Question MPT-2 – February 2024 – Selected Answer 1

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

A public employee does not surrender all First Amendment rights merely because of the employment status. *Garcetti v. Ceballos*. The plaintiff in a public-employee free-speech case bears the burden of proving that his speech is entitled to First Amendment protection. *Id.* To show that 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. If both met, move to balancing test. The court must weigh the interests of the employee in expressing the speech against the interest of the employer in promoting effective and efficient public service. Additionally, the employee must show that the speech was a motivating factor in the adverse employment action.

Ms. Randall was speaking as a private citizen on a matter of public concern. Additionally, the balancing test weighs in favor of protecting Ms. Randall's interests over the interests of her employer. Lastly, it is undisputed that Ms. Randall's Facebook posts were a motivating factor in the suspension decision. Each element is discussed in turn below.

A. Ms. Randall was speaking as a private citizen because her official job duties did not include making social media posts.

When determining if a person spoke as a private citizen or as an employee, the question is whether the person made the speech pursuant to his ordinary job duties. *Lane v. Franks*. When public employees make statements pursuant to their official duties, the employees are not speaking as private citizens for First Amendment purposes. *Garcetti v. Ceballos*. However, speech is not necessarily made as an employee just because it focuses on a topic related to an employee's workplace. *Smith v. Milton*. For example, in *Smith*, a teacher tweeted to the public about how the state mandated his time in the classroom. *Smith*. The 15th Court of Appeals decided the issue of private citizen v. employee solely on the official duties of a teacher. *Id.* "Teaching a lesson in the classroom is part of a teacher's ordinary duties, posting on a personal social media account typically is not." *Id.*

In contrast, in *Dunn*, a firefighter posted messages on Facebook about the qualification of firefighters, a topic which fell within his official duties. *Dunn*. While, like Smith, his official duties did not involve posting on social media, the court held that his posts were made pursuant to his employment responsibilities involving firefighter qualifications. *Id.*

Here, Ms. Randall's duties included developing lesson plans, scheduling classes, training support staff, and preparing reports. Posting on a personal social media account was not in her official duties. Additionally, her posts were not pursuant to her responsibilities or duties as program director of the workforce-development program. Therefore, Ms. Randall was speaking as a private citizen when she posted on Facebook about the cancellation of the workforce-development program.

B. Ms. Randall was speaking on topic of public concern because her settings were set to public, the message was

When analyzing the second element of this claim, the court should consider 3 things: the speech's content (what employee was saying), the speech's nature (how the employee was saying it), and the context in which the speech occurred (the employee's motive and situation surrounding the speech). *Dunn.*

i. Content and Context

The content of Ms. Randall's speech focused on the nature of the workforce-development program, the purpose of the program, the positive effects on the community - all matters relating to public concern. They were not, like in *Dunn*, personal in nature with no mention of how the message affected the public. *Dunn.* The context in which Ms. Randall's posted also favors public concern. She did not mention her employment situation, her specific role in the program, or anything alluding to a disgruntled employee. Ms. Randall's posts were more similar to *Smith* in which Mr. Smith posted about school policies rather than his classroom. *Smith.* Ms. Randall spoke on a matter of public concern by trying to engage the public in reviving a program that affects unemployment rates. Thus, the context and content factor weighs in favor public concern.

ii. Nature

Factors to consider when analyzing the nature of the speech include where the information was posted and the topic of the information shared. *See Dunn v. City of Shelton.* If information was shared through a company intranet or limited to only similarly employed individuals rather that the public, the speech is likely to be deemed private in nature. *See Dunn v City of Shelton; Garcetti v. Ceballos.* If however, the information was shared to the general public, that weighs in favor of public concern. *See Pickering v. Bd. of Education; Smith v. Milton School District.*

In *Pickering*, a teacher wrote letters to the editor of a newspaper in which he criticized his employers use of tax revenues. *Pickering.* They were published in the local newspaper at a time where most people got their news from newspapers. *Id.* Similarly, in *Smith*, Smith changed his settings from private to public to reach a bigger audience. The court in *Smith* held "the nature of the speech changed from personal to public when he changed his social media settings from private, which limited his

audience to his fellow teachers, to public, which allowed anyone to read his posts." *Smith.*
In contrast, Dunn shared his post only with fellow firefighters and first responders; the message was not available to the public. Similarly in *Garcetti*, a prosecutor sent a memo to his supervisor criticizing a decision. Both of these messages were for private figures in private settings.
Ms. Randall's message was posted to the public for the purpose of getting the public involved in the decision.

C. Ms. Randall called attention to an important matter of public concern, thus the balancing favor weighs in favor of protecting her interests.
An employer has the right to promote workplace efficiency and maintain employee discipline. *Kurtz.* However, the balance tilts in favor of an employee calling attention to an important matter of public concern, such as... tax revenue. *Pickering v. Board of Education.*
Here, as in *Smith,* Randall did not criticize coworkers or disturb morale and efficient operation. The claims by Ms. Cook state that she received a dozen or so calls that she was able to handle by assuring the citizens another form of unemployment action was coming. She referred to it as a "waste of time to deal with the public." However, Ms. Cook also admitted that there was no disruptions or or problems of any sort in any county office after Ms. Randall's posts. Mere annoyance is not enough to favor the employer; almost all public speech criticizing the government will incur some annoyance or embarrassment. *Smith.* The only complaint the employer can muster is one of mere annoyance, and that is not sufficient to outweigh the interests of the employee. The balancing test weighs in favor of Ms. Randall.

D. It is undisputed that Randall's Facebook post were a motivating factor in the suspension decision because the employers counsel admits such motivation.
It is undisputed that Ms. Randall received positive past performance reviews. Additionally, Susan Burns, the defendants counsel, wrote in an email "Ms. Randall was suspended because of her Facebook posts." Therefore, it is clear that the posts were a motivating factor in the decision to suspend Ms. Randall.

Therefore, the county has violated Ms. Randall's First Amendment rights.

Question MPT-2 – February 2024 – Selected Answer 2

III. Legal Argument

In *Garcetti v. Ceballos*, the United States Supreme Court held that a public employee does not surrender all First Amendment rights merely because of their employment status. 547 U.S. 410 (2006). Instead, the speech of a public employee will receive First Amendment protections if it meets three requirements. First, the public employee must sufficiently demonstrate (1) the employee's speech was made in their capacity as a private citizen and (2) the employee's speech addressed a matter of public concern. *Dunn v. Shelton Fire Dep't* (15th Cir. 2018). Second, even if the employee can prove they spoke as a private citizen on a matter of public concern, the court must find that the interests of the employee in expressing the speech outweighs that of the employer's interest in promoting effective and efficient public service. *Id.* Third and finally, the employee must prove their speech was the motivation for the disciplinary action taken by their employer. *Smith v. Milton Sch. Dist.* (15th Cir. 2018).

In this case, only the first two factors are at issue. Bristol County conceded the third element by admitting Ms. Randall was suspended because of her two Facebook posts made on October 15 and October 17 of 2023.

A. Ms. Randall spoke as a private citizen because posting messages on Facebook about the county's budget decisions was not a task pursuant to her ordinary job duties.

To receive First Amendment protection, a public employee must speak as a private citizen, not pursuant to their official duties. *Dunn (citing Garcetti)*. The United States Supreme Court has explained the key question to determine when a public employee speaks as a private citizen is "whether the employee made the speech pursuant to his ordinary job duties." *Dunn (citing Lane v. Franks*, 573 U.S. 228 (2014)). Importantly, speech is not automatically made as an employee just because the topic of the speech relates to the employee's workplace. *Smith*. For example, the Fifteenth Circuit held a teacher who posted on Twitter about the nature of standardized testing spoke as a private citizen because, even though the posts did concern school-related topics, "posting on a personal social media account" is not part of the teacher's ordinary duties. *Id.*

The Fifteenth Circuit's decision in *Smith* should also control here. Ms. Randall has worked as a librarian for Bristol County for over ten years. As part of her job, she became the director of Bristol County's Workforce-Readiness Program which required her to develop the curriculum and lesson plans for the GED program, schedule classes and assessments, train support staff, create policies and procedures for connecting participants with other county services and resources, and ensure all proper reports were prepared to comply with the grant requirements. Notably, posting on Facebook about the program was not one of Ms. Randall's duties. Just as

the teacher in *Smith* did not have an ordinary duty to post on Twitter, Ms. Randall did not have an ordinary duty to post on Facebook. Thus, her speech is best classified as that of a private citizen. Bristol County will likely argue Ms. Randall did not speak as a private citizen because her speech directly related to the Workforce-Readiness Program even if posting on Facebook was not an ordinary duty. For example, in *Dunn*, the Fifteenth Circuit determined an Assistant Fire Chief responsible for conducting continuing education training who posted messages on Facebook criticizing the revised continuing education qualifications spoke pursuant to his official duties. *Dunn*. However, *Dunn* is inapposite here. Mr. Dunn was specifically tasked with "communicating information and updates concerning firefighter qualifications as part of his official continuing education duties." *Dunn*. Ms. Randall did not have a similar duty. Further, Ms. Randall's speech was intended to inform residents of Bristol County about the county's budgeting decisions, not criticize job-related requirements. Thus, Ms. Randall's speech is more closely analogous to the speech found to be protected in *Pickering* where a public-school teacher wrote letters to a local newspaper criticizing his employer's budgeting decisions. *Pickering v. Board of Education*, 391 U.S. 563 (1968). As she testified in her deposition, Ms. Randall intended her speech to alert the community of the county's decision not to renew the program and the upcoming application deadline. Randall Deposition.

Accordingly, Ms. Randall's speech must be considered that of a private citizen because posting on Facebook about the county's budget decisions was not incident to her ordinary responsibilities as director of the Workforce-Readiness Program.

B. Ms. Randall spoke on a matter of public concern because her posts discussed a county funding decision on a platform designed to reach the public and were motivated by a desire to save a program actively helping citizens.

The Supreme Court established three factors to evaluate whether speech is on a matter of public concern: (1) the speech's content (2) the speech's nature and (3) the context in which the speech occurred. *Dunn (citing Garcetti)*. Turning first toward the speech's content, Ms. Randall's Facebook posts specifically concerned the county's funding decisions, a topic typically considered within the public concern because it affects the public. *See Pickering* (finding budgeting decisions within the public concern); *Smith* (commenting that school district financing is of public concern). In particular, her October 15 post reads "now the county has decided it doesn't want to renew the grant. Bad call!" and her October 17 post includes "the county decided not to renew the grant." Additionally, her concern as to how this decision will affect the public was clearly the basis of the content: both of her posts mentioned how the program has had great success helping citizens obtained GEDs and find work and would likely

help even more citizens if it was renewed. These phrases clearly establish her content was specifically targeted to discuss a county budgeting decision and its effect on the public more broadly, content firmly within the public concern.

Second, the nature of the Facebook posts show Ms. Randall intended to speak to the public. In *Dunn*, the court determined the firefighter's Facebook posts were not of public concern in part because they were posted in a private channel only for first responders and were not available to citizens generally. *Dunn*. In sharp contrast, Ms. Randall's Facebook posts were posted in a way that anyone in the public could access the messages. Ms. Randall intentionally made her posts open everyone because she "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." Randall Deposition. Further, the Fifteenth Circuit deemed Twitter "a modern-day public square" and Facebook operates similarly to Twitter and serves the same purpose of providing a public forum for open discussion. *Smith*. Additionally, the language of her posts also reflected her intention to reach the public generally: Ms. Randall opened her first post by writing "Hey fellow Bristol County residents!" In fact, approximately a dozen members of the public reached out to County Executive Marie Cook asking about the program, proving not only that the messages reached the public but that the public was concerned about the program's impending cancellation. Cook Deposition.

Third, the context of Ms. Randall's Facebook posts clearly establishes her motive was not personal but intended to get the word out to the public to save a program that was helping many others. Before making her Facebook posts, Ms. Randall tried to reach out to the office of the County Executive who, it should be noted, decided to not renew the program without consulting Ms. Randall, the program's director, at all. Randall Deposition; Cook Deposition. Ms. Randall decided to make her posts because her numerous messages went unanswered and the deadline to renew the application was rapidly approaching. Randall Deposition. In fact, she testified that she acted because she wanted to ensure a program that already helped over 40 people receive their education and access employment opportunities got renewed. Ms. Randall's motive is also readily discernible from her posts because she urges the public to reach out to the County Executive to express support for the renewal of the program.

Bristol County may argue Ms. Randall was motivated by personal desire to retain her job. After all, Ms. Randall was the director of the Workforce-Readiness Program which Ms. Randall herself admitted was a prestigious position. Randall Deposition. Ms. Randall also noted that she directed the program in her October 17 post. However, the posts were not focused on her employment situation, indicating she was not motivated by a private concern. *See Smith* (noting tweets about something

other than employment situation indicative of public concern). Ms. Randall's decision to mention that she directed the program in her post is much more likely to have been included to give her statements about the benefits of the program more credibility with the public. Additionally, it's unlikely Ms. Randall was motivated by fear of losing her job as she has been a librarian for Bristol County for over ten years and would continue to be a librarian regardless of the program's existence.

Thus, these Facebook posts should be found as speech on a matter of public concern because Ms. Randall spoke about a county funding decision on a platform that should be considered a "modern-day public square" and was motivated by her desire to continue helping citizens of the community access education and job opportunities.

C. On balance, Ms. Randall's interests in free speech outweigh Bristol County's interests in efficient operation of county government and good relations among its departments because the posts did not cause disruptions or disparage coworkers.

Ms. Randall's Facebook posts did not interfere with Bristol County's stated interests in "the efficient operation of county government and good relations among its departments and Department personnel." *See* Susan Burns Letter. The Supreme Court has determined that the balance between employee interests and employee interests must tilt in favor of an employee who calls attention to an important matter of public concern such as public budgeting. *See Pickering*. By contrast, an employer's interest in effective and efficient public service will outweigh an employee's speech interest where such speech causes disruption to a unified workplace. *See Dunn* (in determining employee's interest in free speech outweighed by departments interest in unified firefighting team); *Kurtz v. Orchard Sch. Dist.* (Fr. Ct. App. 2009).

Here, Bristol County failed to introduce any evidence of interference with the effective and efficient operation of their office. Ms. Cook testified the Facebook posts "stir[ed] up the public" and caused trouble. Cook Deposition. However, in reality, the office only received about a dozen public inquiries. *Id.* These tasks are those normally incident to being an elected official running a government office and should not be considered true interference with effectiveness or efficiency. These individuals who made inquiries did not cause any further disruption after their questions were answered. *Id.* In addition, Ms. Cook specifically testified she was not aware of any other disruptions or problems in any county office within the State. *Id.*

Bristol County will likely argue Ms. Randall's Facebook posts criticized Ms. Cook and thus her interests do not outweigh the county's interests. *See Smith*

(commenting criticisms of coworkers might disturb morale or efficient operation). In her first post, Ms. Randall commented that she believed the decision not to renew the grant was a "bad call," and, in her second post, Ms. Randall wrote "the County executive needs to get her priorities straight!" Further, Ms. Cook stated Ms. Randall failed to show her respect "by complaining and putting those posts on Facebook and embarrassing me." However, in *Smith*, the Fifteenth Circuit acknowledged any speech criticizing the Government naturally incurs some annoyance or embarrassment on behalf of the public official, but such annoyance or embarrassment is not enough, on its own, to outweigh an employee's otherwise protected speech. *Smith*. So too here: a citizen acting in her private capacity commenting on a funding decision that does not cause any other disruption or issue within the county government besides embarrassment of the elected official should be considered insufficient justification to require the court to find in favor of suppressing that citizen's speech.

Accordingly, the weighing of interests must favor Ms. Randall's free speech particularly because her actions did not cause any true interference with the effective and efficient operation of the county government, only some minor embarrassment on behalf of Ms. Cook.

IV. Conclusion

For the aforementioned reasons, Ms. Randall respectfully requests this Court grant her motion for summary judgment and award her relief in the form of restoration of her lost pay and expungement of the suspension from her employment record.

Question MPT-2 – February 2024 – Selected Answer 3

TO: Michael Carter
FROM: Examinee
DATE: February 27, 2024
RE: Brief in Support of MSJ: 1st Amendment violation in *Randall v. Bristol County*

III. Suspension of Oliver Randall Constituted Violation of Her First Amendment Rights

In suspending Olivia Randall over her two Facebook posts, Bristol County violated her First Amendment right to free speech.

To show that a public employee's speech is protected under the First Amendment, the 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). 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). If he meets that burden, the court must balance the interests of the employee and the employer. *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

1. Olivia Randall Posts Were Made as a Citizen, Not an Employee

When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes. *Garcetti*. However, speech is not necessarily made as an *employee* just because the speech focuses on a topic related to an employee's workplace. *Smith*.

Here, Randall spoke as a citizen alerting the public to her concerns about the non-renewal of the grant. This is similar to Smith, who spoke as a citizen in alerting the public to his concerns about mandatory testing. In both cases, the social media posts were not made in pursuant to their official duties, although their posts concerned topics related to their respective workplaces. This is akin to the public school teacher in *Pickering v. Bd. of Education* (1968) who wrote letters to the editor of a newspaper criticizing the employer's use of tax revenues. Although the letters concerned the workplace, they were informing residents of the goings-on of the school district, just like Randall's posts on Facebook. These cases are completely different from those like *Garcetti* or *Dunn*. In the former, a DA was disciplined for criticizing the legitimacy of a search warrant in a memo to his supervisor. That speech was held to be unprotected since it was made pursuant to his official duties as a prosecutor. Similarly, firefighter Dunn's statements were not made as a citizen due to his duties of consulting with the fire chief and communicating information and updates regarding qualifications. By contrast, Randall's official job duties as the director of the grant-funded program were the development of curriculum, materials, class-scheduling, and reports. Posting on a public website was not part of her job duties. Thus, since her posts were informing the public as to the goings-on pertaining the grant that members of the community had come to rely on, her speech was made as a private citizen and not as an employee.

2. Randall Posted Regarding a Public Concern

In determining whether a matter is of public concern, the court must consider the content, nature, and context of the speech. *Smith* (citing *Garcetti*). Employees who make public statements outside the course of performing their official duties retain

some possibility of First Amendment protection since that's the kind of activity engaged in by citizens who don't work for the government. *Dunn* (citing *Garcetti*). Matters such as school district finances, public corruption, discrimination, and sexual harassment by public employees have been found to be matters of public concern and thus protected, as opposed to complaints about work conditions. *Id.* 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*.

a. Content Concerns Matter of Public Concern

Here, Randall's posts were not personal the way Dunn's were. Dunn did not explain how the new hiring qualifications would affect the public. Rather, he sounded like a disgruntled employee. By contrast, Randall explained how the grant helps people get jobs and that citizens should call the county executive if they are interested in the renewal of the grant. Therefore, the content of her posts regards a matter of public concern.

b. Nature of Posts Was Public

Here, Randall's posts were open to the public at large as a means of informing them, like Pickering's protected letter. The letter was deemed protected because it had no official significance and bore similarities to letters submitted by numerous citizens every day. Likewise, her posts are indistinguishable from that of a concerned citizen who wants the renewal of a grant that benefits her community. This is completely different from Dunn's limited audience of fellow first responders. Indeed, it is more like Smith's public Tweets intended to reach parents and the community at large. Thus, the nature of Randall's posts is regarding a matter of public concern.

c. Context Was Informative

Lastly, Randall's motive was to inform the public about a swiftly approaching deadline. Her posts are almost identical to Smith's Tweets, which were held to be protected speech. There, Smith tweeted about the effect test preparation has on classroom instruction. Twitter was a modern "public square" for him to reach parents and community about a public concern: the education of their children. Similarly, Randall's Facebook posts regard an important community interest: getting Bristol County residents job-ready. Her posts were not "mere griping" like Dunn's. Therefore, the context of Randall's posts were regarding a matter of public concern.

3. Balancing Test Favors Randall

a. Randall's Interests Outweighs County's

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. *Dunn*. Over time, courts have tended to favor public employers over public employees, such as when a teacher's social media posts disparaging students was held to erode trust and thus was not protected speech. *Smith* (citing *Kurtz v. Orchard Sch. Dist.* (Fr. Ct. App. 2009). Balance tilts in favor of an employee, however, if he or she is calling attention to an important matter of public concern, such as a school district's budget and use of tax revenue. *Smith* (citing *Pickering v. Bd. of Education*, 391 U.S. 563 (1968)). Mere annoyance is not enough to favor the employer, since almost all public speech criticizing the government will incur some annoyance or embarrassment. *Smith*.

Here, Randall's free speech interest outweighs Bristol County's interest in efficient operation of county government and "good relations among its departments and department personnel." This is shown with the similarity of the facts in Randall's case with Smith (whose speech was deemed protected) as opposed to Dunn's unprotected speech. In Smith, his tweets did not criticize coworkers, which might disturb the school's morale or efficient operation. Rather, he criticized the state's educational requirements. Nor did the defendant in that case present evidence the tweets had an effect on staff morale or created issues between Smith and the school's administration. Likewise, Randall's posts criticize the government decision not to renew a beneficial grant. Although Bristol County will argue that Randall's post addressed the county executive directly, this is not enough to favor the employer since almost all public speech criticizing the government will incur some annoyance or embarrassment. Indeed, Marie Cook, the county executive, testified that the posts "embarrassed us and the county." Yet, she also testified that the only trouble that was caused was having to answer maybe a dozen inquiries from the public. She did not report any disruptions or problems in any county office. Contrast this with Dunn. There, the department was held to be justified in believing the firefighter's posts could undermine the morale needed for firefighters to work safely. Here, however, mere annoyance is not enough. Thus, the balance of interests favor's Randall's free speech rights over Bristol County's unimpeded interests in efficient government operation and good departmental relations.

b. Randall's Speech Was Motivating Factor in Her Firing

For an employee to prevail in a balancing test, the employee must show that the speech was a motivating factor in the adverse employment action. *Dunn*.

Here, Cook explicitly testified that she suspended Randall for two weeks due to failing to be a team player and failing to show respect. When pressed further, she elaborated that this was due to her posts that "failed to accept" the county's decision. Like the superintendent in Smith who testified that Smith's tweets annoyed the school board, there is a clear line from the social media posts in both cases and the subsequent negative work actions. Neither employee had negative work performance issues in the past.

Thus, Randall's posts were made as a private citizen concerning a matter of public concern, and the balance of interests favors her free speech rights.