



2019 Fall Institute

Twitter and Taking the Knee:

*Exploring Scope of
Employee Free Speech*



Presented by:
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**Twitter and Taking the Knee:
Exploring Scope of Employee
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ACHRO EEO
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The First Amendment States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



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**History and Trends in Employee
Free Speech Law**

- *Pickering v. Board of Education:*
 - The Public Concern and State Interest Balancing Test
- *Connick v. Myers:*
 - Refining the Public Concern Inquiry
- *Waters v. Churchill*

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Statements Made By Public Employees Pursuant to Their Official Duties:

<i>Garcetti v. Ceballos</i>	<i>Garcetti</i> left several questions unanswered
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Free Speech Free Speech

Speech Made "Pursuant to Official Duties"

Academic Speech

Whistleblowing?

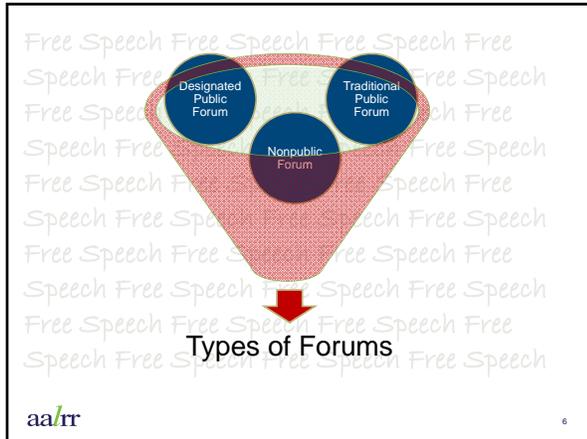
Free Speech Free Speech

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The Ninth Circuit's Five-Step First Amendment Retaliation Test

- 1**
 Plaintiff must show that she/he spoke on a matter of public concern under *Connick*;
- 2**
 Plaintiff must show that s/he spoke as a private citizen or public employee under *Garcetti*;
- 3**
 Plaintiff must show that his/her protected speech was a substantial or motivating factor in the adverse employment action;
- 4**
 The burden shifts to the government employer to show there was an adequate justification for treating the employee differently from other members of the general public under the *Pickering* balancing test; and
- 5**
 If the government fails the *Pickering* balancing test, it alternatively bears the burden of demonstrating that it "would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct." (*Id.* at 1070.)

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You Be the Judge

Case Study 1

- A police officer made complaints to supervisors about allegedly abusive and unlawful conduct at the City Police Department.
- The police officer was subsequently placed on administrative leave pending investigation.
- The officer claimed the leave was retaliation for protected speech.

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You Be the Judge

Case Study 2

- Tenured associate professor owned and operated an independent publishing company.
- While serving on a committee that was debating whether the College of Communication should separate from the school of liberal arts, the Professor wrote a pamphlet called "The Plan."
- He provided "The Plan" to several other faculty members, posted it on a public website, and enclosed it with a letter to the University Provost and President in which he offered a monetary donation from his publishing company.

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You Be the Judge

Case Study 2

- Professor attached a copy of the draft introduction and first chapter from a book he later published in his application for Sabbatical; in the application, he disclosed the book contained information that was critical of the academy.
- Subsequently, the Professor received a negative annual performance review and a formal notice of discipline.
- The Professor filed suit, alleging the administrators retaliated against him in violation of the First Amendment for distributing sections of his book and the Plan.



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You Be the Judge

Case Study 3

- A math professor sent three racially charged emails over a distribution list maintained by the district, such that all employees received the emails.
- Email 1 – referred to a “Dia de la Raza” event and asked, “Why is the district endorsing an explicitly racist event?”
- Email 2 – referred to Columbus Day and stated, “It’s time to acknowledge and celebrate the superiority of Western Civilization” and “Our survival depends on discrimination”; and offered excerpts from articles.



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You Be the Judge

Case Study 3

- Email 3 – commented on messages the professor had received, saying, “Boogie-boogie-boo to you too! Racist? Hardly. Realistic is more like it,” and providing links to the professor’s website (maintained on District’s web server).
- The administration denounced the Professor’s statements as not representing the position of the university, but did not prevent further emailing on the issue.
- A group of Hispanic employees sued, alleging the employer failed to correct or prevent harassment by failing to properly respond to the emails, which, they asserted, created a hostile work environment.



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You Be the Judge

Case Study 4

- The university system chancellor announced a budget shortfall and a plan moving forward.
- A professor sent an email to university faculty, staff, and students, challenging the determination and arguing the plan of action would be detrimental to students.
- The professor also circulated to faculty members a report from an independent analyst concluding that termination of staff was not necessary to resolve the budget shortfall.



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You Be the Judge

Case Study 4

- The professor sent four more emails the following month criticizing the chancellor's determinations — He claimed the chancellor favored the "wealthier" and "superior" students; encouraged members of the university community to gather for a protest of the termination plan; and analogized the chancellor's decision to actions of certain militia and camp guards who massacred striking coal miners and their families in Colorado.
- Less than an hour after reading the professor's last email, the university president terminated the professor's access to electronic resources at the university, including his email account, without notice.
- The professor asserted a claim against the university president for violation of his right to free speech.



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You Be the Judge

Case Study 5

- On his personal time, a criminal prosecutor assigned to a gang unit maintained a blog and twitter account discussing "conservative politics, liberal media bias, and criminal law."
- On his blog and twitter page, the prosecutor included a disclaimer: "The statements made on this web site reflect the personal opinions of the author. They are not made in any official capacity, and do not represent the opinions of the author's employer."



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You Be the Judge

Case Study 5

- The prosecutor wrote and posted to his blog eight unfavorable articles about a civil activist. He also posted to his blog over 200 pages of deposition transcript from an unrelated lawsuit between the activist and her former employee.
- The activist filed suit against the prosecutor, alleging that the prosecutor's harassment violated her First Amendment constitutional right to petition the government for redress of grievances.




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You Be the Judge

Case Study 6

- POTUS maintains a Twitter account.
- Several individuals posted criticism of the President or his policies on his Twitter feed, and were subsequently blocked from accessing or posting on the President's Twitter account.
- The individuals file suit, alleging their First Amendment rights had been violated.




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You Be the Judge

Case Study 7

- High School football coach takes a knee at the Friday night game, while the National Anthem was played.
- The following week, the coach is given a written reprimand.
- The coach files a complaint, alleging violation of his free speech rights.




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Thank You
For questions or comments,
please contact:

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Sharon Ormond chairs the firm's Education Law Technology group and is a member of the firm's Higher Education, Title IX, Civil Rights, and Wage and Hour groups. She represents numerous Community College Districts and other California educational agencies in labor relations and personnel matters, and brings over two decades of experience to her handling of cases including employee discipline, reductions in force, unfair practice charges, contract grievances, and the investigation and defense of discrimination, harassment, whistleblower, retaliation, and free speech claims. Her practice also includes advice, counsel, and litigation in First Amendment, search and seizure and privacy rights, wage and hour compliance, leaves of absence, disability accommodations, student discipline, and compliance with the Brown Act and the California Public Records Act.

Ms. Ormond regularly represents employers before the Office of Administrative Hearings, Department of Fair Employment and Housing, Equal Employment Opportunity Commission, Public Employment Relations Board, office of the California Labor Commissioner, and in federal and state courts. In a case of alleged discrimination and retaliation, she helped a public university secure a 12-0 jury verdict in its favor.

Events & Speaking Engagements

Ms. Ormond conducts workshops and training sessions for public educational agencies and professional associations, including ACBO, ACCCA, ACHRO, ACSA, CASBO, CISOA, and WACUBO on a variety of employment and education law issues, including investigations, technology use issues, and Title IX compliance. Ms. Ormond is a senior trainer for the FRISK® Documentation Model.

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Sharon J. Ormond

Publications

Ms. Ormond assisted with developing AALRR's ePROOF® materials for investigating technology incidents, and serves as an ePROOF® trainer. She is a frequent contributor to the firm's many publications and blog.

Community & Professional

- Labor and Employment Law and Public Law Sections of the California Bar Association
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