To: US District Court
From: Law Offices of Michael Carter
Date: February 27, 2024
Re: Randall v. Bristol County

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

A public employee does not surrender all First Amendment rights merely because of their 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. *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). A plaintiff in a public-employee free-speech case bears the burden of proving that his speech is entitled to First Amendment protections. *Smith v. Milton School District* (15th Cir. 2015).

A. Because Ms. Randall was not publishing her social media posts pursuant to her ordinary job duties as the Director of the Workforce-Readiness Program, Ms. Randall was speaking as a citizen.

When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes. *Garcetti* (US 2006); *See Dunn* (15th Cir. 2018). The question is whether the employee made the speech pursuant to his ordinary job duties. *Lane v. Franks*, 573 U.S. 228 (2014). Speech is not necessarily made as an employee just because it focuses on a topic related to an employee's workplace. *Smith* (15th Cir. 2015).

In *Garcetti*, the Court concluded that an assistant district attorney spoke pursuant to his official duties as a prosecutor and not a citizen when he criticized the legitimacy of a search warrant in a memo advising his supervisor (US 2006). In *Dunn*, the plaintiff spoke as an employee when he posted about firefighter education requirements in a Facebook page for first-responders, made pursuant to his employment responsibilities as assistant fire chief, which included consulting with the chief and others on continuing education requirements and issues. (15th Cir. 2018); *see also Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007). In *Smith*, the plaintiff-teacher spoke as a citizen in alerting the public to his concerns about mandatory state testing. (15th Cir. 2015).

Ms. Randall made two Facebook posts that resulted in her suspension. In her second post, she identified herself as the director of the Workforce-Readiness Program and demonstrated that she has helped 40 Bristol County residents get their GED. Defense counsel will likely argue that Ms. Randall was acting in her official capacity when she made the posts since it was related to her role as the director. In Ms. Randall's deposition, she stated that her duties as the program's director included: (i) developing curriculum and lesson plans; (ii) creating materials describing program eligibility requirements; (iii) scheduling classes and assessments; (iv) training support staff; (v) creating policies and procedures for connecting participants with other county services and resources; and (vi) ensuring all proper reports were prepared to comply with grant requirements.

Unlike the plaintiff in *Dunn* and *Garcetti*, none of Ms. Randall's official job duties include posting information on social media or as related to informing individuals about the grant and its value. Similar to the plaintiff in *Smith*, Ms. Randall's social media posts were not simply made as an employee because it focused on a topic related to her role in the Workplace-Readiness Program. Instead, she spoke as a citizen in alerting the public to her concerns about ending the program. In her deposition, Ms. Randall adamantly states that she did not publish the posts pursuant to her job duties and "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." As Ms. Cook herself states, "I make the decisions, not the library director or employees like Ms. Randall." Therefore, it was not within Ms. Randall's official capacity to make social media posts critiquing the county's decision not to apply for the grant.

B. Ms. Randall's social media posts were made to make the public aware of the county's decision not to renew a state grant that has led to increased employment prospects in the community in light of the approaching deadline; therefore, her speech was a matter of public concern.

In gauging whether a matter is of public concern, there are three relevant factors: (1) the speech's context; (2) the speech's nature; and (3) the context in which the speech occurred.

In *Dunn*, the court determined that the plaintiff's speech did not address a matter of public concern because his motive appeared personal. (15th Cir. 2018). Plaintiff did not explain how the new hiring qualifications affected the public nor offer facts showing how the new standards are lax or will lead to unqualified firefighters. *Id*. Dunn's comments were additionally directed to his fellow first-responders, not the general public, as the Facebook page was known among fisrt-responders as a sounding board for gripes and complaints. *Id*.

In *Smith*, a teacher openly criticized the nature of state-mandated standardized testing and the school district's budget and use of tax revenues, and the court held that school policies, rather than personal complaints or issues related to the plaintiff's classroom, are protected matters of public concern. For example,matters such as school district finances, discrimination, and sexual harassment by public employees have been found to be matters of public concern. *Smith* (15th Cir. 2015). The plaintiff changed his social media settings from private to public, which allowed anyone to read his posts. *Id*.
In *Pickering v. Bd. of Education*, a public school teacher wrote letters to the editor that criticized his employer's use of tax revenues, which was published in the local newspaper. 391 U.S. 573 (1968). The court determined that the teacher's letter was protected under the First Amendment because it had no official significance and bore similarities to letters submitted by numerous citizens every day.
First, Ms. Randall's statements, taken in context, demonstrated a desire to critique the county's decision in not renewing the grant. Ms. Randall made two Facebook posts, both revolving around the county's decision not to renew the state grant. In her first post, she stated that the grant and resulting program have had great success in helping citizens obtain their GED, and she believed that was the wrong decision. In her second post, she explained the grant and its recent effects, and criticized the county and the county executive's decision not to apply to renew the grant.
Second, Ms. Randall's statement was both informative and persuasive. As previously mentioned, she attempted to spread the accomplishments of the program while encouraging individuals to reach out to the county's executives. Ms. Randall stated that her social media posts were posted on her personal Facebook page, but the social media application permitted her to make her posts public and open to everyone.
Third, Ms. Randall's statement was motivated by a desire to inform the public. She stated in her deposition that "I called the county executive and left numerous messages but got no reply. I assumed she did not want to talk to 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." Ms. Randall has denied that her motivation is not fueled by disappointment in seeing her position end; instead, she contends that she truly believes this grant is important in helping citizens prepare for the GED and enter the workforce. Despite the defendant's contention that Ms. Randall's primary motivation in making the social media posts were to embarrass her, there is no evidence demonstrating that Ms. Randall had any motivation to embarrass Ms. Cook. In fact, Ms. Cook has admitted that she does not know Ms. Randall and still has never met her.

C. Ms. Randall's interest in speaking freely and informing the public of a matter of public concern outweighed the county's interest in efficient operation and good relations between its departments and personnel.

If it is determined that the employee spoke as a citizen on a matter of public concern, the inquiry moves to a balancing test. *Dunn* (15th Cir. 2018). 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. *Id*. Over time, courts have tended to favor public employers over public employees. *Smith* (15th Cir. 2015); *see Kurtz v. Orchard Sch. Dist*. (Fr. Ct. App. 2009).

In *Dunn*, the plaintiff's interest in speaking freely was outweighed by the fire department's interest in a team that is unified in firefighting, and the plaintiff's Facebook posts could undermine the teamwork needed for firefighters to work safely. In *Smith*, the court determined that the balance tilts in favor of an employee calling attention to an important matter of public concern, such as school district's budget and use of tax revenue. The plaintiff in that case did not criticize his coworkers; instead, he criticized the state's educational requirements. *Id*. The defendant did not present any evidence that the plaintiff's social media posts had an effect on staff morale or that they created issues between Smith and the school's administration. *Id*. The superintendent's mere annoyance was not enough to justify tilting the scales in favor of the employer. *Id*.

Defense counsel will likely argue 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. Ms. Cook further contends that the grants were costly for the county because the county had to hire and supervise staff, account for funds, make reports, and take up space in the main county library and in two of its branch facilities. Additionally, Ms. Cook admits that some of the new county board members have lobbied for an economic growth office, which will replace many of the functions that the Workplace-Readiness Program had previously dealt with, though it is not currently in effect.

However, defendant did not make any of this information known to Ms. Randall. Instead of addressing her phone calls, emails, or texts, she continues to emphasize and highlight her disdain for Ms. Randall's actions simply because it embarrassed her and showed a lack of respect. Ms. Cook's mere annoyance is not enough to justify removing First Amendment protection. Ms. Randall did not criticize her team or negatively affect affect staff morale, demonstrated by Ms. Cook's statement that her only complaint about Ms. Randall was the social media posts and the time she wasted in having to respond to the public. However, Ms. Cook's subsequent consequence of public questioning is not necessarily a

harm that weighs in her favor. As the county executive, Ms. Cook is tasked with operating all county functions, and is is within the scope of her employment to respond to public inquiries. Further, Ms. Cook admitted that there were no disruptions or problems in any county office. Ms. Cook also indicated that, when the grant ends, Ms. Randall will lose her position as director of the Workforce-Readiness Program and return to her old job at the library. Therefore, Ms. Randall has refuted the presumption that favors public employers by demonstrating her interest in speaking freely is not outweighed by any cognizable county interest.

D. The county's motivating factor in suspending Ms. Randall was the social media posts, as demonstrated by Ms. Cook's deposition and correspondence by the county's counsel.

In addition, for an employee to prevail, the employee must show that the speech was a motivating factor in the adverse employment action. *Id*. In *Smith*, the court determined that his social media posts were the motivating factor in the decision not to renew his teaching contract because it was undisputed that his past performance reviews were positive. *Id*. Additionally, the superintendent in *Smith*'s testified that the social media posts annoyed the school board, which established a sufficient nexus between the plaintiff's speech and the employer's decision not to renew his contract. *Id*.

The county has conceded that Ms. Randall was suspended because of her Facebook posts, and the facts are undisputed. Pursuant to the letter from the Personnel Office of Bristol County dated October 27, 2023, Ms. Randall was suspended specifically for insubordination, with no further explanation. Further, in the letter sent on November 4, 2023, the county's legal counsel stated that "Ms. Randall was suspended because of her Facebook posts." In her deposition, Ms. Cook stated that she suspended Ms. Randall 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." Therefore, Ms. Randall has satisfied her burden of demonstrating that the speech was a motivating fact in the adverse employment action. Ms. Randall should be entitled to relief in the form of restoration of her pay and expungement of the suspension from her employment record.

III. Legal Argument

When Bristol County Library suspended Olivia Randall for two weeks without pay for "insubordination," the county violated Ms. Randall's First Amendment rights. There is no genuine dispute as to any material fact, and even viewing those facts in the light most favorable to the county, this Court should grant summary judgment in Ms. Randall's favor.

A public employee does not surrender all First Amendment rights merely because of their employment status. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). To show that their speech is protected by 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. *Dunn v. City of Shelton Fire Dep't* (15th Cir. 2018). If the plaintiff meets that burden, the court must then balance the interests of the employee and the employer. *Garcetti v. Ceballos.*

In this case, the undisputed facts show that Ms. Randall made her speech as a private citizen, that her speech addressed a matter of public concern, and that the balance of the interests weighs heavily in her favor. As such, we respectfully request that this Court grant Ms. Randall's Motion for Summary Judgment.

A. Because Ms. Randall's Facebook posts were not pursuant to her official duties, Ms. Randall was speaking as a citizen.

When public employees make statements pursuant to their official job duties, the employees are speaking as employees and not as citizens. *Garcetti.* Ms. Randall's job duties did not include posting on her personal social media account.

As the Fifteenth Circuit explained in *Smith v. Milton School District*, teaching a lesson in the classroom is part of a teacher's ordinary duties, but posting on a personal social media account is not. *Smith v. Milton Sch. Dist.* (15th Cir. 2015). In her deposition, Ms. Randall explained that her job duties include developing the curriculum and lesson plans for the county's GED program; creating materials describing the program eligibility requirements; scheduling classes and assessments; training support staff; creating policies and procedures for connecting participants with other county services; and

preparing reports to comply with the grant requirements. Her job duties do not include posting on social media.

This case is distinguishable from *Dunn*, where the Fifteenth Circuit found that a firefighter spoke as an employee when when posting about firefighter education requirements in a private Facebook page for first responders. *Dunn.* In that case, the speech fell within his broad employment responsibilities of "consulting with the chief and others on continuing education requirements and issues." *Id.* Ms. Randall's job duties are much narrower and do not include general consultation with her employer and others on issues related to her program.

Ms. Randall's speech is the modern-day equivalent of the protected speech in *Pickering. 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. *Id.* In this case, Ms. Randall published Facebook posts directed at her "fellow Bristol County residents" criticizing her employer's decision to not renew the Workforce-Readiness Program. This was at a time when "most citizens got their news about local issues from their local newspaper or TV station." *Dunn.* Now, most citizens read news about local issues on social media. Just as Pickering's letter informed residents of the school district about the district's budgeting decisions and financial matters, Ms. Randall's post informs Bristol County residents about the county's decision on a public education financing matter.

B. Because Ms. Randall's Facebook posts concerned a public program designed to help Bristol County residents obtain their GED, her speech was on a matter of public concern.

In considering whether the employee's speech is on a matter of public concern, courts consider the content, nature, and context of the speech. *Garcetti.*

First, the content of the speech her involved a matter of public concern: the possible termination of a public program that helps local citizens attain their GED get "job-ready." Over three years, the program had helped 40 local residents earn their GED and attain basic employment skills, leading Ms. Randall to the reasonable conclusion that the termination of the program is an important issue that the public should know about. Ms. Randall's first post called on fellow residents who wanted the county to renew the state grant to call the county executive, and her second post criticized the county

executive for failing to "get her priorities straight" and deciding not to apply to grant that "helps people get jobs." In her deposition, Ms. Cook admits that the workforce-development grant was fulfilling its purpose, and had helped a number of people.

Unlike the speech at issue in *Dunn*, which was motivated be "personal" animus and contained comments "of a disgruntled employee," Ms. Randall's speech was motivated by her concern as a local resident that an important program for fellow Bristol County residents could soon be terminated. While her position as the program's director gives her some personal interest in this decision, the termination of the program would not have threatened her job but merely change her duties. Ms. Randall's primary motivation in making the posts was not to ensure her continued employment as director, but "to ensure that [the county] renewed this grant."

Second, the nature of Ms. Randall's posts were public. Unlike the social media posts at issue in *Dunn*, which were made on a private page for fellow public responders -- an "essentially internal" communication -- Ms. Randall's posts were made on her Facebook page which is public to everyone. This was a conscious decision on her part to "alert the public," rather than -- as in *Dunn* -- a post made in a private page known as a "sounding board for gripes and complaints." *Dunn*. As the Fifteenth Circuit explained in *Smith*, social media (in that case, Twitter) is "a modern-day 'public square,'" which enables citizens to reach the broader community.

Third, the context surrounding Ms. Randall's Facebook post confirms their public nature. Ms. Randall had initially called the county executive numerous times and sent messages by phone, email and response, to no avail. While Ms. Cook argues that Ms. Randall should have simply waited for her office to get back to her, time was of the essence. Because the application deadline was about to pass, Ms. Randall concluded that she had no option than to turn to her ability as a public citizen to voice her criticism on a public platform, and let local residents have a say in the decision.

Thus, the content, nature, and context of Ms. Randall's speech all point to the speech being on an important matter of public concern.

C. Because the Facebook posts did not materially disrupt the efficient and effective public service of Bristol County, the balance of the interests favors Ms. Randall.

In conducting its balancing test, a court must weigh the interests of the employee in expressing the speech against the employer's interest in promoting effective and efficient public service. *Dunn.* Although courts have tended to favor public employers over public employees, the balance tilts in favor of an employee calling attention to an important matter of public concern. *Smith; Pickering.*

While Ms. Randall's speech did criticize and "embarrass" the county executive, that is insufficient to tip the balance in favor of the county. As the Fifteenth Circuit explained, "almost all public speech criticizing the government will incur some annoyance and embarrassment." *Smith.* And there is no evidence here that the effect of the speech was any more than just that -- annoyance and embarrassment. According to Ms. Cook, the posts showed a lack of "respect" and "embarrassed" her and the county.

The county may argue that the posts caused a significant disturbance, but Ms. Cook's own testimony admits that the "trouble" caused was merely "a dozen" public inquiries that her team was able to respond to. Despite her apparent inability to respond to Ms. Randall's prior messages, Ms. Cook's office was able to respond to the members of public. Ms. Cook admitted that there were no disruptions or problems in the county office. Furthermore, there is no evidence of a negative effect on team morale, as there was in *Dunn* -- or even in public confidence in the county. When Ms. Cook informed the concerned members of the public that the county has a new plan to end unemployment, the residents "seemed satisfied."

D. Because Ms. Randall's speech was the motivating factor in the decision to suspend her, Ms. Randall has satisfied the nexus between her protected speech and employment suspension.

Finally, the County has conceded that Randall was suspended because of her Facebook posts. Therefore, the nexus between Ms. Randall's speech and the county's decision to suspend Ms. Randall has been satisfied.

E. Conclusion

Because the undisputed facts of this case demonstrate that Ms. Randall's speech was entitled to First Amendment protection, we respectfully request that this Court grant Ms. Randall's Motion for Summary Judgment and find that Bristol County violated Ms. Randall's First Amendment rights.