce-Readiness Program Director, effective tomorrow. The reason for the suspension is insubordination.

Do not report to work tomorrow and for 13 calendar days following the effective date. Your compensation will be adjusted accordingly.

Sincerely,

Jean Pearsall

Jean Pearsall
Director, Personnel Office

Office of Legal Counsel of Bristol County
450 Main St.
Derby, Franklin 33201

November 4, 2023

Attorney Michael Carter
Law Offices of Michael Carter
1300 W. Cherry St.
Derby, Franklin 33205

RE: Matter of Olivia Randall

Dear Attorney Carter:

I have received your letter on behalf of your client, Olivia Randall, demanding that Bristol County rescind her suspension.

Ms. Randall was suspended because of her Facebook posts. After a careful review of the law, I am convinced that the Facebook posts at issue do not deserve First Amendment protection. I am also convinced that the employer's interest in the efficient operation of county government and good relations among its departments and department personnel is stronger than any interest Ms. Randall may have had in speaking out.

Sincerely,

Susan Burns

Susan Burns, Esq.
Assistant Corporation Counsel

Content of Posts on Olivia Randall's Facebook Page

October 15, 2023. Hey, fellow Bristol County residents! For the past couple of years, the county has had great success in helping citizens who didn't finish school obtain their GED—the equivalent of a high school diploma—and start looking for work, all thanks to a grant from the State of Franklin. Now the county has decided it doesn't want to renew the grant. Bad call!!! If you want the county to renew the state grant, call the county executive, Marie Cook.

October 17, 2023. More information: the county received a "workforce development" grant from the state and, with this grant, created a Workforce-Readiness Program—that I direct—to help Bristol County residents get "job-ready." Thanks to this grant, we helped 40 Bristol County residents get their GED, and I am ready to help even more. It is time to renew the grant for another three years. But for reasons unclear to me, the county decided not to apply to renew the grant. This grant helps people get jobs. The county executive needs to get her priorities straight!

**Excerpts from Deposition of Olivia Randall
January 15, 2024**

Examination by Bristol County Assistant Corporation Counsel Susan Burns

Q: At the time of your Facebook posts, were you in charge of Bristol County's Workforce-Readiness Program?

A: Yes.

Q: Tell me about the program.

A: This program is funded by a workforce-development grant from the State of Franklin. The county applied for this grant. When we received this three-year grant, I became the director of the program funded by the grant but kept some of my other responsibilities at the library. We used the grant funds to help county residents who did not finish high school prepare to take the GED tests; if they pass, they receive the equivalent of a high school diploma. With a GED, these residents are more likely to get jobs. We are nearing the end of the initial grant. We have helped 40 Bristol County residents earn the GED and attain basic employment skills. Many of these residents are now employed. We were anticipating renewal of the grant for another three years when I received notice from the county that it did not want to renew the grant.

Q: Could you describe your duties as the program's director?

A: Yes. I developed the curriculum and lesson plans for our GED program. I created materials describing the program eligibility requirements. Once the program was up and running, I was responsible for scheduling classes and assessments. I also trained support staff who taught the classes. I created policies and procedures for connecting participants with other county services and resources, such as transportation assistance. And of course, I made sure that all the proper reports were prepared to comply with the grant requirements.

Q: Was posting on Facebook about the Workforce-Readiness Program part of your job duties?

A: No, it was not.

Q: Did you make the Facebook posts dated October 15, 2023, and October 17, 2023?

A: Yes, I did.

Q: Why did you make these Facebook posts?

A: Because I believe that the county should apply to renew the workforce-development grant. We have done a lot of good but could do even more with another three years of funding. I was very disappointed that the county would not seek to renew the grant.

Q: When you posted on Facebook, the postings were public, right?

A: Yes, anyone could read them. I posted them on my personal Facebook page, but Facebook lets you make your posts open to everyone.

Q: Why did you make the posts public?

A: I called the county executive and left numerous messages but got no reply. I assumed she did not want to talk with me. I thought the public should know that the application deadline was about to pass, and this program would end if the county did not apply to renew it.

Q: Is disappointment with seeing your position end the reason you made the Facebook posts?

A: Of course not. This grant is important. Helping people get ready for the GED and get jobs is important.

Q: So when you did not get your messages to the county executive returned, you decided to go public to embarrass the county?

A: I was not trying to embarrass anyone. I was trying to ensure that we renewed this grant.

Q: You are still employed by the county, right? Your job is not threatened?

A: I am still employed. I assume I will receive new duties in the library. But my reputation has been hurt, and I have lost the prestige that goes with directing the Workforce-Readiness Program. Not to mention, I have also lost two weeks' pay. My employment record was excellent. Now it is blemished. It's one thing to see the grant program end. It is another to see my work record and my reputation hurt.

* * * * *

**Excerpts from Deposition of Marie Cook, County Executive, Bristol County
January 15, 2024**

Examination by Plaintiff's Attorney Michael Carter

Q: Explain your position as county executive.

A: I am charged with operating all county functions. I report to the county board, whose members are elected.

Q: Why did you suspend Olivia Randall for two weeks in October 2023?

A: Because she failed to be a team player, failed to accept decisions made by the county, and failed to show respect for me and the county. In general, she was insubordinate.

Q: How did she fail to be a team player?

A: She failed to accept the county's decision not to seek renewal of the state workforce-development grant, which funded the workforce-readiness program she directed.

Q: Who made the decision not to seek renewal of the grant?

A: I did.

Q: Why did you make that decision?

A: Even though grants bring in money, they cost us money, too: we have to hire and supervise staff, account for the funds, make reports, and so on. And the Workforce-Readiness Program's offices and classrooms were located in the main county library and in two of its branch facilities, taking up space and putting wear and tear on these facilities.

Q: This grant was administered through the library; did the library director want to renew it?

A: Yes. But I make the decisions, not the library director or employees like Ms. Randall. We have a newly elected county board here in Bristol County, and some of the new board members urged me to establish an economic growth office, specifically tasked with promoting economic development. That office would also work on reducing unemployment.

Q: Is that economic growth office in place?

A: We are working on it.

Q: Was the workforce-development grant fulfilling its purpose?

A: I think so. The grant was designed to help residents who didn't have a high school diploma or job skills get better prepared for the workplace. I think a number of people have been helped. But as I said, the county board wants to take a comprehensive approach to improving economic development in the county, and the new economic growth office will address these issues.

- Q:** Before Ms. Randall's posting on Facebook, did you have any problems with her?
- A:** No. I did not know her and still don't. She works in the main county library, not in the county office building. The county has a lot of employees—I can't know all of them.
- Q:** Before deciding not to renew the grant, did you consult Ms. Randall?
- A:** No.
- Q:** Are you aware that Ms. Randall sent you several messages by phone, email, and text, and you did not reply?
- A:** That could be true. I get a lot of messages, and I can't return them all. She should have waited for my office to get back to her. Instead, she goes public and tries to make a big deal out of losing the grant. She did not show respect for me and my decision-making authority.
- Q:** How did Ms. Randall fail to show respect for you?
- A:** By complaining and by putting those posts on Facebook and embarrassing me.
- Q:** How did she embarrass you?
- A:** By stirring up the public. I had to spend time answering queries about the grant.
- Q:** How did Ms. Randall embarrass the county?
- A:** When Ms. Randall made those Facebook posts, she embarrassed us and the county.
- Q:** Is your only complaint about Ms. Randall that she made two Facebook posts?
- A:** Yes, and all the trouble they caused.
- Q:** When you say "trouble," are you referring to the public inquiries about the grant?
- A:** Yes, and the time I wasted having to deal with the public.
- Q:** How many public inquiries have you had?
- A:** Maybe a dozen from the public. Some people called, some texted, a few sent emails. They all wanted to keep the grant.
- Q:** Were you able to respond to these inquiries and address the concerns?
- A:** I guess so. When I told these members of the public that we have a new plan to end unemployment, they seemed satisfied.
- Q:** After Ms. Randall made these posts on Facebook, were there any disruptions or problems in any county office?
- A:** Not that I know of.
- Q:** What will Ms. Randall do when the current grant ends?
- A:** When the grant ends, she will lose her position as director of the Workforce-Readiness Program and return to her old job at the library.

* * * * *

Dunn v. City of Shelton Fire Department
(15th Cir. 2018)

The sole issue on appeal is whether the City of Shelton Fire Department violated the constitutional rights of Kevin Dunn when it disciplined him in response to two social media posts. After the department demoted him from assistant fire chief to firefighter first class, Dunn filed this Section 1983 action, claiming that the department's actions violated his First Amendment right to free speech. The district court granted summary judgment to the department, and Dunn appealed.

The essential facts are undisputed. Dunn was an assistant fire chief in the City of Shelton Fire Department; one of his duties was conducting continuing education training for all fire personnel. In March 2017, Dunn made two posts to a Facebook page that was limited to an audience of first responders in Shelton—members of the fire, police, and paramedics departments in the city. In the first post, Dunn criticized the recently revised qualifications for new firefighters, stating that the fire chief was “pandering to the current generation of softies who have no discipline.” Several other fire personnel “liked” this post. Dunn then made a second post, stating that the younger generation “need to toughen up if they plan to succeed in life.” After seeing the posts, the fire chief told Dunn to stop posting on Facebook and removed him from the position of assistant fire chief.

A public employee does not surrender all First Amendment rights merely because of the employment status. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). To show that the speech is protected under the First Amendment, a public employee must demonstrate that (1) the employee made the speech as a private citizen, and (2) the speech addressed a matter of public concern.

As to the first requirement, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.” *Id.* The question is whether the employee made the speech pursuant to his ordinary job duties. *Lane v. Franks*, 573 U.S. 228 (2014).

As to the second requirement, that the speech be on a matter of public concern, the court should consider three things: the speech's content (what the employee was saying); the speech's nature (how the employee spoke and to whom); and the context in which the speech occurred (the employee's motive and the situation surrounding the speech).

If it is determined that the employee spoke as a citizen on a matter of public concern,

the inquiry moves to a balancing test. The court must weigh the interests of the employee in expressing the speech against the employer's interest in promoting effective and efficient public service. In addition, for an employee to prevail, the employee must show that the speech was a motivating factor in the adverse employment action.

Speaking as a citizen. The department, relying on *Garcetti*, argues that Dunn was not speaking as a citizen when he made his Facebook posts. In *Garcetti*, Ceballos, an assistant district attorney, was disciplined when he criticized the legitimacy of a search warrant in a memo advising his supervisor. The Court concluded that Ceballos, in writing the memo, spoke pursuant to his official duties as a prosecutor and not as a citizen. Therefore, Ceballos's speech was not entitled to protection. Similarly, in this case, the department argues that Dunn did not speak as a citizen because he was responsible for consulting with the fire chief and communicating information and updates concerning firefighter qualifications as part of his official continuing education duties, and thus his speech is not protected by the First Amendment.

Dunn argues that his Facebook posts were not made pursuant to his official duties and that his situation is akin to the protected speech in *Pickering v. Bd. of Education*, 391 U.S. 563 (1968). In *Pickering*, a public school teacher wrote letters to the editor that criticized his employer's use of tax revenues. The letters were published in the local newspaper. When *Pickering* was decided in the 1960s, most citizens got their news about local issues from their local newspaper or TV station. *Pickering*'s letter informed residents of the school district about the district's budgeting decisions and financial matters.

In the instant case, we conclude that in his Facebook posts, Dunn spoke not as a citizen but as an employee. As with the prosecutor's speech at issue in *Garcetti*, when Dunn posted about firefighter education requirements in a Facebook page for first responders, Dunn's speech was made pursuant to his employment responsibilities as assistant fire chief, which included consulting with the chief and others on continuing education requirements and issues. See *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007) (police officer's conversations with prosecutors discussing an arrest were part of the officer's duties).

Addressing a public concern. Because we conclude that Dunn did not speak as a private citizen, our inquiry could end here. However, even if we assume that Dunn spoke as a citizen, his claim would fail because his speech did not address a matter of public concern. This involves an examination of the content, nature, and context of the employee's speech, including his motive and audience. Here the content of Dunn's speech, like his

motive, appears personal—he is not happy with the current generation, whom he calls “softies” who need “to toughen up.” He does not explain how the new hiring qualifications affect the public, nor does he offer facts showing how the new standards are lax or will lead to unqualified firefighters, matters that might be of interest to the public. Dunn’s comments sound more like those of a disgruntled employee than those alerting the public to a public issue.

Nor were the nature and context of his posts directed to the public. Because of the limits on the Facebook page, the audience for Dunn’s posts was his fellow first responders—not the public. In fact, this Facebook page is known among the first responders as a sounding board for gripes and complaints. “Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.” *Garcetti*. Thus in *Pickering*, the teacher’s letter to the editor was protected because it had no official significance and bore similarities to letters submitted by numerous citizens every day. But Dunn did not voice his concerns through channels available to citizens generally. His communication was essentially internal and therefore retained no possibility of constitutional protection.

Balancing test. Finally, even if we assumed that Dunn spoke as a citizen on a matter of public concern, the balance of the interests involved favors the fire department. Dunn’s interest in speaking freely is outweighed by the department’s interest in a team that is unified in firefighting. The department is justified in its concern that Dunn’s posts could undermine the teamwork needed for firefighters to work safely.

The district court properly granted summary judgment to the department.

Affirmed.

Smith v. Milton School District
(15th Cir. 2015)

The Milton School District appeals from a summary judgment in favor of Damon Smith, who filed a civil rights complaint under 42 U.S.C. § 1983 alleging that the school district violated his First Amendment rights when it failed to renew his teaching contract because of tweets he posted on Twitter, a social media platform. For the reasons stated below, we affirm.

Smith, a teacher in the Milton School District (MSD), posted several times on Twitter about the nature of state-mandated standardized testing of students and the hours that teachers at his middle school devote to testing and test preparation. Initially, Smith posted to fellow teachers about what he called “crazy time,” the weeks spent in the classroom preparing students for the statewide tests.

Later, Smith changed the setting on his account to permit the public to see his tweets. He then made three more tweets, complaining that the state’s tests assess only reading, science, and math skills, and do not assess social studies, writing, or critical thinking. His final tweet read: “Parents: I spend three weeks teaching your children how to do well on Franklin’s state-mandated standardized tests. Wouldn’t you rather I teach them how to think critically, to write intelligently, and to distinguish rumor from fact?” A week later, MSD informed Smith that it would not renew his contract. Up to that point, Smith had always received positive performance reviews.

The school superintendent testified at his deposition that MSD and its teachers, like Smith, have no choice but to follow state requirements. By posting on social media, Smith was inviting parental inquiries for no good reason.

The district court held that Smith spoke as a citizen and not as a public employee in making his social media posts on a matter of public concern, and therefore Smith’s rights to freedom of speech were violated by MSD’s failure to renew his contract. On appeal, MSD argues that Smith’s tweets were not protected speech, that the trial court failed to properly apply the balancing test, and that Smith failed to show that his speech was the motivation for the discipline.

A plaintiff in a public-employee free-speech case bears the burden of proving that his speech is entitled to First Amendment protections. If he meets that burden, the court must balance the interests of the employee and the employer. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Speaking as a citizen. Speech is not necessarily made as an employee just because it focuses on a topic related to an employee's workplace. Teaching a lesson in the classroom is part of a teacher's ordinary duties, but posting on a personal social media account typically is not. On these facts, we conclude that Smith spoke as a citizen in alerting the public to his concerns about the mandatory testing.

Addressing a public concern. We also conclude that Smith addressed a matter of public concern. In determining if matters are of public concern, the court must consider the content, nature, and context of the speech. *Garcetti*. The speech at issue focuses on school policies, rather than personal complaints or issues related to Smith's classroom. Matters such as school district finances, public corruption, discrimination, and sexual harassment by public employees have been found to be matters of public concern, and a public employee's speech about these matters is protected. In contrast, complaints about work conditions are not public concerns.

Smith's tweets were not about his employment situation. Rather, they focused on the effect test preparation has on classroom instruction. By using Twitter, a modern-day "public square," Smith could reach parents and others in the community and tell them about the tests' content, the classroom time spent preparing for them, and how this focus on test preparation came at the expense of other subjects.

Moreover, the nature of Smith's speech changed from personal to public when he changed his social media settings from private, which limited his audience to his fellow teachers, to public, which allowed anyone to read his posts. The content of his complaints broadened from being only about the tests themselves to discussing the effect of the mandatory testing on the curriculum—that it took time away from other classroom activities and subjects. Thus, both the content and context of his speech raised a public concern regarding the education of children.

Balancing test. MSD contends that, even if Smith's speech is protected by the First Amendment, a proper balancing supports MSD, which as the employer has the right to promote workplace efficiency and maintain employee discipline. Over time, courts have tended to favor public employers over public employees. *See, e.g., Kurtz v. Orchard Sch. Dist.* (Fr. Ct. App. 2009) (teacher's social media posts that disparaged students eroded trust and were not protected speech). However, the balance tilts in favor of an employee calling attention to an important matter of public concern, such as a school district's budget and use of tax revenue. *Pickering v. Bd. of Education*, 391 U.S. 563 (1968).

Here, Smith did not criticize his coworkers; had he done so, those criticisms might have disturbed the school's morale or efficient operation. Instead, he criticized the state's educational requirements. MSD's primary defense is that it, like Smith, is bound to follow state regulations. MSD did not present any evidence that Smith's tweets had an effect on staff morale or that they created issues between Smith and the school's administration. While the superintendent may have been annoyed by Smith's tweets, annoyance is not enough to favor the employer. Almost all public speech criticizing the government will incur some annoyance or embarrassment. We agree with the district court that the balance favors Smith; his interest in speech outweighs MSD's interest in an efficient operation.

Motivating factor. Finally, Smith has shown that his speech was the motivating factor in the decision not to renew his contract. It was undisputed that his past performance reviews were positive. The superintendent testified that Smith's tweets annoyed the school board. Thus, the superintendent's testimony supplies the nexus between Smith's speech and MSD's decision not to renew Smith's contract.

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.