FIRST AMENDMENT LAW
Free Speech within the Employment Relationship
BUT FIRST…

- WCTC EMS Leadership and Management Technical Diploma Program
- 100% Online
- 8-Week, Accelerated Courses
- Enter at any Course

If you are a seasoned EMS provider looking to take your career to the next level, this program may be right for you. Those in leadership roles within fire and EMS agencies must have a collaborative mindset, be able to motivate staff, communicate effectively, delegate to others, and be strategic and critical thinkers.

About This Program
Designed for experienced Emergency Medical Services (EMS) professionals and built upon the National Fire Academy's Fire and Emergency Services Higher Education (FESHE) core curriculum, WCTC's online-only EMS Leadership and Management program provides the knowledge and skills to those interested in functioning as a leader-manager within a fire-based or stand-alone EMS service.

What Makes This Program Unique
- Courses are taught by experienced EMS professionals who are experts in their field.
- Each class features relevant coursework that can immediately be applied to the EMS agency or fire department.
- Those interested in enrolling in this program must possess a State EMS license or National Registry of Emergency Medical Technicians (NREMT) certification (at any level) prior to applying.

EMS Leadership and Management
School of Protective & Human Services
PROGRAM CODE 30-531-9
Credits
CORE COURSES:
Courses are taught in an accelerated format in eight-week blocks.
January – February
531-342 EMS Legal & Political Aspects 3
March – April
531-343 EMS Service Management 3
May – June
531-344 EMS Safety and Risk Management 3
July – August
531-345 EMS Quality Management and Research 3
September – October
531-346 EMS Community Risk Reduction 3
November – December
531-341 EMS Systems Foundations 3
ONLINE-ONLY FORMAT
This program can be started throughout the year.

Career Salaries
$27,000 – $32,000 annually
Salary range calculated as the 25th to 75th percentile of all wages for related occupations in Waukesha County as reported by Economic Modeling Specialists International (EMSI). Program graduate wages may vary based on experience, industry, location and specific job requirements.

Potential Careers
- Paramedic Lieutenant
- EMS Chief Officer
- EMS Service Director

Waukesha County Technical College does not discriminate on the basis of race, color, national origin, sex, sexual orientation, disability or age in employment, admissions or its programs or activities. The following position has been designated to handle inquiries regarding the College's non-discrimination policies: Director, Compliance and Equity, 800 Main Street, Pewaukee, WI 53072 or 262.695.3481 or compliance@wctc.edu.
DISCLAIMER

• Not Legal Advice
• Fact-Driven
• Changing Landscape
• Width and Breadth of Law
Settled in November 2012. (Civil Service Commission did not believe he deserved to lose his job. Imposed a 15-month suspension, which had been served by that time.) No court decision on whether or not the posting deserved First Amendment protection.
FIRST AMENDMENT

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

• “No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”
FOURTEENTH AMENDMENT

• “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”
WHAT THE COURTS SAY ABOUT THE FIRST AMENDMENT…


- Speech concerning public affairs is more than self-expression; it is the essence of self-government. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

CONSTITUTIONAL SCRUTINY

- **Strict Scrutiny**
  - “Fundamental Right” or Equal Protection/Suspect Classification (e.g., Marriage, Content-Based Speech, Race, National Origin, Religion, Alienage)
  - Compelling State Interest
  - Narrowly-Tailored Law or Regulation to Achieve the Result
  - Burden of Proof is on the Government

- **Intermediate Scrutiny**
  - e.g., Gender/Sex, Orientation, Some First Amendment Issues, Commercial Speech
  - Important Governmental Objective
  - Substantially-Related to Achieving the Objective
  - Burden of Proof is on the Government

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Strict —>
Skinner v. Oklahoma (1942) - Oklahoma law allowed sterilization of a person who was convicted three or more times of a “felony of moral turpitude.” Law was overturned.
Korematsu v. US (1944) - Japanese descent was excluded from certain sensitive areas during WWII. Upheld.

Intermediate —> Craig v. Boren, 429 US 190 (1976) - Oklahoma law that allowed females to purchase alcohol at 18 where males were 21. Law was overturned.
CONSTITUTIONAL SCRUTINY

- **Rational Basis Review**
  - Government has a Legitimate Interest in the Law or Policy
  - Reasonable, Rational Relationship Between that Interest and the Challenged Law
  - Burden of Proof is on the Plaintiff who Challenges the Government

Nebbia v. NY (1934) - NY set a minimum retail price for dairy. Supreme Court said the government has the right to create general restrictions on private conduct for the purpose of regulating the economy, so long as the government action is not “arbitrary, discriminatory, or demonstrably irrelevant” to the action regulated. Was not a “sensitive issue;” just a “regular government regulation,” so it only had to be reasonable.
GOVERNMENT VERSUS PRIVATE EMPLOYMENT

• The Constitution protects the citizens against government (not private party) atrocities or abuses of power.

• At Issue… The government’s rights as a sovereignty versus those as an employer.

• Due Process Requirement Before “Deprivation” of Property

• Protected Property Interest = Reasonable Expectation of Continued Employment
WHY ARE WE TALKING ABOUT THIS?

- Advent of Social Media
- Loss of Civility
- Bolder / Less Filtered
- Ease of Video Recording, Photo Taking, and Sharing
MICHIGAN (2016)
ARKANSAS (2017)

Jonathan Mancill

U want my honest opinion about these worthless piece of crap professional football basketball and baseball wannabe players i think trump should post snipers at every game and each player that takes a knee or sits in the backroom should b shot in the head i have no sympathy for them and no respect and as for the rest of u obama vote snowflakes out here protesting and makin idiots out of u selves u should b shot on sight if u disagree with me then dont let the door hit ya where the good lord split ya

Earle Fire Department

This post is in light of the recent events by an Earle Firefighter on their social media. Earle Fire Department Officers have reviewed the information and agree with the statements that were made and that type of behavior will not be tolerated by any employees of Earle Fire Department.

Assistant Fire Chief John Buford... See More
PUBLIC / GOVERNMENTAL EMPLOYMENT

• Landmark Case: *Pickering v. Board of Education*, 391 US 536 (1968)

  • Board of Education dismissed a teacher for writing and publishing a letter (newspaper) criticizing the Board's allocation of school funds and subsequent communications.

  • Pickering lost his case at trial and before the Illinois Supreme Court.

  • The U.S. Supreme Court overruled the decisions. Pickering’s speech was protected under the First Amendment.

Note: Speech would not have been protected if it contained false statements that were knowingly or recklessly made.
“PICKERING BALANCE TEST”

• “The [public employee’s] interest as a citizen in making public comments must be balanced against the [governmental employer’s] interest in promoting the efficiency of its employees’ public services.”

• Does the public employee’s interest in commenting upon matters of public concern outweigh the employer’s interests in promoting the efficiency of the public services it performs through its employees?
When a public employee speaks upon matters only of personal interest (not a public concern), a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.

Requiring the state to “clearly demonstrate” that the speech involved “substantially interfered” with the operation of the office would create an unduly onerous burden. The State’s burden varied depending upon the nature of the employee’s expression. Reasonable belief in the disruption of the office was adequate in this case.
CONNICK-PICKERING TEST

• Public employee's speech is constitutionally protected if:
  • The speech was made as a **private citizen**,  
  • The speech addressed a **matter of public concern**, AND 
  • The speaker's **interest in expressing that speech** was not **outweighed** by the state's interests as an employer in **promoting effective and efficient public service**.


Pickering applies once the speech is determined to be a matter of public concern.

Did the government entity have an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer?
ARE YOU A PRIVATE CITIZEN?

- Statements made pursuant to official duties are not protected as the person making such statements is not speaking as a citizen for First Amendment purposes. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

Garcetti —> Deputy district attorney fired for writing an internal memorandum recommending dismissal of a case on the basis of purported government misconduct.
### ON-DUTY VERSUS OFF-DUTY

  - “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”
  - “Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”
  - “We hold that when 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.”

Defendant (deputy district attorney, LA County) believed an affidavit used to obtain a search warrant contained serious misrepresentations. Defendant drafted a memo explaining his concerns and recommended dismissal of the case. Also followed-up with a second memo given a second conversation with the warrant affiant. Prosecution went forward and defendant (in this case) testified for the underlying defendant in the matter in question. Defendant claimed retaliation.
WHAT IS A MATTER OF PUBLIC CONCERN?

• Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

WHAT IS A MATTER OF PUBLIC CONCERN?


• When speech relates both to an employee’s private interests as well as matters of public concern, the speech is protected if it is primarily motivated by public concern. *Altonen v. City of Minneapolis*, 487 F.3d 554, 559 (8th Cir., 2007).

• If the main motivation for the speech was furthering the employee’s private interests rather than to raise issues of public concern, the speech is not protected, even if the public would have an interest in the topic of the speech. *Bailey v. Dep’t of Elementary and Second Educ.*, 451 F.3d 514, 518 (8th Cir., 2006).
EMPLOYER’S INTERESTS IN PROMOTING EFFICIENCY?

• Actual Harm or Disruption to the Employer’s Mission and Functions
  • “Polarizing” Speech
  • “Hostile” Speech
  • Threat of Violence
  • Withholding of Services

• Reasonable belief that speech would interfere with operations.
  (Connick v. Myers, 461 U.S. 138 (1983))

Reasonable belief that speech would interfere with operations. (Connick v. Myers).
PUBLIC SAFETY ORGANIZATIONS

- Public safety organizations have “a more significant interest than the typical government employer in regulating the speech activities of its employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in its ability.” Shands v. City of Kennett Shands, 993 F.2d 1337 (8th Cir., 1993).
“GARCETTI/PICKERING” ANALYSIS FOR FIRST AMENDMENT RETALIATION CLAIMS

• Was speech made pursuant to an employee’s official duties?

• Was speech on a matter of public concern?

• Are the government’s interests, as an employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests?

• Was the protected speech a motivating factor in the adverse employment action?

• Would the employer have reached the same employment decision in the absence of the protected conduct?

Trant v. Oklahoma, 754 F.3d 1158 (10th Cir., 2014).
WHO HAS THE BURDEN?

• Employee must show:
  • Speech involved a matter of public concern. *(Question of Law)*
  • Employee’s free speech interests outweighed the employer’s interest in effective and efficient fulfillment of its responsibilities. *(Question of Law)*
  • Speech played a substantial part in the adverse employment action. *(Question of Fact)*
  • Employer/government must then show (preponderance of the evidence standard):
    • The same decision would have been reached absent the protected speech. *(Question of Fact)*


First two are questions of law (decided by the court). The final two are questions of fact (decided by the jury).
PROTECTED UNION ACTIVITY

• National Labor Relations Act
  • Does not apply to governmental employment.
• State of Wisconsin (Wis. Stat. 111, Employment Relations)
  • Municipal Employees are Covered by Wis. Stat. 111.70
  • “Municipal employees have the right . . . to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

NLRA §157:  ...engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...
WHISTLEBLOWING?

- State employee protection under Wis. Stat. 230.83.
- Other government employees' discriminatory actions only (Wis. Stat. 111.322):
  - Age
  - Race
  - Creed
  - Color
  - Disability
  - Marital Status
- Sex
- National Origin
- Ancestry
- Arrest Record
- Conviction Record
- Military Service
- Use or Nonuse of Lawful Products Off the Employer's Premises During Nonworking Hours
- Declining to Attend a Meeting or to Participate in Any Communication about Religious or Political Matters
- Others (Not all-Inclusive):
  - Hours of Labor
  - Family or Medical Leave
  - Bone Marrow and Organ Donation Leave
  - Records Open to Employee
  - Recovery of Arrears of Wages
  - Internet Privacy Protection
  - Employees' Right to Know
  - Employment of Minors

It is an act of employment discrimination to discharge or other discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified, or assisted in any proceeding under this subchapter.
TAKEAWAYS…

• Speech must be as a **private citizen**.

• Speech must be related to a **matter of public concern**. (Personal or "petty" grievances do not qualify.)

• Speech must **NOT cause actual harm or disruption** to the employer’s mission and function.

• Interest in expressing the speech was **not outweighed** by the state’s interests as an employer in promoting effective and efficient public service.
SO HOW ARE THESE REQUIREMENTS APPLIED?

Let's look at the case law!
December 2017 — Judge ruled there was no First Amendment or due process violation in the termination, but the policy requiring pre-approval for outside employment was unconstitutional.

Was a matter of public concern.

Government’s legitimate interest in avoiding disruption does not require proof of actual disruption; reasonable possibility of adverse harm is all that is required. The manner, time, and place of the employee’s expression are relevant, as is the context in which the dispute arose. *Moss v. City of Pembroke Pines*, 782 F.3d 612, 622 (11th Cir., 2015).
COCHRAN V. CITY OF ATLANTA, ET AL.
DECEMBER 2017

• Parties agreed it was a matter of public concern.

• Court held that the Pickering balance test weighs in favor of the City.

• “…speech caused such an actual and possible disruption that it does not warrant First Amendment protection in the workplace…”

• The City’s Pre-Clearance Policy for private employment constituted a prior restraint and was unconstitutional.
Probationary full-time paramedic/firefighter received a suspension and subsequently drafted an email to a local report to air grievances with the agency. He was subsequently fired.

Court held that the email was not motivated by public concern and the speech was indeed disruptive to agency operations.

Termination was upheld.
JANUARY 2018
RICHARD BANSKE v. CITY OF CALUMET CITY (IL)

- Firefighter since 1992.
- Promoted to Deputy Chief in 2009.
- Fired in December 2016 for private political views on Facebook.
- Banske filed a lawsuit for First Amendment retaliation (42 USC §1983).
- Case was dismissed.
  - Plaintiff failed to demonstrate that his “political Facebook posts” were indeed political commentary and not expressions of private grievances.
Four employees exchanged text messages with several others in the public safety department questioning the truth of statements made by the public safety director to the local news. Some texts also contained gender-based comments related to their female public safety director.

They were fired for discourteous treatment of other employees, inappropriate electronic communications, and detrimental conduct.

Court found that some of the texts were on matters of public concern, but the interest in making the statements did not outweigh the employer’s interests in maintaining order and discipline within the department.

What hurt the plaintiffs? Did not voice concerns to leadership first. Texts did not seek to effect change or otherwise rectify the alleged safety deficiencies. Some messages were insubordinate. (i.e., One suggested an officer was promoted in return for sexual favors.) Employers do not have to tolerate behavior they reasonably believe to be disruptive and insubordinate.

The court allowed their due process claim to proceed, however. (Terminations were published before a timely name-clearing hearing was allowed/provided.)
JUNE 2018
SHEAN V. CORBIN (OHIO)

• Sheriff’s deputy supported an incumbent candidate for sheriff (who subsequently lost).

• Endorsed incumbent in a local newspaper and signed as a Lieutenant with the Sheriff’s Office.

• New sheriff reassigned the deputy. (Back to road patrol after 30 years in an administrative position.)

• Court held she was speaking as an employee, not a private citizen. No First Amendment protection existed for her speech.

Signed the endorsement as an employee. Endorsement related primarily to staff assignments, which is an issue of employment, not public concern.

She also had an ADA claim that was allowed to proceed.
JUNE 2018
CARR V. COMMONWEALTH OF PENNSYLVANIA, ET AL.

• Plaintiff worked for the DOT and posted a “rant” on Facebook about the quality (or lack thereof) of school bus drivers.

• “…I don’t give a flying s**t about those babies and I will gladly smash into a school bus…”

• Reiterated that she cared more about herself and her safety more so than the safety of the children on school buses.

• Comments were deemed “inappropriate” by the court, but were a matter of public concern and did not cause disruption. “[DOT’s] generalized interest in the safety of the traveling public [did] not outweigh [plaintiff’s] specific interest in commenting on the safety of a particular bus driver.”

• Employee was reinstated.
Two paramedics were fired by Desoto Parish EMS. The plaintiffs’ allegation was that the firing was in retribution for a letter forwarded to the agency’s Police Jury that criticized the service’s practices as they related to NREMT recertification (which also recommended multiple changes and the replacement of some administrators). The firings occurred approximately 19 months after the letter.

Upon a motion to dismiss, the court found the speech to be protected. The speech was “mixed” (private and public) and the defendant failed to establish its interest in promoting workplace efficiency and lawsuit was allowed to proceed.
Police officer attempted to start a union (Corinth Police Officers’ Association).

After organization efforts started, “harassing” conduct began and plaintiff was eventually terminated.

Freedom of association rights (expressive association) were established for the CPOA, which then extended to the plaintiff.

Motion to dismiss upon qualified immunity was denied. Lawsuit may proceed.

Reprimands for “petty violations.”
Rank and file were intimidated and pressured to not join the union. (Several did not out of fear of retaliation.)
FIRST AMENDMENT PROTECTION
SUMMARY

- Speech must be as a **private citizen**.
- Speech must be related to a **matter of public concern**. (Personal or "petty" grievances do not qualify.)
- Speech must **NOT cause actual harm or disruption** to the employer’s mission and function.
- Interest in expressing the speech was **not outweighed** by the **state’s interests as an employer** in **promoting effective and efficient public service**.
THANKS FOR ATTENDING!