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DHR Fall 2019 Forum

Tuesday, November 12, 2019

8:30 a.m. – 4:00 p.m. | Lincoln Auditorium, Idaho State Capitol

8:15 – 8:30 a.m.	Check In
8:30 – 8:45 a.m.	Welcome and DHR Updates Susan E. Buxton, Esq., <i>DHR Administrator</i>
8:45–9:45 a.m.	Unconscious Bias Mindi Anderson, <i>Maximize Solutions</i>
9:45 – 10:15 a.m.	Conducting Workplace Investigations Leslie Hayes, Esq., <i>Deputy Attorney General</i>
10:15 – 10:30 a.m.	Break
10:30 – 11:30 a.m.	Social Media and First Amendment Rights Susan E. Buxton, Esq., <i>DHR Administrator</i>
11:30 – 11:45 a.m.	Statewide Updates Zach Hauge, <i>Governor’s Chief of Staff</i>
11:45 – 1:00 p.m.	Lunch – On Your Own
1:00 – 1:30 p.m.	Mental Health Awareness Ross Edmunds, <i>Behavioral Health Administrator</i>
1:30 – 2:00 p.m.	Health Matters: Three Good Things Angela Kraft, <i>Health Matters Coordinator</i>
2:00 - 2:30 p.m.	Luma Overview Sheena Coles, <i>Change Project Manager</i> McKenzie Smith, <i>Luma Communications Manager</i>
2:30 – 2:45 p.m.	Break
2:45 – 3:00 p.m.	Office of Group Insurance Update Jennifer Pike, <i>Statewide Group Insurance Manager</i>
3:00 – 3:30 p.m.	Fair Labor Standards Act (FLSA) Update Susan E. Buxton, Esq., <i>DHR Administrator</i>
3:30 – 4:00 p.m.	Wrap-Up and Questions Susan E. Buxton, Esq., <i>DHR Administrator</i>

PUBLIC EMPLOYEES FREE SPEECH IN THE WORKPLACE

Susan E. Buxton, Esq.

Administrator

DHR Fall Forum November 12, 2019

CASES DEVELOPING THE FREEDOM OF SPEECH RIGHTS OF PUBLIC EMPLOYEES

“There may be a constitutional right to talk politics, but there is no right to be a policeman.”

McAuliffe v. Mayor of City of New Bedford, 29 N.E. 517, 517-518 (1892)

“You have a constitutional right to say and think as you will, but you have no constitutional right to work for the government.”

Adler v. Bd. of Ed., 342 U.S. 485 (1952)

Public employee speech is protected when: (1) Speaks as a citizen on a matter of public concern, and (2) there is little or no adverse impact on either the employment relationship, or the operations of the governmental entity.

Pickering v. Board of Education, 391 U.S. 563 (1968)

If a matter of public concern is not present, the First Amendment does not apply. If the concern is personal, it is not protected. *Connick V. Myers*, 461 U.S. 138 (1983)

If a matter of public concern is present, the expression is protected only when the value of the speech outweighs the government employer's interests in restricting or punishing it.

A “wide degree of deference to the employer’s judgment I appropriate.” And, the public employer is not required to “allow events to unfold” to demonstrate the disruptive nature of the employee’s speech. *Connick at 152; Sadid v. ISU*, 154 Idaho 88 (2013)

When the employee’s expression “more substantially” involves a public concern, the government may need to make a stronger showing of disruption. *Connick, Id.*

“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.” *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

When public employees speak as “citizens” about matters of public concern such speech is restricted to that which is “necessary for their employers to operate efficiently and effectively.” *Garcetti* at 419

Public employees have a right to free expression “on their own time on topics unrelated to their employment” unless the government’s interest in restricting such expression is “far stronger than mere speculation. *US v Nat’l Treasury Employees Union*, 513 U.S. 454 (1995)

When a public employee is speaking on a matter of public concern, but while in their official duties, the employee is not speaking as a private citizen.

Federal and state statutes, including Idaho, address rights of whistleblowers.

Public employees often are in the best position to speak about issues of public importance. *Lane v. Franks, 134 S.Ct. 2369 (2014)*

“Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.” *Lane*

COMMON TYPES OF SOCIAL MEDIA



Example 1: Police Lieutenant gave a speech posted on YouTube and then posted white supremacist views on Facebook. The reaction from the community made the post go viral, causing the Police Department's own Facebook page to be shut down.

Example 2: Corrections officer posted racially inappropriate views multiple times on Facebook, disparaging the corrections facility, and the inmates. Anonymously reported to employer (corrections facility).

Example 3: SWAT sniper posted on another person's Facebook post regarding a suspect being caught stating "it's a shame he didn't have a few holes in him..."

Example 4: Part-time police officer who created a "meme" of a sergeant sleeping in a police car. The Police Chief said the post was the last straw and insubordinate. The officer's authority was usurped, created divisiveness in the department.

Example 5: Tenured faculty member of University who had been offered a position, subject to approval of the board, expressed condemnation of Israeli action in Gaza which resulted in the deaths of 2,100 Palestinians, including 500 children on Twitter.

“The Court need not reproduce Dr. Salaita’s tweets verbatim; to put it mildly, they were critical of Israel's actions and used harsh, often profanity-laden rhetoric.”

Tweets garnered media coverage, to which the University stated it had a policy of recognizing freedom of speech rights for all its employees. Students, alumni and donors then wrote the University expressing concerns, and the Board did not approve the hire.

Example 6: Tenured teacher's personal blog started at work, but mostly done at home. Most of the blog was not work related, and did not identify employer or location. Teacher received positive job performance reviews.

- Posts: “ Gimme an A.I.R.H.E.A.D. What's that spell? Your kid!” “Rat Like” “Lazy A\$\$hole” “Dresses like a Streetwalker” “One of the most annoying students I've ever had the displeasure of being locked in a room with for an extended period of time.” “I hear the trash company is hiring.” “Utterly loathsome in all imaginable ways.”
- Teacher went on maternity leave. Came back and received negative performance review after blog discovered and public outcry was received by the school.

TAKEAWAYS

Free speech rights claims by public employees are often rejected because:

- Individual employee's interests are often outweighed by larger governmental interests.
- Employee's expressions are often incompatible or detrimental to the public image or government entity. (e.g., Rule 190)
- Off-duty conduct indicates higher standards, including better judgment to which public employees are held.
- Offensive speech also implicates respectful workplace protections

THANK YOU

QUESTIONS?

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Susan E. Buxton, Esq.

Administrator

Idaho Division of Human Resources

FLSA Update

November 12, 2019

Susan E. Buxton, Esq.
DHR Administrator



Effective January 1, 2020

New salary threshold is **\$684 per week** for executive, administrative, and professional employees.

\$17.10 per hour

\$85.50 per day

\$35,568 per year

Exempt Employees Falling Below New Limit

Raise salary and remain exempt **OR** reclassify to non-exempt status?

Considerations

number of hours typically worked?

budget implications?

DOL's duties test

To-Do List

Work with DHR & DFM

Manage personnel costs within existing budget

Thank You

QUESTIONS

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