"LIKE" IT OR NOT

EMPLOYEES' RIGHTS AND RESPONSIBILITIES ON SOCIAL MEDIA

Mari McGowan
Director/Shareholder
Abernathy, Roeder, Boyd & Hullett, P.C.
McKinney, TX

A | R | B | H

ABERNATHY ROEDER
BOYD HULLETT

EST. 1876

LEGAL DISCLAIMER

This presentation should not be construed as legal advice related to any specific facts or circumstances. Although this presentation covers legal subjects, it is intended to educate attendees about school law topics and not to provide advice that will be the basis for action or inaction in any specific circumstance. Attending this presentation or viewing these materials does not create an attorney-client relationship between Abernathy, Roeder, Boyd & Hullett, P.C. and the attendees or the attendees' institutions. For circumstance-specific legal advice, please directly contact a licensed attorney.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

PRESENTATION AGENDA

- Different Social Media Platforms
- Legal Frameworks
- Case Law Updates
- Political Advertising
- Texas Public Information Act
- Social Media Policy Guidelines
- Examples and Discussion
- Q&A

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876



WHATSAPP?

GUESS THE FAKE EMPLOYEE SOCIAL MEDIA NEWS STORY

A | R | B | H

ABERNATHY ROEDER
BOYD HULLETT

EST. 1876

WARM-UP: ROUND 1, STORY 1

Texas teenager @Cella was fired over Twitter before she even started her job at Jet's Pizza. On the eve of beginning work, she Tweeted: "Ew I start this (expletive) job tomorrow" followed by five thumbs-down emojis. Her never-to-be boss saw the Tweet and responded: "And...no you don't start that job today! I just fired you! Good luck with your no money, no job life!"

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

WARM-UP: ROUND 1, STORY 2

A kitchen worker at an upscale steakhouse in New York was fired after his first day. Upset about having to buy new clothes for his uniform, the man Tweeted a picture of his tennis shoes with the caption: "Boss says I got to buy new shoes an pants for my uni. Well, how bout these sweet kicks I stole today!" The man's manager was a Twitter follower, and promptly sent him a sick pink slip.

A | R | B | H
Abernathy Roeder Boyd Hullett
EST. 1876

WARM-UP: ROUND 1, STORY 3

After interviewing at Cisco Systems, a California man Tweeted: "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work." Cisco found out about the Tweet, and rescinded the offer. The poor-taste-Tweeter is now known online as "Cisco Fatty"!

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

WARM: WHICH IS THE FAKE STORY?

Which is the FAKE news story?

1. The Pizza Poster
2. The Twitter Thief
3. The Cisco Fatty

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

WARM: WHICH IS THE FAKE STORY?

Which is the FAKE news story?

1. The Pizza Poster
2. The Twitter Thief
3. The Cisco Fatty

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

WARM-UP: ROUND 2, STORY 1

A college grad student in Tennessee was fired from his job as a teaching assistant for Instagramming a picture of the online grade book along with the line "I grade u based on how hot you r" The assistant was fired by his supervising professor. When interviewed for the campus newspaper, the assistant said "well, at least I tell the truth!"

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

WARM-UP: ROUND 2, STORY 2

Shea Allen, a TV reporter for an ABC affiliate in Huntsville, Alabama, was fired for posting a list of her "top ten confessions" on her blog. Allen's admissions included "I'm frightened of old people and I refuse to do stories involving them or the places they reside"; "I've taken naps in the news car"; and "I've stolen mail and then put it back. (maybe)." After briefly taking the blog down, she decided to stick by her guns and put it back up…until she was fired.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

WARM-UP: ROUND 2, STORY 3

Andrew Kurtz was fired from his job as a Pittsburgh Pirates Pierogi for criticizing Pirates players on his personal Facebook page. Kurtz's Pierogi position involved wearing a man-sized costume of Cheese Chester, Sauerkraut Saul, Oliver Onion, or Jalapeno Hannah and racing other potato-filled pastries around the baseball diamond during the seventh inning stretch. Kurtz will have to find a new way to earn some "dough."

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

WARM UP: WHICH IS THE FAKE STORY?

Which is the FAKE news story?

1. The Tennessee TA
2. The Napping Newscaster
3. The Pittsburgh Pierogi

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

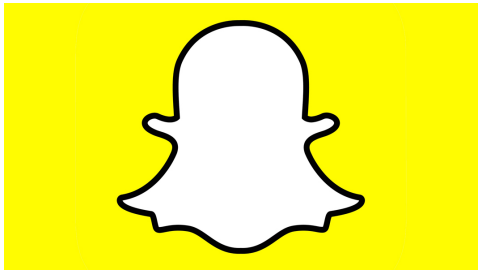
WARM UP: WHICH IS THE FAKE STORY?

Which is the FAKE news story?

1. The Tennessee TA
2. The Napping Newscaster
3. The Pittsburgh Pierogi

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

CAN YOU NAME THE SOCIAL MEDIA PLATFORMS BASED ON THEIR SYMBOL?







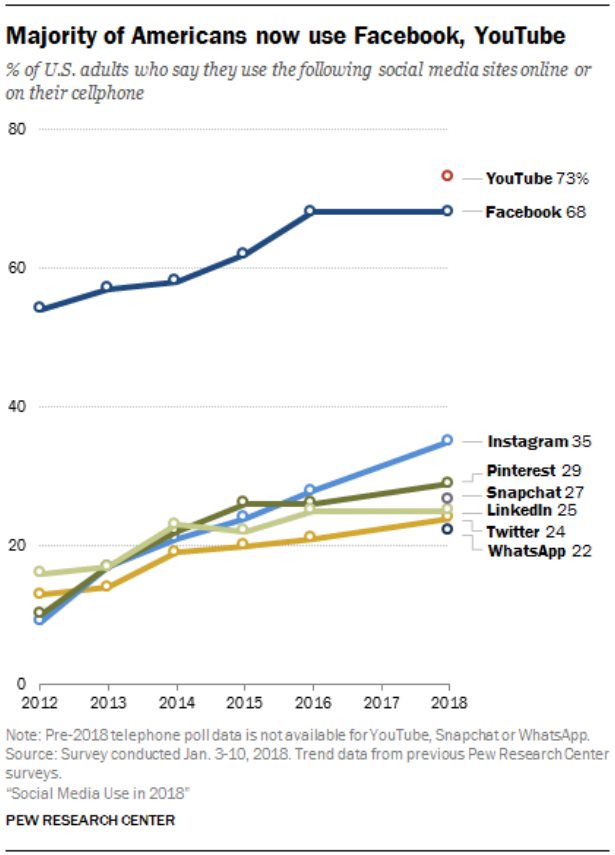




ABERNATHY ROEDER BOYD HULLETT
EST. 1876

THE PREVALENCE OF SOCIAL MEDIA

- According to a 2018 Pew Research Center survey, around 2/3 of American adults use Facebook.
- 74% of these users visit Facebook at least once a day.
- Nearly ***half*** of all U.S. adults get news from Facebook.
- Roughly 1 in 5 people get news through YouTube, and about 1 in 10 get news from Twitter.



ABERNATHY ROEDER BOYD HULLETT
EST. 1876

MILLENNIALS AND SOCIAL MEDIA

- Nearly 90% of 18-29 year olds use some form of social media.
- The median 18-29 year old uses at least four of the major social media platforms.
- Roughly 80% of this demographic report visiting Snapchat and Instagram at least once a day.
- 55% of this demographic visit these platforms several times per day.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876



TIMEHOP!

PAST LEGAL FRAMEWORKS FOR EMPLOYEE FREE SPEECH AND SOCIAL MEDIA

A | R | B | H

ABERNATHY ROEDER BOYD HULLETT

EST. 1876

FREE SPEECH: *PICKERING* AND *CONNICK* BALANCING TEST

- In *Pickering v. Board of Education*, the U.S. Supreme Court established the balancing test weighing the government employer's interest in promoting the efficiency of the public services it performs against the First Amendment interests of the employee's speech as a citizen.
- The Court elaborated on this standard 15 years later in *Connick v. Myers*, holding that a public employee must first show that the speech involved a "matter of public concern" rather than one of mere "personal interest" to the employee.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

ADDING TO THE FRAMEWORK: *GARCETTI* AND *FRANKS*

- The Supreme Court embellished the standard created by *Pickering* and *Connick* by emphasizing employee motivation as a factor in determining whether the speech is protected in *Garcetti v. Ceballos*.
- In *Garcetti*, the Court held 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."

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

ADDING TO THE FRAMEWORK: *GARCETTI* AND *FRANKS*

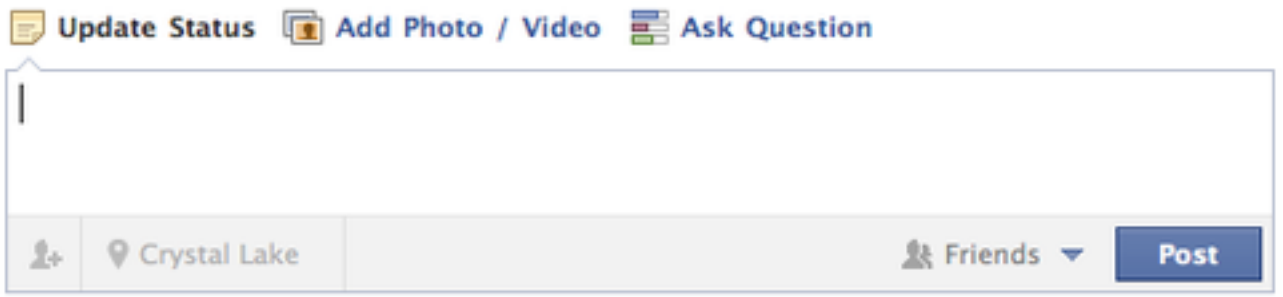
- In 2014, the Court further clarified how to interpret *Garcetti*. In *Lane v. Franks*, the Court held that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech."
- Instead, the critical question under *Garcetti* is whether the speech at issue is itself is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

EMPLOYEE TERMINATION: *RANKIN* AND *MT. HEALTHY*

- In *Rankin v. McPherson*, the Court held that "it is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."
- However, in *Mt. Healthy City School District Board of Education v. Doyle*, the Court found that an employee's First Amendment claim will fail if the employer can establish that the same decision would have been made for another, lawful reason.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876



"STATUS UPDATES"

RECENT COURT DECISIONS IMPLICATING SOCIAL MEDIA

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

OVERLY BROAD SOCIAL MEDIA POLICIES: *LIVERMAN*

- In *Liverman v. City of Petersburg*, the Fourth Circuit struck down a police department social media policy prohibiting any posts "that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees" as overly broad.
- Officer Herbert Liverman wrote a Facebook post critical of department decisions regarding instructor positions, including the following:

"Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data… shows on average that it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to teach other officers."

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

OVERLY BROAD SOCIAL MEDIA POLICIES: *LIVERMAN*

- Liverman challenged the social networking policy and asserted that his comments were protected speech under the First Amendment.
- The Court found the constraints of the social media policy created a "virtual blanket prohibition" of all speech critical of the government employer, and that Liverman's speech was a matter of public concern.
- The Court also characterized the criticisms of department operations and policies as arguably the "paradigmatic" matter of public concern.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

MIXED PUBLIC AND PRIVATE CONCERN: *GRUTZMACHER*

- In *Grutzmacher v. Howard County*, a Fire Battalion Chief Kevin Buker commented in support of a Facebook post about gun control and "beating a liberal to death with another liberal…"
- Buker eventually removed the posts, then posted to his own "wall" about free speech only applying to liberals, and complaints about the Department social media policy.
- Finally, three weeks later, Buker "liked" a photo of an elderly woman with her middle finger raised with the caption:

"THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT ITS MINE I'LL POST WHATEVER THE FK I WANT"**

- The firefighter who originally posted the picture wrote "for you, Chief" as part of the post.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

MIXED PUBLIC AND PRIVATE CONCERN: *GRUTZMACHER*

- Buker sued the fire department, alleging the Department fired him in retaliation for exercising his First Amendment free speech rights, and also alleging that the Department's social media policy was facially unconstitutional.
- The Fourth Circuit upheld the District Court's grant of summary judgment in favor of the Department.
- The Court acknowledged some of the posts did address matters of public concern, but ultimately held that the Department's interest in efficiency and preventing disruption outweighed Buker's interest in speaking in the manner he did regarding gun control and the Department's social media policy.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

EMPLOYEE-EMPLOYER DISPUTES: *GRAZIOSI V. CITY OF GREENVILLE*

- In *Graziosi v. City of Greenville*, a District Court in Mississippi granted summary judgment for the City of Greenville where a police officer alleged the GPD wrongly terminated her because of comments she made on Facebook.
- Susan Graziosi and several other officers expressed concern to the Chief of Police regarding attending a funeral for an officer killed in the line of duty in another town.
- After learning that no member of the GPD attended the funeral, Graziosi called the decision "totally unacceptable" and later stated the department no longer has "LEADERS."
- Graziosi then posted her original statement on the Greenville Mayor's Facebook page.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

EMPLOYEE-EMPLOYER DISPUTES: *GRAZIOSI V. CITY OF GREENVILLE*

- The Fifth Circuit held that because Graziosi's statements were not made within the ordinary scope of her duties as a police officer, those statements were speech made as a citizen rather than a public employee.
- However, the Court agreed that Graziosi's speech did not address a matter of public concern, but instead, involved a dispute over an intra-departmental decision.
- Weighing "the content, form, and context of Graziosi's speech together, we hold that the speech is not entitled to First Amendment protection."
- Additionally, the Court held that it could not allow the "mere insertion of a scintilla of speech regarding a matter of public concern" to plant the seed of a constitutional case.

BLOCKING PRIVATE CITIZENS: *KNIGHT FIRST AMENDMENT V. TRUMP*

- In *Knight First Amendment Institute v. Trump*, the Southern District of New York considered whether a public official may, consistent with the First Amendment, "block" a person from his Twitter account in response to the political views that person has expressed.
- The Court also considered whether the analysis differed because the public official in question happens to be the President of the United States.



BLOCKING PRIVATE CITIZENS: *KNIGHT FIRST AMENDMENT V. TRUMP*

- The Court held that the President could not block users trying to engage in protected speech on social media and concluded that President Trump's Twitter account constituted a designated public forum.
- In addition, the Court found that the individual plaintiffs were blocked as result of viewpoint discrimination, and the defendants conceded that the plaintiffs were blocked from the President's Twitter account because the plaintiffs posted tweets that criticized the President or his policies.



A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

DON'T GET "BLOCKED"

IMPROPER USE OF SOCIAL MEDIA DURING ELECTIONS



A | R | B | H

ABERNATHY ROEDER BOYD HULLETT

EST. 1876

POLITICAL ADVERTISING AND CITY FUNDS

- Section 255.003 of the Texas Election Code states that an officer or public employee of a political subdivision may not spend or authorize the spending of public funds for political advertising.
- This includes municipal officers and employees.
- One of the most common problems for government employees during election season is the creation or dissemination of political advertising on city time.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

WHAT IS POLITICAL ADVERTISING?

- "Political advertising" means a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that:
  - In return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or
  - Appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or
  - On an internet website (including a communication appearing on a social media website).

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

WHAT IS NOT POLITICAL ADVERTISING?

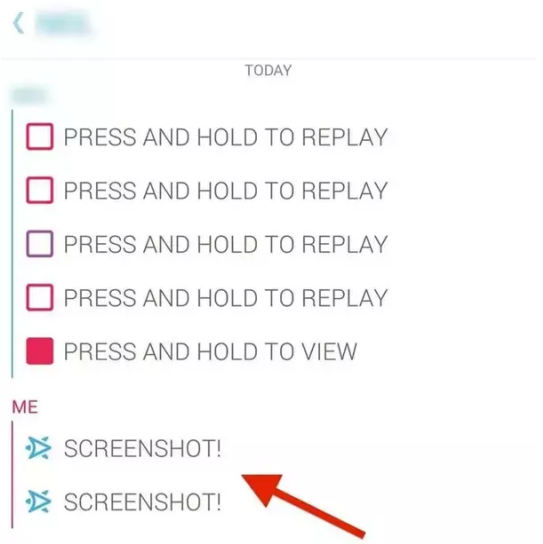
- Section 255.003 does not apply to communication **that factually describes the purposes of a measure** if the communication does not advocate passage or defeat of the measure.
- For example:
  - "The bond measure will provide $2.2 million to build a training facility for the Fire Department." – OK
  - "Voting for the bond measure will provide a sorely needed training facility for our hard-working Firefighters." – NOT OK

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

POLITICAL ADVERTISING SCENARIO

- An employee is processing a case file for the Generic City Human Resources Department. While processing the file, the employee creates a brochure on her city-issued laptop that says, "Do what is right for Generic City! Vote to support our city by supporting the bond measure!" Proud of her work and in an effort to remind all of her peers about early voting, the employee copies and posts the flier all over City Hall and uses her City Facebook account to post the flier.
- Is this a violation of the prohibition against political advertising?
- What if the employee sent an email that stated, "Early voting starts this Saturday, May 1st. You can find your appropriate polling place online."
- Is this political advertising?

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876



SCREENSHOTS!

TEXAS PUBLIC INFORMATION ACT AND CITY EMPLOYEE BASICS

A | R | B | H

ABERNATHY ROEDER BOYD HULLETT

EST. 1876

TEXAS PUBLIC INFORMATION ACT BASICS

- The Texas Public Information Act (TPIA) gives the public the right to request access to government information.
- The TPIA applies to information of every "governmental body," including municipalities, counties, and the municipal governing bodies.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

TEXAS PUBLIC INFORMATION ACT BASICS

- The TPIA also applies to recorded information in practically any medium, such as "e-mail, Internet posting, text message, instant message, other electronic communication…"
- This includes "any electronic communication created, transmitted, received or maintained **on any device** if the communication is in connection with the transaction of official business."

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

RECORDS RETENTION

- City social media posts do fall under the broad definition of public information as provided by the TPIA.
- City employees should make sure to archive or otherwise retain social media posts, unless the post contains duplicate information or information that exists elsewhere (such as in emails or on an official city webpage, for example).
- However, employees should also keep in mind that just because they are on a private social media account or using their personal phone, does not mean they are shielded from the requirements of the TPIA if they use those accounts or devices to conduct official business.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876



GROUP CHATS

CREATING A SOCIAL MEDIA POLICY FOR YOUR MUNICIPALITY

A | R | B | H

ABERNATHY ROEDER BOYD HULLETT

EST. 1876

SOCIAL MEDIA POLICY

- We recommend creating a municipal social media policy *prior* to creating official city accounts on social media platforms.
- The policy should contain guidelines for "Acceptable Use" outlining differences between personal and professional use of social media, privacy expectations, content restrictions, and protocols for approving the creation of new social media accounts for city purposes.
- The policy should also create a process for designating employees who will be allowed to access city social media accounts.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

CONTENT RESTRICTIONS

- The social media policy should define or list prohibited content for city accounts, including:
  - Unlawful political advertising;
  - Confidential information;
  - Personal information for the employee using the account or that of other city employees;
  - Threatening, harassing, or discriminatory content; or
  - Offensive content containing lewd or obscene references.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

DIFFERENTIATING BETWEEN PLATFORMS

- The social media policy should also designate the acceptable platforms for official social media accounts.
- Cities may want to delineate specific acceptable uses for each platform the city decides to utilize.
  - For example: Facebook typically allows for more detailed postings than Twitter due to the lack of character limits and nature of the site. Policies should reflect those differences and outline protocols for each accordingly.

SECURITY CONCERNS

- Social media accounts pose some of the same security risks as other electronic media used by the city for official communication and business.
- Like a city email account, the policy should remind employees to refrain from sharing account or password information with any third parties who are not designated as authorized users of the account by the city.

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

WRAP-UP: SOCIAL MEDIA DO'S AND DON'TS

Do's:

- Encourage employees to maintain strict private settings on Facebook, Twitter, and other social media platforms.
- Discourage employees from associating their online presence with the city in any way (listing the employer, posting pictures wearing a city t-shirt, etc.).
- Encourage separate personal and work accounts for each platform used.
- Review the city's social media policies with all employees.

Don'ts:

- Do not allow employees to post confidential information about the city.
- Do not allow designated social media employee-users to share the password to city accounts with other employees or third parties.
- Do not allow employees to post obscene or lewd material on city social media platforms.
- Do not forget to create and maintain a city social media policy.

A | R | B | H
ABERNATHY ROEDER BOYD HULLETT
EST. 1876

QUESTIONS?



A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

THANK YOU!

Mari McGowan
Director/Shareholder
Abernathy, Roeder, Boyd & Hullett, P.C.
McKinney, TX

A | R | B | H

ABERNATHY ROEDER
BOYD HULLETT

EST. 1876