

Southeastern Association of School Business Officials Conference and Discovery Forum 2024

LEGAL PITFALLS

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Southeastern Association
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FEDERAL COURTS



Lindke v. Freed, (USSC 3/2024)

City Manager of Port Huron, posted “prolifically and primarily” about his personal life on his FaceBook page

Occasionally posted about city matters and would delete responsive posts that he considered “derogatory” or “stupid”

Lindke posted on this personal site objecting to the City’s COVID measures; Freed would sometimes delete his posts and ultimately blocked him

Lindke v. Freed, (USSC 3/2024)

- WHAT IS THE TEST?
- “A public official’s social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State’s behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.”
- “The alleged censorship must be connected to speech on a matter within Freed’s bailiwick. There must be a tie between the official’s authority and “the gravamen of the plaintiff’s complaint.”



Lindke v. Freed, (USSC 3/2024)



Practical Hint

“Here, if Freed’s account had carried a label—e.g., ‘this is the personal page of James R. Freed’—he would be entitled to a heavy presumption that all of his posts were personal, but Freed’s page was not designated either ‘personal’ or ‘official.’ The ambiguity surrounding Freed’s page requires a fact-specific undertaking in which posts’ content and function are the most important considerations. “

SOCIAL MEDIA LESSONS FROM THE COURT

- You are responsible for the consequences of what you post
- There is no privacy on the Internet



Free Speech Rights

Garcetti v. Ceballos, 547 U.S. 410 (2006) delineated three categories of potential speech made by a public employee:

Speech made by an employee who is not speaking on a matter of public concern

Speech made by an employee who is speaking as a private citizen regarding matters of public concern

Speech made by an employee who is acting as an employee

Garcetti Free Speech



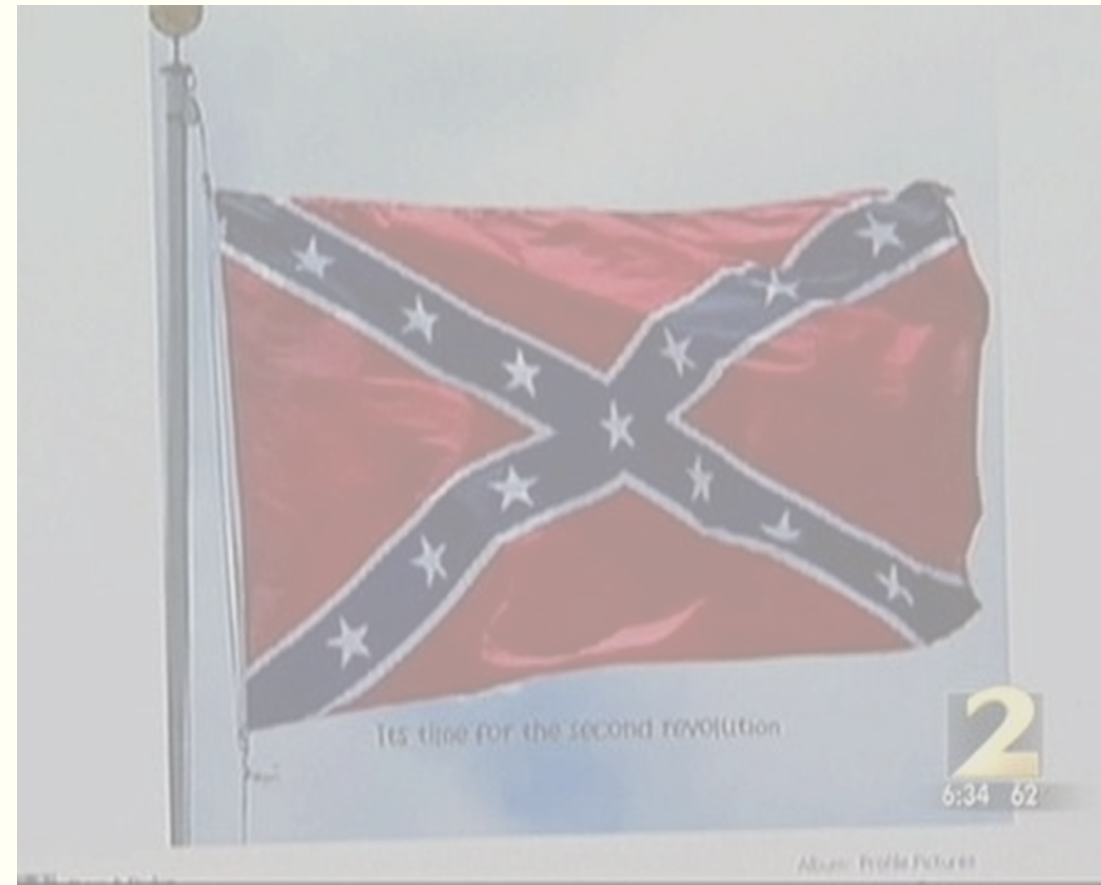
- Employee acting as an employee:
 - “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.”
 - Therefore, no First Amendment protection

Garcetti Free Speech

- Employee not speaking on a matter of public concern:
 - Not protected under the First Amendment
- Employee speaking as private citizen regarding matters of public concern:
 - Generally protected under the First Amendment
 - “[Employees] must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively”

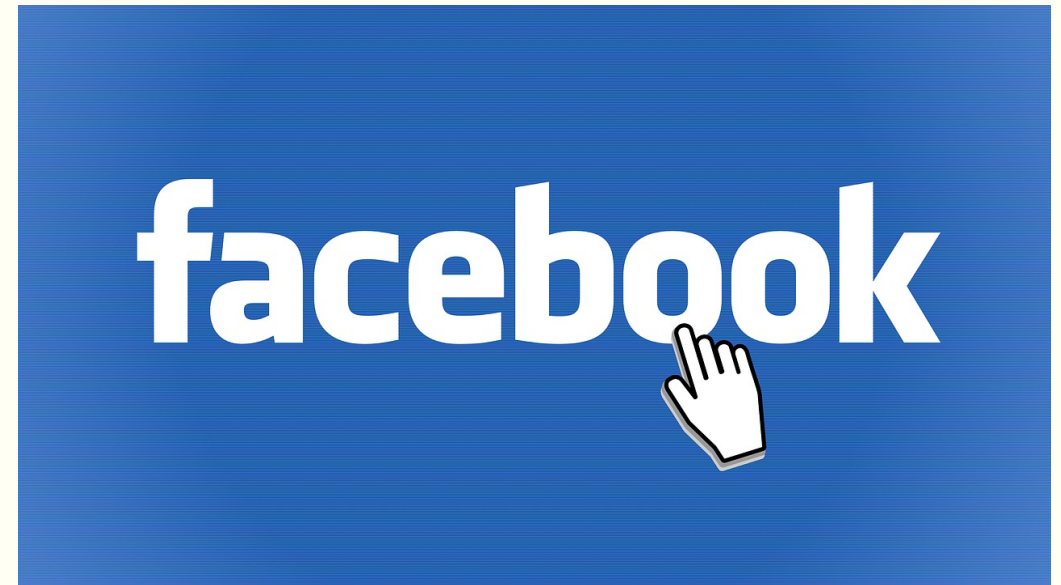


**SPEECH ABOUT
PUBLIC MATTERS
DUKE V. HAMIL,
997 F. SUPP. 2D 1291 (N.D.
GA. 2014)**



Duke v. Hamil

- Personal Facebook page, accessible only by “close friends and family”
- Facebook profile did not reference his employment at the Clayton State University Police Department or his job as assistant chief
- Took down the post within an hour, but before he did, someone provided an image of the post to local TV station



Duke v. Hamil



The Court's Decision and Advice

- “In addition to possible internal disruption, the public attention the speech received also implicated the Department's reputation and the public's trust.”
- “Yet despite his intentions and his quick removal of it, the post became public after someone provided the image to a television station. **This illustrates the very gamble individuals take in posting content on the Internet and the frequent lack of control one has over its further dissemination.**”



SICK AND TIRED AT WORK

Family and Medical Leave Act





- Eligibility of Employees:
 - Employed for at least 12 months (in total)
 - Worked 1250 hours in preceding 12 months
 - Actual hours worked – time on leave does not count
 - Teachers and other salaried employees are presumed to have met requirement – burden on employer to prove they did not.

**LEAVE
ENTITLEMENT
OF 12 WEEKS
DURING ANY 12-
MONTH PERIOD
FOR:**

- Birth of a child, or to care for a newborn within one year of birth
- Placement of a child with employee for adoption or foster care
- “Serious health condition” of spouse, child, or parent
- Employee’s own “serious health condition.”
- “Qualifying exigency” due to active duty in military

CALCULATING WEEKS

- Leave entitlement is 12 weeks, and leave is typically taken in weeklong blocks
- Do not count weeks in which the employee would not be working anyway
 - Winter break, summer break, spring break
- Fact that a holiday occurs during the week has no effect
 - Labor day week still counts as 1 week.
- What about Thanksgiving break?

FMLA

- How Has Board Of Education Determined The 12-month Period?
 - Calendar year?
 - School year?
 - “Rolling” year?
- If not defined in policy, the 12-month period is that which is most advantageous to the employee
 - Effectively, 24 weeks in a 24-month period
- Concurrent with other available local leave



Returning to Work

- On return from FMLA leave, employee is entitled to the same position as the employee held when leave commenced, or to an “equivalent position.”
 - Equivalent position is “virtually identical” to former position in terms of pay, benefits, and working conditions (including privileges, perquisites and status). Must involve same or substantially similar duties and responsibilities, requiring substantially equivalent skill, effort, responsibility and authority.



Intermittent Leave/ Reduced Leave Schedule

- Available for serious health condition of employee or family member or for covered service member with serious injury or illness
 - Not for pregnancy or adoption alone.
- Must be a medical need for leave that can be best accommodated through an intermittent or reduced leave schedule
 - Example: Chemotherapy every Friday
- Also available for qualifying exigency without medical necessity



Other FMLA Issues

- Any combination of other FMLA leave with covered servicemember leave is limited to 26-total weeks (no stacking)
- Must maintain benefits during leave
- Spouses working for same employer may only take 12/26-weeks total for birth, adoption, parent's serious health condition, or covered servicemember
- Employer may require substitution of accrued paid leave



The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. § 825.305. The employer must give the employee **at least 15 calendar days** to provide the certification. If the employee fails to provide complete and sufficient medical certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found [on the WHD website at www.dol.gov/agencies/whd/fmla](http://www.dol.gov/agencies/whd/fmla).

SECTION I – EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, this form asks the health care provider for the information necessary for a complete and sufficient medical certification, which is set out at 29 C.F.R. § 825.306. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308.** Additionally, you **may not** request a certification for FMLA leave to bond with a healthy newborn child or a child placed for adoption or foster care.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

(1) Employee name: _____
First Middle Last

(2) Employer name: _____ Date: _____ (mm/dd/yyyy)
(List date certification requested)

(3) The medical certification must be returned by _____ (mm/dd/yyyy)
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)

(4) Employee's job title: _____ Job description (is / is not) attached.
Employee's regular work schedule: _____
Statement of the employee's essential job functions: _____

(The essential functions of the employee's position are determined with reference to the position the employee held at the time the employee notified the employer of the need for leave or the leave started, whichever is earlier.)

SECTION II - HEALTH CARE PROVIDER

Please provide your contact information, complete all relevant parts of this Section, and sign the form. Your patient has requested leave under the FMLA. The FMLA allows an employer to require that the employee submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to the serious health condition of the employee. For FMLA purposes, a "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves *inpatient care or continuing treatment by a health care provider*. For more information about the definitions of a serious health condition under the FMLA, see the chart on page 4.

You may, but are **not required** to, provide other appropriate medical facts including symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment. Please note that some state or local laws may not allow disclosure of private medical information about the patient's serious health condition, such as providing the diagnosis and/or course of treatment.

SERIOUS HEALTH CONDITION

- Use DoL forms for certification of serious health conditions (and everything else)
- Contains maximum amount of information allowable under federal law
- Two forms of serious health condition:
 - Inpatient Care
 - Continuing Treatment

THE
IMPORTANCE OF
CLARITY ABOUT
HOW FMLA
COORDINATES
WITH STATE
AND LOCAL
LEAVE

- Interaction with employer's policies: Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies. 29 CFR §825.700 (b)
- Interaction with State laws: Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA...If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. 29 CFR §825.701 (a)