GOVERNMENT EMPLOYEES AND SOCIAL MEDIA

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Social Media Use

- Facebook – 1.15 BILLION users / 669,000,000 daily active users
- Twitter – 555,000,000 users (58,000,000 tweets per day)
- YouTube – 4 BILLION views per day / 100 *hours* video uploaded every *minute*
- Tumblr – 150,000,000 users
- MySpace – 25,000,000 users
- Instagram – 40,000,000 photos uploaded per day

- Access to employee social media accounts
- Discipline of employees for social media use
- Social media policy issues

Can I access my employee's personal social media information?

Employer Access to Employee Social Media Accounts



(Photo by B2B News Network)

City of Ontario v. Quon, US SCt (2010)

- Used department pager for "sexting" girlfriend
- Repeated use in excess of 25,000 characters
- Audit -- # characters sufficient for work?
- Permitted warrantless exception – work related inquiry

City of Ontario v. Quon, US SCt (2010)

- Assumed 4th A right to privacy
- Warrantless exception
- Non-investigatory work-related need that justified employer's access

Stored Communications Act

- Title II, Electronic Communications Act of 1986
  - Electronic communications held by ISP
  - Third party doctrine – little to no expectation of privacy

Stored Communications Act

- Protects stored electronic communications in hands of third party ISPs
  - Consent
  - ECS and RCS
    - ECS (send/receive electronic communications) – PC / warrant
      - RCS (storage/processing) – subpoena / court order

Stored Communications Act

- *Pietrylo v. Hillstone Restaurant Group*, US District Court for NJ (2009)

- "SpecTator" forum on MySpace
- Password access
- Manager asked user to access
- Employee felt "coerced"
- Jury: violation of SCA, actual and punitive damages

Stored Communications Act

- *Ehling v. Monmouth Ocean Hosp. Serv.*, US District Court for NJ (2013)

- Facebook "friend" with access gave screenshots to management
- "Friend" had authorized access
- Provided to employer voluntarily
- No violation of SCA

Maryland User Name and Password Privacy Protection Act (October 2012)

- Employer can't request / require user name, PW, or access information for personal account
- Employer can't penalize employee for refusing access

- Limited exceptions (*i.e.*, certain compliance / regulatory purposes)

Other States:

- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Illinois
- Louisiana
- Maine
- Michigan
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- Oklahoma
- Oregon
- Rhode Island
- Tennessee
- Utah
- Virginia
- Washington
- West Virginia
- Wisconsin

Bottom line:

- Maybe some limited 4th Amendment protection
- No unauthorized access (coercion / hacking)
- Consent by authorized user / "friend")
- Access for business necessity
- Targeted investigation – may need a warrant
- Employer can access if it's "public" . . . .

…and it's pretty much ALL public!

"Given the millions of users . . . privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."

Romano v. Steelcase, NY Supreme Court for Suffolk County (2010)

"Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets."

Largent v. Reed, Court of Common Pleas of Pennsylvania (2009)

So What's An Employer To Do?

(Agent-X Comics)



But don't I have a First Amendment Right?



First Amendment

- Government employees – *limited* First Amendment rights:
  - Right of employee to speak (private citizen / report government misconduct)
  - Right of employer to manage work environment and control / discipline employees

Connick-Pickering test

- Government employee first Amendment right:
  1. Employee speaks as a ***private citizen*** (not as employee)
  2. Employee speaks on a ***matter of public concern*** (not a matter of personal interest)
  3. The employee's ***right to speak outweighs*** employer's interest in restricting the speech

1. *Employee speaks as private citizen:*

- *Garcetti v. Ceballos,* 547 U.S. 410 (2006)
  - no First Amendment protection for employee who speaks on behalf of employer as part of official job duties
- *Lane v. Franks*, 134 S.Ct. 2369 (2014)
  - critical question – is speech "ordinarily within the scope of employee's duties, not whether it concerns those duties"

1. *Employee speaks as private citizen:*

- Official government social media account
- *Garcetti* – no First Amendment protection

- Personal social media account – outside employee's ordinary job duties
- Limited First Amendment protection

2. *Matter of public concern:*

"any matter of political, social, or other concern to the community"

- Employee opinions about political, social, or personal issues
- Whistleblowing, safety violations, government misconduct
- NOT employee gripes / grievances or matters solely of personal import

3. Balance interests:

- "[w]hether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary"

  Rankin v. McPherson, 483 U.S. 378, 388 (1987)

- "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."

  Connick v. Myers, 461 U.S. 138, 151-52 (1983)

3. Balance interests:

- Under *Connick-Pickering* test:

  Employer can discipline employee for speech if there is a *reasonable apprehension* it will disrupt operations and working relationships

  Connick v. Myers, 461 U.S. 138, 152 (1983)

3. Balance interests:

- Public safety agency:
  - "need for discipline, esprit de corps, and uniformity" and "camaraderie and efficiency"
  - "Order and morale are critical . . . With a need to secure discipline, mutual respect, trust, and particular efficiency among the ranks"
  - "particular interest in maintaining a favorable reputation with the public"
  - High stakes if something goes wrong

    Duke v. Hamil, 997 F. Supp.2d 1291, 1301 (N.D. Ga. 2014)

All the world's a stage, and all the men and women merely players.

William Shakespeare

As You Like It (1600)





Liverman v. City of Petersburg, 844 F.3d 400, 407, 410 (4th Cir. 2016)

- "similar to writing a letter to a newspaper"
- "intent to communicate to the public or to advance a political or social point of view beyond the employment context"
- "A social media platform amplifies the distribution of the speaker's message"
- "increases the potential in some cases exponentially, for departmental disruption"

City of San Diego v. Roe, US SCt (2004)

- PO sold sex videos, dressed in police uniform
- Court upheld firing:
  - Speech not aimed at informing citizens of matters of public concern
  - Nexus with SDPD (no *direct* connection, but same username)
  - Speech "detrimental to the mission and functions" of the SDPD

Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2013)



Bill Johnson, Delta Democrat Times

Dear Mayor , can we please get a leader that understands that a department sends officers (to) the funeral of an officer killed in the line of duty? we had somethings (sic) then that we no longer have..LEADERS. .

PO Susan Graziosi, Greenville, Mississippi Police Department

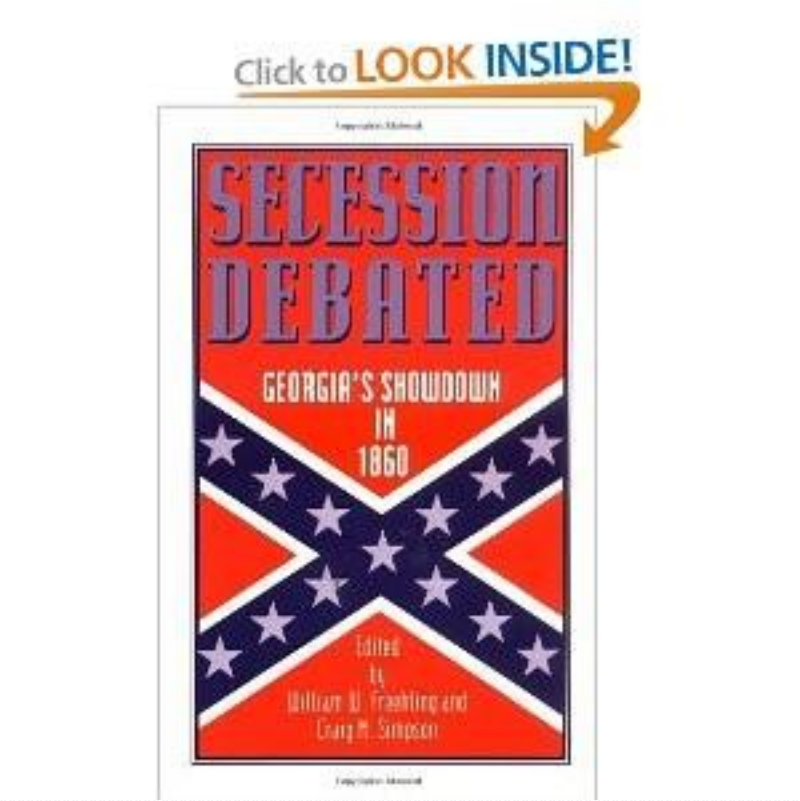
Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2013)

- Some posts could be "fairly considered as relating to any matter of political, social, or other concern to the community"
- "quickly devolved into a rant" telling the police chief to "get the hell out of the way"
- Speech *not matter of public concern* – akin to internal grievance

Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2013)

- "smack of insubordination"
- "actually disruptive" to operations – "buzz around the department"
- two officers showed "change in demeanor" to chief
- "wide degree of latitude to determine dismissal was appropriate"

Duke v. Hamil, 997 F. Supp.2d 1291 (N.D. Ga. 2014)



- "It's time for the second revolution!"
- Post on Facebook for 1 hour before taken down
- "Friends" only
- Employer not listed on profile

Duke v. Hamil, 997 F. Supp.2d 1291 (N.D. Ga. 2014)

Speech was a matter of public concern BUT….

….it reflected on the PD's "reputation, and could undermine loyalty, discipline, and good working relationships" and could undermine confidence in the PD, which is charged with upholding law and order

Is “like” speech?



- “clicking on the ‘like’ button literally causes to be published the statement that the User ‘likes’ something, which is itself a substantive statement”

Grutzmacher v. Howard County, 851 F.3d 332 (4th Cir. 2017)

- Series of Facebook posts were "single expression of speech"
  - Public concern – "let's kill someone with a liberal" and "liking" a "black . . . scary" one
  - Public concern – "prevent future butthurt" and county government is "Liberal Democrat held"
  - Matter of personal interest – "liking" middle finger "for you Chief"

Grutzmacher v. Howard County, 851 F.3d 332 (4th Cir. 2017)

- Balance tipped in favor of FD because:
- Dissension / complaints
- Battalion Chief – role model, more disruptive
- Frustrated public safety mission and public trust
- Insubordination – "sparring match" that escalated to telling Fire Chief to "f*** off"
- "rife" with examples that Facebook post upset chain of command

Is there a different standard for civilian employees?

- *Rankin v. McPherson*, 483 U.S. 378 (1987)
  - clerk in constable's office
  - "no evidence that it interfered with the efficient functioning of the office"

- *Grutzmacher v. Howard County* (DMd. 2015)
  - volunteer EMT in Fire Department
  - evidence of disruption applicable to Battalion Chief "is essentially meaningless"

Bottom line:

- Private citizen speech
- Public concern:
  - Whistleblowing, government wrongdoing
  - Political discussions, even if "jokes"
  - *Not* insubordination
- *Pickering* balancing:
  - Public safety agencies – deference (dire consequences)
  - Supervisors versus low level employees
  - Public concern – greater showing of disruption

Employer Social Media Policies

454 United States v. National Treasury Employee's Union ("NTEU), SCt (1995)

- Policies may serve as a prior restraint on a "broad category of speech" – higher burden on government
  - Modified *Pickering* balancing test:
    - Employee speaks as a private citizen on a matter of public concern
    - Government must show "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's impact on the actual operation of the government"

Liverman v. City of Petersburg

844 F.3d 400 (2016)

- Fourth Circuit Case
- City policy on social media use violated First Amendment's Free Speech Clause
  - Officers comments spoke to "matter of public concern"
  - "virtual blanket prohibition on all speech critical of the government employer"
- *Pickering v. Bd. Of Educ.*
- *City of San Diego v. Roe*
- *Garcetti v. Ceballos*
- *Connick v. Myers*

Liverman v. City of Petersburg

844 F.3d 400 (2016)

- City Policy:
  - Prohibits posts that "may bring discredit to" the PD
  - "Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law."

Liverman v. City of Petersburg

844 F.3d 400 (2016)

- City Policy:

  "Officers may comment on issues of general or public concern (as opposed to personal grievances) so long as the comments do not disrupt the workplace, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer."

Liverman v. City of Petersburg

844 F.3d 400 (2016)

- Applying *Pickering* to policy:
  - Balance the employer's interest in government operations
  - With interests of (in various expressions of speech)
    - Potential audiences
    - Present and future employees

Social Media Policy

- Common policy prohibitions:
  - Sharing of information obtained through official job duties (with no public concern)
  - Photographs from crime or incident scenes
  - Photographs depicting evidence, victims, suspects
  - Confidential information
  - Statements / endorsements that could be interpreted to represent views of the agency (without a disclaimer)

Social Media Policy

- Common policy prohibitions:
  - No personal social media use during work hours
  - Do not identify yourself as an agency employee (without disclaimers)
  - Do not post photographs with agency logos, uniforms, badges, ID patches, equipment, or facilities
  - Do not post about events or incidents occurring in the agency or learned through employment (unless public concern)

Social Media Polilcy

- Common policy guidance:
  - Do NOT post anything that may ridicule, malign, disparage, or disrespect any race, religion, sex, gender, sexual orientation, nationality, or any other protected class
  - Do NOT post anything that may be construed as harassment, threats of violence, sexual, violent, racial, ethnically derogatory material, weaponry, or offensive comments, pictures, artwork, video in conjunction with any reference to the agency

Social Media Policy

- Common policy guidance:
  - Do NOT posts anything that may include ethnic slurs, profanity, personal insults, material that is harassing, defamatory, fraudulent, or discriminatory, or other conduct or communications that would not be acceptable in the workplace
  - Do NOT posts anything that may include discourteous or disrespectful remarks regarding another's ethnicity, race, gender, religion, gender identity (including self-identification)

Social Media Policy

- To consider –
  - Does speech impair the efficiency of the workplace?
    - Discipline
    - Co-worker relationships and harmony
    - Personal relationships
    - Impact on professional responsibilities
    - Efficient operation of agency
    - Impact on agency mission
    - Impact on public trust
    - Impeachment????

Social Media Policy

- Guidance vs. Training vs. Policy
  - What is your agency really trying to accomplish?

Social Media Policy

- Concluding thoughts:
  - "Model" Policies?
  - First Amendment parameters
  - Focus on conduct, not speech
  - Policy / prohibitions versus guidelines / training
  - Policy versus individual disciplinary action
  - Are there existing work rules/policies which already govern that which you are seeking to address?

QUESTIONS?