



HANEY PHINYOWATTANACHIP  
PLLC



## **DIVISION STAFF AND THE FIRST AMENDMENT**

Pakapon Phinyowattanachip  
Andrew P. Selman  
HANEY PHINYOWATTANACHIP PLLC

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T (804) 500-0310  
F (804) 500-0309

11 South 12<sup>th</sup> St. Suite 100 B  
Richmond, Virginia 23219

info@haneyphinyo.com  
www.haneyphinyo.com

## DIVISION STAFF AND THE FIRST AMENDMENT

By

Pakapon Phinyowattanachip and Andrew P. Selman  
HANEY PHINYOWATTANACHIP PLLC

### WHAT ARE THE SOURCES OF EMPLOYEE SPEECH RIGHTS?

- U.S. Constitution, First Amendment
  - “Congress shall make no law . . . abridging the freedom of speech...”
- Virginia Constitution, Art. I, Sec. 12
  - “That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech . . . .”
  - Free speech rights under the Virginia constitution are “coextensive” with free speech rights under the First Amendment. See Elliott v. Commonwealth, 267 Va. 464, 473–474 (2004) (“Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment.”).
    - Note the Virginia Supreme Court has an opportunity to revisit this relationship in Vlaming v. West Point School Board, et al., No. 211061.
- HB 384, passed by the General Assembly in 2022, provides that “[a]n employee of any unit of local government shall not be penalized by his employer for expressing his opinion regarding a current or proposed regulation, rule, policy, position, or other action or purpose of a unit of local government at a hearing of a public body during the time designated for public comment when such employee is speaking on his own behalf as a member of the public.”

## WHAT IS SPEECH?

Speech includes expression, not just verbal communication.

- Conduct is potentially protected under First Amendment when it is (1) intended to convey a particularized message and (2) there is a great likelihood that the message would be understood by those who viewed it. Spence v. Washington, 418 U.S. 405, 409 (1974).
- Examples of symbolic speech include some instances of clothing/jewelry, flag burning, marching in a parade, nude dancing, and donating money to political campaigns.

## HOW IS PROTECTED SPEECH DETERMINED?

Whether speech is protected is determined through a two-step inquiry:

- First, is the employee speaking as a private citizen on a matter of public concern? This inquiry is explained in **Section I** below.
  - For teachers speaking in the classroom, speech is not protected under the First Amendment if it is curricular speech.
  - For other staff and teacher speech outside the classroom, speech is not protected under the First Amendment if the employee was speaking pursuant to official duties or the content, form, and context of the speech show it was not on a matter of public concern.
- Second, do the interests of the employee in speaking outweigh the interests of the School Board to efficiently provide public services? This inquiry is explained in **Section II** below.
  - Conduct Pickering balancing to make this determination. If the balance weighs in favor of the employee, then the speech is protected under the First Amendment, and the School Board may not take any action against the employee because of the speech.

## **Section I: Is the employee speaking as a private citizen on a matter of public concern?**

Whether something is of public concern “rests on whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee.” Edwards v. City of Goldsboro, 178 F.3d 231, 247 (4th Cir. 1999). “[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of [the speech].” City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004).

- Speech by a **teacher in the classroom** is considered to be an issue between an employer and an employee—and so there is no First Amendment protection—when the speech is **curricular**. Lee v. York County Sch. Div., 484 F.3d 687, 697 (4th Cir. 2007).
  - For speech to be curricular, it must (1) bear the imprimatur of the school and (2) be supervised by faculty and designed to impart knowledge on students.
    - Selection of play was curricular speech because it was supervised by teacher, performed in interscholastic drama competitions, and the theater program was intended to impart particular skills to students, and so students, parents, and members of the public might reasonably perceive it bore the imprimatur of the school. Boring v. Buncombe Cty. Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998).
    - A teacher posting news articles highlighting the religious practices of certain individuals was curricular speech because the teacher posted the items on school-owned bulletin boards that were “constantly present for review by students in a compulsory educational setting” and subject to the supervision of the school principal, and because the teacher posting these items “sought to impart the particular knowledge of these figures and their values to his students in order to expose the students to social and moral values he deemed beneficial to their emotional growth.” Lee v. York Cty. Sch. Div., 484 F.3d 687, 700 (4th Cir. 2007).



evaluating his performance.” Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

- “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.” Lane v. Franks, 573 U.S. 228, 238 (2014).
  - Superintendent was speaking as part of official job duties when she communicated with the school board about alleged violations of state and federal law, including open meetings laws, and instructing a subordinate to contact federal authorities about unlawful activities related to the Head Start program she was assigned to manage, but not when she wrote to the state’s attorney general about alleged violations of open meetings laws because the board had never assigned the superintendent any responsibility over the board’s meeting practices. Casey v. West Las Vegas Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007).
  - Police officer was not speaking pursuant to official duties when calling governor’s office to complain about police misconduct when daily professional activities did not require contacting the governor’s office and “a general duty to enforce criminal laws in the community does not morph [into] calling the Governor’s Office because the chief of police himself is engaging in misconduct into part of an officer’s daily duties.” Hunter v. Town of Mocksville, 789 F.3d 389, 399 (4th Cir. 2015).
- Speaking as an employee on a matter of personal interest
    - To make this determination, consider the **content, form, and context** of the speech in question. See Connick v. Myers, 461 U.S. 138, 147–48 (1983) (“Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement.”). This guides evaluation of comments “to assess whether they are intended to

evaluate the performance of the office—which would merit constitutional protection—or merely to gather ammunition for another round of controversy with superiors—which would not.” Brooks, 685 F.3d at 371 (internal quotation marks omitted).

- When the content, form, and context indicate that the employee is speaking as an employee on a matter of personal interest, there is no First Amendment protection.
  - Content
    - Public employee’s complaint of racial and religious discrimination in the workplace did not address matters of public concern because plaintiff’s complaint “pertained to personal grievances and complaints about conditions of employment” rather than informing the public that corrections officers were not discharging their governmental responsibilities, bringing to light actual or potential wrongdoing or breach of public trust, or conveying any information “other than the fact that a single employee is upset with the status quo.” Brooks, 685 F.3d at 372–73 (internal quotation marks omitted).
    - School’s disciplinary practices that discriminated against African American children are a matter of public concern. See Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004).
    - The law “provides many examples of situations where a complaint of sexual harassment by a single employee is not a matter of public concern, but we can certainly envision situations where such a claim might well constitute a matter of public interest—for example, where a high-ranking public official is the offender.” Campbell v. Galloway, 483 F.3d 258, 269 (4th Cir. 2007).

- Allegations that safety regulations were being violated are matters of public concern, but matters of internal policy, favoritism, and other employment-related matters are not. See Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 353 (4th Cir. 2000).
- A teacher’s grievance complaint and criticism of the administration related to having to work longer hours on four days, and attend a workshop that interfered with her vacation plans did not suggest public concern. Gregory v. Durham County Bd. of Education, 591 F. Supp. 145 (M.D.N.C. 1984).
- A teacher’s stated concerns about school budget mismanagement by administration related to matter of public concern. Stroman v. Colleton Cty. Sch. Dist., 981 F.2d 152, 158 (4th Cir. 1992).
- Form
  - A “letter to a newspaper,” an “online posting contributing to a public discussion,” or “testimony at a public meeting” demonstrate “an effort to participate in a larger public dialogue” and so suggest speech on a matter of public concern. See Crouse v. Town of Moncks Corner, 848 F.3d 576, 585–86 (4th Cir. 2017).
  - “[S]peech through an internal grievance procedure demonstrates that he does not seek to communicate to the public or to advance a political or social point of view beyond the employment context. An employee . . . who seeks primarily resolution of his personal situation through an employer-provided grievance process simply does not speak with the civic intent necessary to invoke the First Amendment. Brooks, 685 F.3d at 373 (internal citations and quotation marks omitted).
  - Internal grievance procedure filings can touch on a matter of public concern when part of police

officer’s “overarching allegations of serious and pervasive law enforcement misconduct” and publicized outside of sheriff’s office. See Durham v. Jones, 737 F.3d 291, 300 (4th Cir. 2013).

- “[T]he fact that [Plaintiff] did not make his views publicly known does not, in any way, undermine the public concern encompassed in his speech. Indeed, as we recently noted, ‘public employees do not forfeit the protection of the Constitution’s Free Speech Clause merely because they decide to express their views privately rather than publicly.’ In short, the form of the speech does not detract from the public concerns encompassed in [Plaintiff’s] public-safety related speech.” Goldstein, 218 F.3d at 354 (4th Cir. 2000) (internal citation omitted).

- Context

- Voicing concerns in meetings of an advisory group of teachers, administrators, and parents suggests public concern (even if employee also voices concerns during faculty meetings and individual meetings with administrators). See Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004)
- In Campbell v. Galloway, a female police officer’s allegations of sexual harassment and gender discrimination also included complaints of inappropriate conduct directed toward other women, including members of the public. 483 F.3d 258, 270 (4th Cir. 2007). Because the complaining officer “did not bring [attention] to the sexual harassment issues . . . in order to resolver her own personal problem” but rather “was seeking to challenge the practice within the department as much as she was seeking a resolution of her own complaint,” the court held she was speaking on a matter of public concern when she made her complaint. Id.

- In Cromer v. Brown, the court concluded that a group of African-American police officers were speaking on a matter of public concern when they filed a letter of complaint with their supervisor related to racial discrimination because the “specific complaints prompted an expression of concern about the inability of the sheriff’s office to carry out its public mission effectively,” and because the letter was a group complaint, “not the expression of a single disgruntled employee about a personal employment dispute.” 88 F.3d 1315, 1325–26 (4th Cir. 1996).

**Section II: Do interests of employee in making the speech outweigh the interests of the employer in efficiently providing public services?**

- “[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
  - Pickering Balancing:
    - The Fourth Circuit, in Love-Lane v. Martin, 355 F.3d 766, 778 (4th Cir. 2004), has identified seven non-exhaustive factors to consider when conducting Pickering balancing. These include whether the employee’s speech:
      - (1) impairs the ability of supervisors to mete out discipline,
      - (2) impairs harmony among co-workers,
      - (3) damages close working relationships,
      - (4) impedes the performance of the public employee's duties,

- (5) interferes with the operation of the agency,
  - (6) conflicts with the responsibilities of the employee within the agency, and
  - (7) is communicated to the public or to co-workers in private.
- The interests of the community are also relevant. Id.
  - “The government employer must make a stronger showing of the potential for inefficiency or disruption when the employee's speech involves a more substantial matter of public concern.” Id. (internal quotation marks omitted).
  - Political speech “is entitled to the highest level of protection.” Bland v. Roberts, 730 F.3d 368, 387 (4th Cir. 2013)
  - When “a public employee’s expression is in furtherance of matters of personal concern,” the employer’s burden in the balancing test “is lessened.” Crouse v. Town of Moncks Corner, 848 F.3d 576, 586 (4th Cir. 2017) (quoting Joyner v. Lancaster, 815, F.2d 20, 24 (4th Cir. 1987)).
- Examples of Pickering balancing:
    - In finding that Pickering balancing weighed in favor of Love-Lane when she spoke about racially discriminatory discipline practices, the Fourth Circuit held that “her speech did not affect the ability of administrators and teachers at Lewisville to deliver their educational services; nor did her speech diminish the quality of education being provided. But even if Love-Lane’s speech—exposing and opposing race discrimination—caused some disharmony at the Lewisville school, we must remember that her speech dealt with a substantial issue of public concern that was of special interest to the larger Lewisville community.” Love-Lane, 355 F.3d at 779.
    - “[D]espite the Sheriff’s reference to the need for harmony and discipline in the Sheriff’s Office, nothing in the record in this case indicates that Carter's Facebook support of Adams’s campaign did anything in particular to disrupt the office or

would have made it more difficult for . . . others to perform their work efficiently.” Bland v. Roberts, 730 F.3d 368, 387 (4th Cir. 2013)

- A teacher in the school division wrote and circulated a letter among his fellow teachers, encouraging a “sick out” during exam week to protest a change in the summer pay schedule. In finding that Pickering balancing did not favor the teacher, the Fourth Circuit noted that the teacher’s interest “is outweighed by the *public interest* in having public education provided by teachers loyal to that service and, in particular, in having final examinations proctored and completed in a timely fashion, and the School District's *employer interest* in having its employees abide by reasonable policies adopted to control sick leave and maintain morale and effective operation of the schools.” Stroman v. Colleton County School Dist., 981 F.2d 152, 159 (4th Cir. 1992). The court noted that although a teacher “does not waive or forfeit his right to comment on matters of public concern,” when he enters the public teaching profession, “he can be expected, when doing so, to elect a method which does not frustrate provision of the service he is employed to provide,” especially when “other methods of speech and conduct” are readily available for the teacher to express his concern.

## **DO BOARD MEMBERS HAVE FREE SPEECH RIGHTS?**

- In Houston Community College System v. Wilson, 595 U.S. \_\_\_, No. 20-804 (Mar. 24, 2022) the Supreme Court held that a purely verbal censure by a board of trustees for a community college system against one of its members for that member’s speech did not give rise to a First Amendment claim.
  - “[W]e do not see how the Board’s censure could qualify as a materially adverse action consistent with our case law. The censure at issue before us was a form of speech by elected representatives. It concerned the public conduct of another elected representative. Everyone involved was an equal member of the same deliberative body. As it comes to us, too, the censure did not prevent Mr. Wilson

from doing his job, it did not deny him any privilege of office, and Mr. Wilson does not allege it was defamatory. At least in these circumstances, we do not see how the Board's censure could have materially deterred an elected official like Mr. Wilson from exercising his own right to speak.”

## **WHAT OTHER AREAS OF LAW MAY BE IMPLICATED BY STAFF SPEECH?**

- Speech and free exercise of religion may be intertwined
  - Example: teacher refuses to say the chosen pronouns of transgender students because it violates his religious beliefs
  - Example: teacher subjected to adverse employment action for wearing crucifix necklace while teaching
- Speech and rights to assembly/association may be intertwined
  - “[T]o compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.” Shelton v. Tucker, 364 U.S. 479, 485–86 (1960). In Shelton, U.S. Supreme Court found unconstitutional a state law that required every teacher, as a condition of employment, to annually disclose every organization to which teacher belonged or regularly contributed within the past five years. Id. at 480, 490.
- Whistleblowing laws

## **CASES TO PAY ATTENTION TO**

### Vlaming v. West Point School Board, et al.

- Teacher terminated for refusing to use transgender student's chosen pronouns; circuit court sustained School Board's demurrer to plaintiff's claims that termination violated his freedom of speech and freedom of religion rights under Virginia law, among other claims. Appeal pending before Supreme Court of Virginia, No. 211061.

## Kennedy v. Bremerton School District

- School district fired football coach for praying aloud following football games and claims the prayers were made pursuant to his official duties under Garcetti, and so are not protected. Appeal pending before U.S. Supreme Court, No. 21-418. See <https://www.scotusblog.com/case-files/cases/kennedy-v-bremerton-school-district-2/>.