Blogging While (Publicly) Employed: Some First Amendment Implications

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BLOGGING WHILE (PUBLICLY) EMPLOYED: SOME FIRST AMENDMENT IMPLICATIONS

Paul M. Secunda*

I. INTRODUCTION

While private-sector employees do not have First Amendment free speech protection for their blogging activities relating to the workplace, public employees may enjoy some measure of protection depending on the nature of their blogging activity. The essential difference between private-sector and public employment stems from the presence of state action in the public employment context. Although a government employee does not have the same protection from governmental speech infringement as citizens do under the First Amendment, a long line of cases under Pickering v. Board of Education have established a modicum of protection,

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1 U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

2 There is some evidence that many private-sector employees mistakenly believe that they have First Amendment speech protection for blogging. See João-Pierre Ruth, Bloggers Beware: The Boss Has You Bookmarked, NJBiz, Dec. 15, 2008, http://www.njbiz.com/article.asp?id=76834 (“[E]mployees are in for a rude awakening if they assume online activities are completely protected by First Amendment rights.” (quoting Lewis Maltby, president of the National Workrights Institute in Princeton, New Jersey)). Moreover, these employees do not magically gain First Amendment protection as citizens once they leave work and blog about work-related matters. Blogging is just another form of off-duty conduct that may harm the reputation of the company and over which an employer may discipline an employee. See id.

3 See George Rutherford, State Action, Private Action, and the Thirteenth Amendment, 94 VA. L. REV. 1367, 1370 (2008) (“All the . . . provisions of the Constitution regulate the structure and function of government, and if they confer individual rights, they protect only against ‘state action,’ in the broad sense of action by the federal government as well as by the states.”).

4 See Eugene Volokh, Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites, 21 CARDOZO L. REV. 595, 635 (1999) (“Under free speech law, the government acting as employer has far more authority to restrict people’s speech than does the government acting as sovereign.”).

especially when the public employee blogging is off-duty and the blog post does not concern work-related matters.\footnote{See City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per curiam) ("[W]hen government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it." (quoting United States v. Nat'l Treasury Employees Union (NTEU), 513 U.S. 454, 465, 475 (1995))); Paul M. Secunda, \textit{Whither the Pickering Rights of Federal Employees}, 79 U. COLO. L. REV. 1101, 1108 (2008) ("The only thing that is apparently clear concerning the job-relatedness of speech is that public employee speech that occurs off-duty and is not work-related . . . does not come under the \textit{Pickering} framework at all. Rather, under the \textit{NTEU} line of cases, it is protected much like normal citizen speech." (footnotes omitted)).}

Describing the legal protection for public employee bloggers is an important exercise, as many employers have ratcheted up their efforts to limit or ban employee blogging while employees have simultaneously increased blogging activity.\footnote{Recent studies suggest that one's work experience remains a popular blogging topic. See Richard A. Paul & Lisa Hird Chung, \textit{Brave New Cyberworld: The Employer's Legal Guide to the Interactive Internet}, 24 LAB. LAW. 109, 111 (2008) ("Employees are avid [blog] users. In an August 2005 survey, blog entries using the terms 'my job,' 'my work,' and 'my boss' far outnumbered those on the topics of food, sex, sports, and dating." (citing EDELMAN AND INTELLISEEK, \textit{TALKING FROM THE INSIDE OUT: THE RISE OF EMPLOYEE BLOGGERS} 7 (2005), https://www.edelman.com/image/insights/content/Edelman-Intelliseek%20-Employee%20Blogging%20White%20Paper.pdf)).} It is not surprising that a new term has been coined to uniquely denote the act of being fired for blogging about one's employer: "Dooced."\footnote{See Dooce.com, About, http://dooce.com/about ("Never write about work on the internet unless your boss knows and sanctions the fact that YOU ARE WRITING ABOUT WORK ON THE INTERNET. If you are the boss, however, you should be aware that when you order Prada online and then talk about it out loud that you are making it very hard for those around you to take you seriously.".)} So the specific question that this Essay addresses is: Do dooced employees have any First Amendment protection in the workplace? But the larger issue examined by implication, and the one addressed by this Symposium, is the continuing impact of technology on First Amendment free speech rights at the beginning of the twenty-first century.

This contribution to the Symposium proceeds in three parts. Part II examines the predicament of private-sector employees who choose to blog about their workplaces. Part III then lays out the potential First Amendment free speech implications for public employees who engage in the same types of activities. Finally, Part IV briefly considers a potential
future trend in Kentucky involving government employers banning employee access to all blogs while at work.

II. BLOGGING WHILE PRIVATELY EMPLOYED

In the early years of the technology boom in this country, employers became aware that it was vital to maintain tight control over their technological resources. Many management-side employment law associates over the years have been asked, as part of employee manuals developed for employer-clients, to add a section on personal use of telephones, computers, e-mail, and the Internet. Recognizing that the tort of invasion of privacy requires an intrusion to be "highly offensive to a reasonable person,"9 such policies make very clear that private-sector, at-will employees have no legitimate expectation of privacy in their phone calls, e-mails, and Internet activities.10 To make doubly sure, employers commonly attach acknowledgement forms to their employee manuals to ensure that employees read these policies and cannot claim that they were unaware of them in a subsequent termination lawsuit.11

About three to five years ago, these same workplace technology policies began expanding to cover the growing blogging phenomenon.12 More workers were blogging on their home and work computers about work. Employers became increasingly concerned that proprietary, confidential information was making its way to competitors and the public through cyberspace.13 There was also the concern that instead of taking

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9. Restatement (Second) of Torts § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

10. See Anna Bahney, Interns? No Bloggers Need Apply, N.Y. Times, May 25, 2006, available at http://www.nytimes.com/2006/05/25/fashion/thursdaystyles/25intern.html?scp=1&sq=%22no%20bloggers%20need%20apply%22&st=cse ("While there are differences in laws among jurisdictions, from a legal perspective . . . it is generally accepted that companies have the right to impose controls on their employees' use of computers and other equipment used for communication." (quoting Alfred C. Frawley, III, director of the intellectual property practice group at the law firm Preti Flaherty in Portland, Maine)).

11. Such acknowledgment forms also usually require employees to indicate they have read a thorough at-will disclaimer concerning the status of their employment.


13. One article categorizes employers' concerns about employees blogging this way: (1) revealing confidential information; (2) utilizing, in an unauthorized manner, company logo
naps or talking to friends and family on the phone, the newest way to decrease productivity at work was surfing the Web, blogging on one’s own site, or commenting on other people’s blogs. Finally, workers’ sarcastic and nastier sides would come out on the blogs, sometimes producing blog posts attacking their employers and co-employees.\textsuperscript{14}

As a result, many more employers in this country have now added specific blogging policies that apply to workers’ blogging activities.\textsuperscript{15} At Cisco Systems, Inc., for instance, employees must identify themselves if they are commenting on matters related to company activities and must also state that they are describing their own personal opinions, rather than speaking for the company.\textsuperscript{16} Interestingly, this last measure tracks with what attorneys have been appending for years to their e-mail and fax correspondences. There is also evidence from case law that private-sector employees have been discharged for using their own computers at home for writing something unpleasant about their employer or otherwise acting in a manner disloyal to their employer’s best interests.\textsuperscript{17}

\textsuperscript{14} Jay M. Zitter, Annotation, \textit{First Amendment Protections Afforded to Blogs and Bloggers}, 35 A.L.R. 6TH 407, 416 (2008) (“Because the tone of blogs is often irreverent or sarcastic, a successful blog, together with the readers’ postings will, as a matter of routine, severely criticize or ridicule named individuals or institutions.”).

\textsuperscript{15} Bahney, supra note 10 (“[P]rodded by their legal and public relations departments, [employers] are starting to adopt policies that address [blogging by employees].”); see also Martha Neil, \textit{Bosses Are Making New Rules About Worker Blogging}, ABA J., Dec. 15, 2008, http://www.abajournal.com/news/bosses_making_new_rules_about_worker_blogging/ (“Concerned about employee blogging that may have an adverse effect on the companies they work for, many bosses are imposing new rules restricting such activities.”).

\textsuperscript{16} Neil, supra note 15 (citing Ruth, supra note 2); see also Bahney, supra note 10 (“Viacom, the parent company of Comedy Central, now has an explicit policy. In a section on confidentiality, it states that the employee is ‘discouraged from publicly discussing work-related matters, whether constituting confidential information or not, outside of appropriate work channels, including online in chat rooms or ‘blogs.’”).

\textsuperscript{17} Robert Sprague has cataloged a number of examples of bloggers being fired for work commentary that received public attention. See Robert Sprague, \textit{Fired for Blogging: Are There Legal Protections for Employees Who Blog?}, 9 U. PA. J. BUS. L. 355, 357-58 (2007). Other anecdotal evidence suggests that employers sometimes overreact to activities of blogging employees. See Tracie Watson & Elisabeth Piro, Note, \textit{Bloggers Beware: A Cautionary Tale of Blogging and the Doctrine of At-Will Employment}, 24 HOFSTRA LAB. & EMP. L.J. 333, 334 (2007) (“Bloggers such as Joyce Park, a former employee of Friendster, have been fired for such minor infractions as posting already public information on their
In any event, private-sector employees are facing more limits on what they can blog about, when they can blog, and where they can blog. Much to the surprise of many private-sector employee bloggers, the lack of state action in these instances means that the First Amendment does not provide any free speech protection. Instead, employees facing employer discipline or discharge for their blogging activities have been forced to consider other creative legal arguments in this employment at-will world.

For instance, I and others have proposed that bloggers writing about common workplace issues may be engaged in protected, concerted activity under section 7 of the National Labor Relations Act (NLRA). Under the NLRA, employees are free to engage in concerted activities in the workplace for their mutual aid and protection. A recent decision from the

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18 The Employment Law Alliance survey, conducted through a telephone survey of 1000 adults in 2006, found that "of the workers whose companies have blogging policies, 62 percent say the policy prohibits posting any employer-related information and 60 percent say the policy discourages employees from criticizing or making negative comments about the company." See Posting of Paul M. Secunda to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2006/02/employee_blogge.html (Feb. 8, 2006, 7:54 EST).

19 RICHARD A. BALES, JEFFREY M. HIRSCH & PAUL M. SECUNDA, UNDERSTANDING EMPLOYMENT LAW 83 (2007) ("One of the most common misconceptions in employment law is that all workers enjoy First Amendment constitutional protections for their speech in the workplace. They do not.").

20 See Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself." (citation omitted)).

21 See Engquist v. Or. Dep’t of Agric., 128 S. Ct. 2146, 2155 (2008) ("The basic principle of at-will employment is that an employee may be terminated for a ‘good reason, bad reason, or no reason at all.’" (quoting Reply Brief of Petitioner at 27, Engquist v. Or. Dep’t of Agric., 128 S. Ct. 2146 (2008) (No. 07-474))); see also Sprague, supra note 17, at 355 ("While individuals may believe that they have the right to say what they want to on their own time while using their own resources, the employment-at-will doctrine remains a powerful tool for employers to discharge their employees without legal backlash.").


National Labor Relations Board (NLRB) in *Guard Publishing Co.* might put the kibosh on any such argument.\textsuperscript{24} *Guard Publishing Co.* found that employees have no section 7 rights to use their employers' computers for organizing purposes.\textsuperscript{25} Consequently, it may be difficult for an employee-blogger to claim NLRA protection for discussing workplace issues with fellow employees on company computers. Nevertheless, this same reasoning leads to a conclusion that employee blogging about the workplace on a home computer might be protected. It will, of course, take further adjudications by the NLRB to sort out all of these issues, and *Guard Publishing Co.* might not stand long as precedent with the arrival of the Obama NLRB.

Other legal approaches have had little success in protecting private-sector employee bloggers. Some states have passed off-duty conduct statutes, which generally prohibit employers from terminating employees for engaging in lawful conduct outside of the workplace.\textsuperscript{26} For instance, the Colorado lifestyle discrimination statute protects employees engaging in lawful activity while away from work.\textsuperscript{27} However, such statutes generally have limitations. For instance, the Colorado statute permits employers to base adverse employment action on lawful off-duty conduct if such conduct "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee," or would result in the employee having a conflict of

\textsuperscript{24} *Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007).

\textsuperscript{25} *Id.* at 1116 ("[W]e find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications.").

\textsuperscript{26} States with broad off-duty conduct statutes include Colorado, North Dakota, California, and New York. *See* CAL. LAB. CODE § 96(k) (West 2003); COLO. REV. STAT. § 24-34-402.5(1) (2008); N.Y. LAB. LAW § 201-d(2) (McKinney 2009); N.D. CENT. CODE §§ 14-02.4-01 to -03 (2004). Additionally, a Connecticut statute protects employees, both on-duty and off-duty, from suffering adverse employment decisions for engaging in First Amendment-type activities. *See*CONN. GEN. STAT. § 31-51q (2003). Although the Connecticut law, in particular, may seem like a panacea for all that ails private-sector employee bloggers, "the Supreme Court of Connecticut cautioned in *Daley v. Aetna Life and Casualty Company* [734 A.2d 112, 121 (Conn. 1999)], the First Amendment 'safeguard[s] statements made by an employee that address a matter of public concern, but provide[s] no security with respect to statements that address wholly personal matters.'" Stephen D. Lichtenstein & Jonathan J. Darrow, *At-Will Employment: A Right to Blog or a Right to Terminate?*, 11 No. 9 J. INTERNET L. 1, 15 (2008) (second and third alterations by Lichtenstein & Darrow).

\textsuperscript{27} COLO. REV. STAT. § 24-34-402.5(1) (2008).
interest. One can see how this language might preclude an employee blogger writing about workplace issues from relying upon these statutes.

Finally, fired private-sector employee bloggers have argued under common law tort law theories for protection. They have been generally unsuccessful under an invasion of privacy tort because, as explained above, most employers make sure that employees have no expectations of privacy when blogging at work; most blogs are open, so no expectation of privacy exists. Similarly, torts for wrongful discharge in violation of public policy have generally not panned out. In short, there are few protections for private-sector workplace bloggers and even fewer First Amendment implications.

III. BLOGGING WHILE PUBLICLY EMPLOYED

Because of the state action doctrine and the subsequent application of the First Amendment, public employee bloggers find themselves in a somewhat better situation than their private-sector counterparts. But it is far from a perfect one.

Long ago, public employers worried about employees saying unkind things about them in the press and media. Starting with Pickering v. Board of Education forty years ago, which dealt with a public school teacher writing about school budgetary issues in the local newspaper, the United

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28 Id.
29 See Lichtenstein & Darrow, supra note 26, at 17 ("[W]hile the language of the [off-duty conduct] statutes in these five states suggests broad protection for legal off-the-job activities during non-working hours, judicial interpretation of the statutes has so far been exceedingly narrow.").
30 Lichtenstein & Darrow, supra note 26, at 13 ("It is hard to imagine how an employer's act of typing in a Web address and reading a publicly available blog could be considered 'highly offensive.'"); Sprague, supra note 17, at 363 ("[T]he typical blogger will most likely not be able to claim invasion of privacy for the simple reason that most blogs are open and available to anyone with Internet access.").
31 See BALES ET AL., supra note 19, at 89 (noting that courts have generally refused to follow the approach of the Third Circuit Court of Appeals in Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983), and find that the First Amendment may not be the source of public policy for a public policy tort claim). But see Wiegand v. Motiva Enters., LLC, 295 F. Supp. 2d 465 (D. N.J. 2003) (finding that the federal Constitution, including the First Amendment, could be a source of public policy tort, but finding against an employee because commercial hate speech is not protected under the First Amendment).
33 Id. at 565-66.
States Supreme Court has sought to define, with mixed success, what speech rights public employees have. On the one hand, the Court wished to protect these individuals as citizens and recognized that many times these workers held a working knowledge of the inside of government. On the other hand, the Court realized that even government employers have to be able to run their workplaces efficiently and provide their stated services to the general public. Not surprisingly, the Pickering Court split the difference by coming up with a balancing test. Under this balancing test, a court weighs the First Amendment interests of the employee as a citizen against the government interest in running an efficient government service for the public. If the balance under Pickering favors the employee, that employee has First Amendment rights in the speech. So, although public employees have First Amendment rights in the workplace, the rights are not nearly as robust as what individuals enjoy as private citizens.

Furthermore, the scope of the free speech right appears to be shrinking for public employees. Since Pickering, the Court, in a number of decisions, has set up what I have previously referred to as the “free speech five-step.” This same five-step process will determine, in most cases, whether a blogging public employee can seek protections from employer discipline for the employee’s blogging activities.

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34 Id. at 572 (“Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent.”).

35 The governmental interests concern maintaining “a significant degree of control over their employees’ words and actions” because “without it, there would be little chance for the efficient provision of public services.” Garcetti v. Ceballos, 547 U.S. 410, 418-19 (2006) (citing Connick v. Myers, 461 U.S. 138, 143 (1983)).

36 Pickering, 391 U.S. at 571-72. The balance undertaken in Pickering is required because although the government employer performs important public functions and consequently possesses far broader powers in its employer capacity than in its sovereign capacity, nevertheless, “a citizen who works for the government is... a citizen.” Garcetti, 547 U.S. at 419-20.

37 The exact scope of First Amendment protection for public employee bloggers is uncertain because of the lack of litigation concerning blogging and its relationship to blogging employees. See Neil, supra note 15.

38 Secunda, supra note 6, at 1107-11 (describing the free speech five-step for public employees).
In the first step of the process, which is based on the recent United States Supreme Court case Garcetti v. Ceballos, a court first asks whether the employee is speaking pursuant to official duties. In Garcetti, a deputy district attorney for Los Angeles County, Richard Ceballos, was subjected to adverse employment actions for speaking out about an allegedly defective search warrant in a criminal case. The question presented to the Supreme Court was whether Ceballos had engaged in protected speech under the First Amendment such that he could not be retaliated against for his actions with regard to the search warrant. The Court held that if employees are engaged in official duty speech at work, they are not speaking as citizens and thus enjoy no First Amendment protection for their speech. Therefore, Ceballos lost the case because it was determined that his actions were pursuant to his official duties. The Court indicated in making this determination that the test “is a practical one” and focuses on “the duties an employee actually is expected to perform.”

Now, even though most employees do not have the official duty of blogging, many public employees fall into the trap of using their workplace computers to engage in blogging activities that run afoul of their employer or co-employees. Indeed, even some of the most well-intentioned blogging, like research or other work-related purposes, might inadvertently run afoul of Garcetti. Although litigation post-Garcetti is still in its nascent

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40 Id. at 421 (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).
41 Id. at 413-15.
42 Id. at 415.
43 Id. at 424. Interestingly, this holding that government workers cannot act as employees and citizens at the same time controverts a previous statement of the Court that a teacher making a presentation before a board of education “spoke both as an employee and a citizen exercising First Amendment rights.” City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n, 429 U.S. 167, 176 n.11 (1976).
44 Garcetti, 547 U.S. at 424-25.
45 In applying this first step to employees hired to blog, it might be difficult for them to distinguish between their work-related blogging and their personal blogging, especially when their personal blogging criticizes their employers. For an example of this problem in the related case of where a public employee is hired as a spokesperson, but seeks to speak to a newspaper on her own time, see generally the discussion of Chambers v. Dep’t of the Interior, 103 M.S.P.R. 375 (2006), in Paul M. Secunda, Garcetti’s Impact on the First Amendment Rights of Federal Employees, 7 FIRST AMEND. L. REV. 117, 136-38 (2008).
stages, it appears that much of the litigation surrounding Garcetti will focus on a practical assessment of the official duties of the public employee, with employers seeking broad definitions and employees more narrow ones. The Garcetti standard makes only one thing apparently clear: Off-duty public employee speech that has no relation to work (anti-Garcetti speech) does not come under the Pickering framework and is protected much like normal citizen speech. Thus, public employee bloggers should be safe blogging about non-work-related issues while away from work.

Even if public employee bloggers can escape the Garcetti trap, employees must show that their speech addresses a “matter of public concern” because it is only this type of speech that is at the core of the First Amendment’s protections. Under Connick v. Myers, courts are directed to look at the surrounding content, form, and context of the speech to determine whether the speech involves a matter of public concern. This type of speech “typically [includes] matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.” Sometimes the analysis turns on whether the speech addresses a “matter of political, social, or other concern to the community,” or is worthy of legitimate news interest. If it is determined that the public employee blogger is involved merely in

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46 Only a few cases have been found that involve both the Garcetti standard and blogging. See, e.g., Stengle v. Office of Dispute Resolution, 631 F. Supp. 2d 564 (M.D. Pa. 2009); Ranck v. Rundle, No. 08-22235-CIV, 2009 WL 1684645 (S.D. Fla. June 16, 2009).

47 See, e.g., Morales v. Jones, 494 F.3d 590, 596 (7th Cir. 2007) (citing Haynes v. City of Circleville, 474 F.3d 357 (6th Cir. 2007)); Mayer v. Monroe County Cnty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007); Green v. Bd. of County Comm’rs, 472 F.3d 794 (10th Cir. 2007); Battle v. Bd. of Regents, 468 F.3d 755 (11th Cir. 2006); Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006); Mills v. City of Evansville, 452 F.3d 646 (7th Cir. 2006).

48 “[W]hen government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification ‘far stronger than mere speculation’ in regulating it.” City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per curiam) (quoting United States v. Nat’l Treasury Employees Union (NTEU), 513 U.S. 454, 465, 475 (1995)).

49 One possible exception is if the employee becomes a blog addict and neglects his full-time job. Such a scenario obviously may have repercussions for the employee at work.


51 Id. at 147-48.

52 City of San Diego, 543 U.S. at 80.

53 Connick, 461 U.S. at 146.

54 City of San Diego, 543 U.S. at 83-84. The Court itself has recognized, however, that “the boundaries of the public concern test are not well defined.” Id. at 83. Past cases, by analogy, provide the best indication about whether speech is on a matter of public concern.
speech of a purely private interest, like an employment dispute with supervisors or co-employees, then there is no First Amendment protection because such blogging does not implicate the core concerns of the First Amendment.\(^{55}\)

The U.S. Supreme Court tipped its hand on how it might view this type of blogging scenario in the case of *City of San Diego v. Roe*,\(^{56}\) which involved a public employee’s off-duty use of eBay. More specifically, John Roe was a police officer for the city of San Diego who lost his job when his supervising sergeant discovered that, during his free time, John enjoyed stripping off a police uniform, masturbating in front of a video camera, and selling the resulting pornography on eBay.\(^{57}\) In a per curiam decision, the United States Supreme Court held that Roe was not denied his rights to free expression under the First Amendment by the police department’s actions, as he was not expressing himself on a “matter of public concern.”\(^{58}\)

While not similar factually, the recent case *Richerson v. Beckon*,\(^{59}\) which involves a public employee workplace blogger, is similar to *City of San Diego* from an outcome perspective. In *Richerson*, the Central Kitsap School District initially employed Tara Richerson as the Director of Curriculum.\(^{60}\) She then was in line for a voluntary transfer to a new position that would permit her to work half time as a curriculum specialist and half time with a new instructional coaching model.\(^{61}\) Importantly, the instructional coach component of her prospective job required her to follow a model which emphasized the sensitive and confidential relationship between her coaching position and the teachers that she would be mentoring.\(^{62}\)

Before Richerson was transferred, the school district became aware that she was using a personal blog to be critical of her replacement in the

\(^{55}\) See *Connick*, 461 U.S. at 147.

\(^{56}\) 543 U.S. at 78.

\(^{57}\) Id. at 78-79.

\(^{58}\) Id. at 84.

\(^{59}\) No. C07-5590 JKA, 2008 WL 833076 (W.D. Wash. Mar. 27, 2008), aff’d, 337 F. App’x 637 (9th Cir. 2009).

\(^{60}\) Id. at *1.

\(^{61}\) Id.

\(^{62}\) Id. Her blog was located online at http://whatitslikeontheinside.blogspot.com. It now can be found at http://whatitslikeontheinside.com/index.html and contains the disclaimer: “This is a personal blog. All opinions expressed here are my own and not those of my employer, natch.”
director position. Since language is outcome-determinative in public employee free speech cases, here is an excerpt of the July 13, 2006 blog posting:

Save us, White Boy!

I met with the new me today: the person who will take my summer work and make it a full-time year-round position. I was on the interview committee for this job and this guy was my third choice . . . and a reluctant one at that. I truly hope that I have to eat my words about this guy. . . . But after spending time with this guy today, I think Boss Lady 2.0 made the wrong call in hiring him. . . . He comes across as a smug know-it-all creep. And that’s probably the nicest way I can describe him. . . . He has a reputation of crapping on secretaries and not being able to finish tasks on his own. . . . And he’s white. And male. I know he can’t help that, but I think the district would have done well to recruit someone who has other connections to the community. . . . Mighty White Boy looks like he’s going to crash and burn.

Although the school district did not terminate Richerson for this conduct, she was officially reprimanded for violating the professional standards associated with the interview process. Richerson, however, did not appear to learn her lesson and later commented about a co-employee and chief union negotiator on her blog: “What I wouldn’t give to draw a little Hitler mustache on the chief negotiator.” After receiving a complaint from this co-employee, the district involuntarily reassigned Richerson to the position of classroom teacher, though they did not ask her to stop blogging.

Based on this record, the court granted summary judgment to the school district on the claim that Richerson’s blogging deserved First Amendment protection. Specifically, the court found that the language did not qualify as speech on a matter of public concern under Connick. Thus, although there is not much litigation in this area yet, the combination of City of San Diego

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63 Id. at *2.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id. at *4. The court noted that not only did the first blog posting represent a breach of confidentiality, but “it was racist, sexist, and bordered on vulgar,” and it was inconsistent with the types of public concern issues contemplated by the Pickering line of cases. Id.
and Richerson suggests that public employee bloggers might have the hardest time finding First Amendment speech protection under Connick’s public concern test, given the personal nature of many blog postings.

However, if Connick can be cleared, the third step the court undertakes is the previously discussed Pickering balance of interests. Case law over the years has shown that the balancing usually is resolved based on whether the public employee’s expression causes a substantial disruption in the workplace.\(^{69}\) Substantial disruption, in turn, is measured based on such things as “the impact of the speech on working relationships, the harm caused by the speech, the public’s interest in the speech, and the employee’s relationship to that issue.”\(^{70}\) Paradoxically, this substantial-disruption standard appears to constitutionalize the heckler’s veto and makes most vulnerable that speech which is the most unpopular and warrants the most protection under the First Amendment.\(^{71}\) In other words, it may be the controversial blogger who finds it hardest to obtain protection under this prong of the free speech framework. Another way to think of this is that if the blogger’s activities were not causing some significant ripples in the workplace, it is unlikely that the employer would be concerned.

Applying this balance to the Richerson case, it appears clear that the school district would have won the balancing of interests. Although the court did not expressly base its decision on Pickering, there is language in other parts of the opinion that implies that the district’s interest in efficiency would have outweighed Richerson’s First Amendment concerns. More specifically, Richerson was causing a substantial disruption in the workplace and the school district had the right to foster a harmonious working environment. Certainly, given her penchant for gossip, it does not seem that the school district should have been forced to tolerate her as a mentor in an instructional program that requires trust and sensitivity.\(^{72}\)

It is probably, by now, more than apparent to the reader how difficult it is for public employees to negotiate this framework, but if the Pickering


\(^{71}\) Kozel, supra note 69, at 1019.

\(^{72}\) Richerson, 2008 WL 833076, at *3 (“[T]he concern of the defendant was prospective, i.e.[,] that plaintiff’s self proclaimed role as a personality reporter of school personnel would affect her ability to maintain the code above set forth for mentoring fellow teachers with trust and confidence.”).
balance favors the employee, the employee is then considered to have engaged in protected speech. The fourth step requires application of the evidentiary framework established in Mount Healthy City School District v. Doyle. Under this framework, the plaintiff must prove by a preponderance of the evidence that engaging in the protected speech was a substantial or motivating factor for the adverse employment action the employee suffered. This step seems less important in the public employee blogging context because it is usually the employees' expression which gets them into hot water in the first place.

The fifth and final step of this Byzantine framework requires the government to prove that it would have made the same decision even in the absence of the protected employee speech. If the public employer is successful in meeting this burden, there is no liability. This is because "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." Only if the employee can survive this fifth and last obstacle may liability be imposed against the public employer and the responsible agents of the employer. In the case of someone like Richerson, the school district might have been able to point to other objectionable conduct by her and assert that it would have made the same decision regardless of her blogging activities. In other words, if the employee is a general malcontent, this step might prove another way to avert liability for the employer.

In all, public employees do have some First Amendment protection in their blogging activities, but the more job-related the blog content and the more this content causes disruptions at the workplace, the less likely the employee will receive constitutional protection. Given the complexity of the Pickering analysis, public employees may only expect real constitutional protection when blogging if they blog on their personal computers outside of work and in no way related to their work. This is not

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74 Id. at 287.
75 Id.
76 Id. at 285-86.
77 However, even if public employees meet all five steps, state employers may be able to avail themselves of sovereign immunity under the Eleventh Amendment. Moreover, responsible agents of the employers may be able to avoid individual liability if they show they are eligible for qualified immunity, though they still might be subject to injunctive relief. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6.3, at 528-29 (4th ed. 2003).
exactly the robust constitutional protection that many of these bloggers believe they have.

IV. A FUTURE TREND FROM KENTUCKY?: LIMITING PUBLIC EMPLOYEES' ACCESS TO BLOGS

Because of the lack of precedent in this area, there are still many issues that need to be resolved. One of the more important ones involves employee access to technology in the public workplace in the Bluegrass State. The disagreement stems from a dispute over whether a government employer may completely ban its employees from accessing all blogs during work time, while allowing access to other websites on the Internet.  

In Nickolas v. Fletcher, former Republican Governor Ernie Fletcher of Kentucky directed the state to promulgate a policy which prohibited state employees from accessing blogs from state-owned computers. Initially, the ban only applied to chat rooms and pornographic sites, but it was later expanded to blogs and other categories of Web content after a state study concluded that state employees were wasting too much time at work accessing blogs. This policy was subsequently challenged by a non-employee blogger, Mark Nickolas, whose blog focused on Kentucky state politics and was critical of Governor Fletcher's administration. His blog was included in the ban, and he challenged the policy under the First Amendment and Equal Protection Clause, alleging that the ban was due in part to the viewpoints he represented on his blog.

The federal district court ruled against the state's motion to dismiss for failure to state a claim, finding that the blogger's allegations, if taken as true, that the state prohibited employees from accessing his blog because of his viewpoints expressed, would violate the First Amendment. It appears

80 Id. at *1.
81 See id.
82 Id. It was alleged initially that it was the criticisms of the blogger on his site, BlueGrassReport.com, which caused the ban of his website. It was only later that the ban was expanded to all blogs (probably to avoid charges of viewpoint discrimination). See Government Employee Blog, supra note 78.
83 Nickolas, 2007 WL 1035012, at *1.
84 Id. at *3-*4.
that a state employee could have made the same claim if the employee was not able to access a blog because of the viewpoints of its authors. Interestingly, no public employee seems to have challenged the policy as of yet. Nevertheless, although a public employee’s blog is not involved, the ability of public employees to access blogs is involved. First Amendment rights of public employees are therefore involved here because it is not just the speech of the speaker that is protected, but it is the right of the listener to obtain information that is also implicated.\footnote{See Laurent Sacharoff, \textit{Listener Interests in Compelled Speech Cases}, 44 \textit{Cal. W. L. Rev.} 329, 383 (2008) ("The Court \ldots makes clear that listener interests alone can justify a free speech right for listeners, even in cases in which the speakers do not enjoy a free speech right.").}

The court ruled, however, against the blogger’s request for preliminary injunctive relief based on its conclusion that the plaintiff’s claim did not have “a strong likelihood of success on the merits.”\footnote{\textit{Nicholas}, 2007 WL 1035012, at *9.} The court first pointed out that because a public employee did not bring a claim, the \textit{Pickering} analysis was not applicable.\footnote{Id. at *4.} Rather, the court argued that a forum analysis should apply where the government is limiting the use of its website.\footnote{Id.} Undertaking this complicated forum analysis, the court concluded that the Internet on state computers is a nonpublic forum.\footnote{Id.} Moreover, the court concluded that the state’s ban on blogs was consistent with the purpose of a nonpublic forum in that the state’s policy was not unreasonable in light of the state’s interest and appeared to be viewpoint-neutral.\footnote{Id. at *5 (citing Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834 (6th Cir. 2000)).} On the last point, the court pointed to evidence which suggested

\footnote{Id. at *7-*9. This is really the crux of the case: Whether the state was primarily motivated in blocking access to blogs in order to impede Nickolas’s blog, and other blogs, that were critical of it. The timing seems awfully suspicious and there does not appear to be a good reason to distinguish between blogs and other news sites, though the state claims that blogs were one of the types of websites most visited by state employees during work hours. \textit{Id.} at *7. The district court agreed with the state that the access to other mainstream news sites was reasonable in that it was only permitted if "incidental" and did not interfere with government business. \textit{Id.} at *7. It is not clear, however, how the state is keeping track of whether state employee use of news websites is more than incidental or how "incidental" is measured. This purported standard is also confused by the fact that many state employees appear to use mainstream news sites to conduct state business. \textit{Id.} at *8. Finally, it is not clear why blogs with news content could not be utilized for similar, state business-related purposes.}
that the blog ban was based on objective evidence that blogs were one of the types of websites upon which state employees were wasting time and undermining the efficiency of the public service. The court also credited government evidence that the policy was not adopted on a viewpoint-discriminatory basis, strong counter-evidence presented by Nickolas to the contrary notwithstanding.  

The Nickolas case is interesting on a number of levels. Although the case was eventually settled favorably for the plaintiff, and Kentucky’s state policy no longer blocks access to blogs, the case raises the issue of whether other government employers will seek to ban or otherwise limit blog use at government workplaces. For example, under the Kentucky settlement agreement, state employees are still prohibited “from posting on . . . blogs on their state owned computers.” There is also the question of whether the Internet on state computers is indeed a nonpublic forum, subject to a less stringent First Amendment analysis. Finally, and most significant for purposes of this Essay, the question remains: What would happen if a public employee did challenge the Kentucky ban?

Applying the Pickering analysis to the facts of this case, I do not foresee either Garcetti or Connick being an issue. The case would appear to come down to a balancing of public employee First Amendment interests against the efficiency interests of the state government. Although the outcome is far from clear, an employee’s success appears to hinge on a showing that Nickolas’s blog does not cause a substantial disruption to state

91 Id. at *9. I tend to disagree with the court on this point and think that it is more likely that the policy had its genesis in viewpoint discrimination, given its timing, and that the normal procedures for promulgating such a policy do not seem to have been followed. Id. at *8 (“Nickolas claims that the normal procedures regarding a change in the computer systems were not followed when the State adopted its new Internet policy. Furthermore, as evidence that the State’s policy specifically targeted him, Nickolas states that the ban on blogs was implemented the same day that he was quoted in the New York Times article criticizing the Governor and his administration.” (citations omitted)).

92 The case was favorably settled for the plaintiff on June 17, 2008, after new Democratic Governor Steve Brasehear replaced Governor Fletcher on December 11, 2007. See Settlement Agreement in Nickolas v. Brashear (June 17, 2008), available at http://www.citizen.org/documents/NickolasSettlement.pdf. Under the state’s new Internet policy, “the category ‘newsgroups/blogs’ is no longer blocked by the internet filtering software.” Id. at ¶ 6. Nevertheless, the state has retained the discretion to “block access to ‘blogs’ if pursuant to a reasonable, viewpoint-neutral standard that applies equally to all websites.” Id. at ¶ 7.

93 Id. at ¶ 6.
business. Such a showing may be able to be made by arguing that one blog is unlikely to cause much of an upheaval in such a large bureaucracy. Alternatively, an employee could argue that state employees should be able to utilize his blog just like other mainstream news websites to help conduct state business and set state policy. In short, I am cautiously optimistic that a public employee challenge might be successful if someday maintained.

V. CONCLUSION

Public employee bloggers may have First Amendment protections for their blogging activities under current constitutional law doctrine. Such protection is not as robust as that enjoyed by private citizens, but the protection may be enjoyed under limited circumstances. To the extent that public employees wish to take advantage of more blogging technology in the future, both at work and away from work, constitutional doctrine in this area must be modified to recognize the important roles that public employees play in maintaining the transparency and accountability of government for all of us.