**9.10** **Particular Rights**—**First Amendment—Public Employees—Speaking as a Private Citizen**

A plaintiff speaks as a public employee when he or she makes statements pursuant to his or her official duties. In contrast, a plaintiff speaks as a private citizen if the plaintiff had no official duty to make the statements at issue, or if the speech was not the product of performing the tasks the plaintiff was paid to perform.

In deciding whether a public employee was speaking as a citizen and not as part of his or her official duties, and thus whether his or her speech was constitutionally protected under the First Amendment, you may consider the following factors:

(1) Did the plaintiff confine the communications to the plaintiff’s chain of command? If so, then such speech may fall within the plaintiff’s official duties. If not, then such speech may fall outside of the plaintiff’s official duties.

(2) Was the subject matter of the communication within the plaintiff’s job duties? If so, then such speech may fall within the plaintiff’s official duties. If not, then such speech may fall outside of the plaintiff’s official duties.

(3) Did the plaintiff speak in direct contravention to the plaintiff’s supervisor’s orders? If so, then such speech may fall outside of the plaintiff’s official duties. If not, then such speech may fall within the plaintiff’s official duties.

(4) Was the subject matter of the communication about broad concerns over corruption or systemic abuse beyond the specific department, agency, or office where the plaintiff worked? If so, then such speech may fall outside of the plaintiff’s official duties. If not, then such speech may fall within the plaintiff’s official duties.

**Comment**

“Speech made by public employees in their official capacity is not insulated from employer discipline by the First Amendment but speech made in their private capacity as a citizen is.” *Brandon v. Maricopa Cnty.*, 849 F.3d 837, 843 (9th Cir. 2017) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022) (“If a public employee speaks ‘pursuant to [his or her] official duties,’ this Court has said the Free Speech Clause generally will not shield the individual from an employer’s control and discipline . . . .”). The Ninth Circuit has described the inquiry into whether the employee’s speech is protected as “fact-intensive” and explained that “no single formulation of factors can encompass the full set of inquiries relevant to determining the scope of a plaintiff’s job duties.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074-76 (9th Cir. 2013) (en banc); *see also* *Lindke v. Freed*, 601 U.S. 187, 203 (2024) (noting that, in the context of analyzing whether a public official’s social media activity is speech pursuant to their official duties or in their personal capacity, the court ought to engage in a fact-specific undertaking in which each post’s

“content and function are the most important considerations”). For a discussion of “guiding principles for undertaking the practical factual inquiry,” *see* *Brandon*, 849 F.3d at 843 (citing *Dahlia*, 735 F.3d at 1074-76); *see also Kennedy*, 142 S. Ct. at 2424 (describing *Garcetti* and explaining that the prosecutor’s memorandum at issue in that case was government speech because it was speech the government itself had commissioned or created and speech the employee was expected to deliver in the course of carrying out his job).

In *Kennedy v. Bremerton School District*, the Supreme Court held that a public high school football coach spoke not as a public employee, but as a private citizen, when he decided “to persist in praying quietly without his players after three games in October 2015,” 142 S. Ct. at 2422 , which were “the three prayers that resulted in his suspension,” *id.* at 2424. The Supreme Court explained:

[The coach] did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy’s prayers did not “ow[e their] existence” to Mr. Kennedy’s responsibilities as a public employee.

*Id.* (citations omitted);; *see also Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) (holding prior restraint prohibiting highway patrol officers from speaking about controversial canine drug interdiction program with anyone outside of law enforcement violates First Amendment); *Barone v. City of Springfield*, 902 F.3d 1091, 1101-06 (9th Cir. 2018) (holding that prior restraint prohibiting police officer from speaking or writing “anything of a disparaging or negative manner related to the Department/Organization/City of Springfield or its Employees” violated First Amendment); *Ohlson v. Brady*, 9 F.4th 1156 (9th Cir. 2021) (concluding that forensic scientist who testified in court as part of his job duties spoke as employee rather than private citizen entitled to First Amendment protection); *Dodge v. Evergreen School District*, 56 F.4th 767, 778 (9th Cir. 2022) (concluding that teacher engaged in expression as private citizen entitled to First Amendment protection rather than employee when he “display[ed] a message on a personal item while attending a teacher-only training”).

On the other hand, in *Linthicum v. Wagner*, 94 F.4th 887 (9th Cir. 2024) the Ninth Circuit

determined that senators who staged a walkout in protest of a legislative assembly and were subsequently disqualified from appearing on the next election ballot due to a prohibited number of unexcused absences were not engaging in protected speech. The panel based their reasoning on *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), a Supreme Court case that addressed the interplay between legislative power and the First Amendment and concluded that the senators’ right to walk out was an exercise of legislative power rather than personal expressive speech. *Linthicum*, 94 F.4th at 893 (“No private citizen enjoys the privilege to advance or frustrate legislative action directly in the legislature . . . . The use of that power [(the walk out)] therefore implicates the governmental mechanics of the legislative process,” and *Carrigan* makes clear that a legislator has no right under the First Amendment to use that official power for expressive purposes.’”) (quoting *Carrigan*, 564 U.S. at 127)); *see also* *Sullivan v. Univ. of Wash.*, 60 F.4th 574, 581-82 (9th Cir. 2023) (holding that the First Amendment right of expressive association did not protect the work of committee members individually or collectively when they were appointed to serve a public function and their work fell within the scope of their official duties on a university committee).

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