

Social Media & the First Amendment

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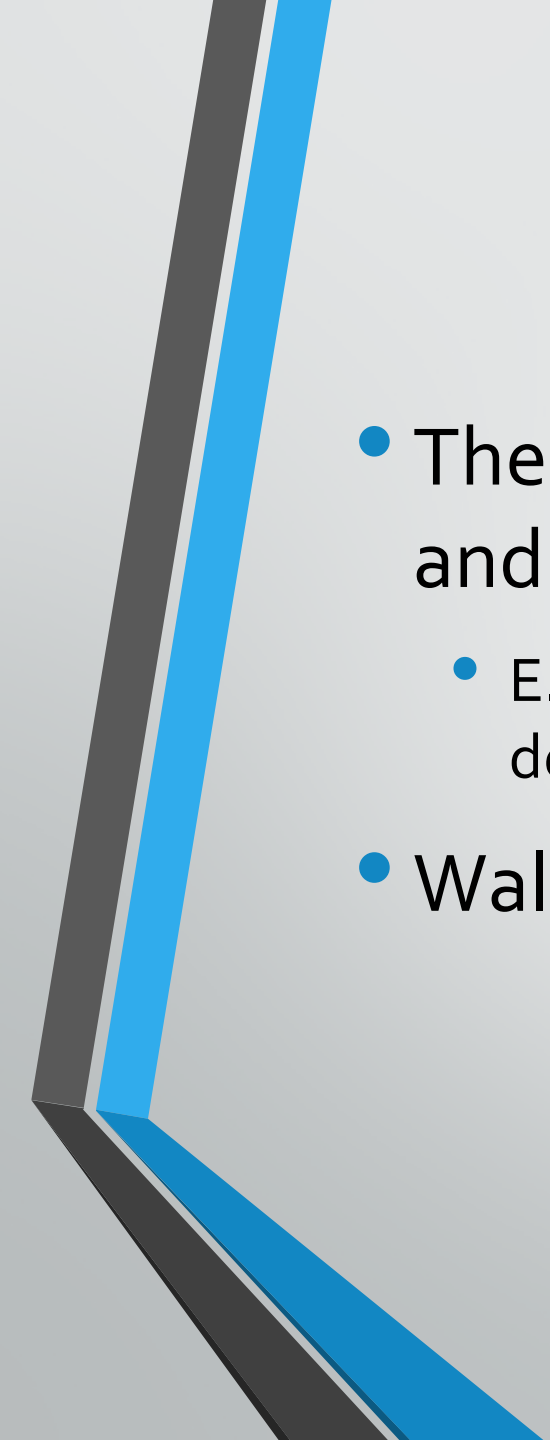
First Amendment

- U.S. Supreme Court says *government* social media is subject to First Amendment
- First Amendment does not apply to private persons or to Facebook, Twitter, etc.





Risk Analysis and Defending Litigation

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- The risk analysis is generally the same before discipline and after lawsuit
 - E.g., *Bennett v. Metro. Gov't* – employee posts on social media and department wants to take action
 - Walk through the elements before taking action

“The Claim”: First Amendment Retaliation

- Defined as taking action against someone because they engaged in conduct protected by the First Amendment
- Can arise in many government contexts (jail, schools, etc.), but we are addressing only the employee context
- 3 elements:
 - (1) engaged in protected activity
 - (2) adverse action taken against them
 - (3) causal connection

The Elements

- Element One (protected conduct) has three sub-elements
- Have developed out of SCOTUS rulings over time to create bars to recovery in certain situations
 - Matter of public concern (not private grievance)
 - Acting as a private citizen (*Garcetti* test) or an employee
 - *Pickering* balancing – SCOTUS-created balancing test

Sub-Element One: Public Concern

- Sub-Element One: Matter of public concern (not private grievance)
- Frequent subject of summary judgment motion practice
- Very fact-intensive analysis; research your facts
- Cannot cherry-pick statements; question is whether speech as a whole and in context relates to a matter of public concern
- Examples of “public concern”:
 - Reports of unlawful conduct (whistleblower speech, discrimination)
 - Political issues and elections
 - Social justice issues
- Personal grievances about your own employment situation, absent a complaint of unlawful conduct, is not a matter of public concern

Sub-Element Two: Private Citizen or Employee?

- Sub-Element Two: Acting as a private citizen (*Garcetti v. Ceballos*, 547 U.S. 410 (2006)) or an employee
- “So long as employees are *speaking as citizens* about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” (emphasis added)
- Question is not whether the person was *at work*.
- Question is whether the statement was made pursuant to official duties.
 - *Lane v. Franks*, 573 U.S. 228 (2014) – sworn testimony outside job duties protected; sworn testimony pursuant to subpoena relating to job duties is an unanswered question

Sub-Element Three: *Pickering*

- Sub-Element Three: *Pickering* balancing
 - Established in *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968)
 - Enumerated further in *Rankin v. McPherson*, 483 U.S. 378 (1987)
 - Employee's interest in speech outweighs the employer's interest in the efficiency of the workplace
- *Pickering* balancing is a question of law – court decides
- Jury may decide questions of fact that inform the balancing
- *Bennett v. Metro* – pending SCOTUS petition – case turned exclusively on *Pickering*

Pickering Balancing Test

- As a result of *Rankin*, there are numerous factors used to conduct the *Pickering* balancing:
 - Time, place, and manner of the speech
 - Context of the speech
 - Is the speech “reasonably likely to:
 - “impair discipline by superiors”
 - “impair . . . harmony among co-workers”
 - “impede the performance of the speaker’s duties”
 - “interfere with the regular operation of the enterprise”
 - “undermine the mission of the public employer,” paying attention “to the responsibilities of the employee within the agency”

Pickering Balancing Test (cont.)

- Three significant points about the test:
 - (1) The factors are balanced with an eye toward “effective functioning of the public employer’s enterprise” (*Rankin*)
 - Thus, cannot censor speech based on content
 - The question is whether it impacts the workplace such that the government employer’s interest outweighs the employee’s interest in speech
 - The content may be part of the analysis, but it can’t be the reason
 - Key difference between government as sovereign and government as employer

Pickering Balancing Test (cont.)

- (2) A greater level of public concern present in the speech means a stronger showing of government interest will be required to overcome
- Whistleblower speech is entitled to highest level of protection
 - *Bennett* – trial court gave too much weight to the employee's interest (political speech laced with a racial slur), and Sixth Circuit reversed

Pickering Balancing Test (cont.)

- (3) Actual impairment of operations (disruption) usually not required
- Question is whether certain outcomes are “reasonably likely”
 - Plurality opinion in *Waters v. Churchill*, 511 U.S. 661 (1994), Supreme Court notes deference given to government employer’s “reasonable predictions of harm.”
 - Different circuits handle this differently (no actual disruption can require different showings), so research your circuit

Actual (vs. Anticipated) Disruption

- Second, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all stated that actual disruption is not required.
 - Collected cases cited in *Gillis v. Miller*, 745 F.3d 677 (6th Cir. 2017)
- Regardless of the law on actual disruption, employers should use caution before taking an adverse action against an employee on the basis of predicted disruption.

Public Perception

- Second, Fourth, Sixth, Ninth, and Eleventh Circuits have recognized that public perception is relevant to the *Pickering* analysis
 - *Locurto v. v. Giuliani*, 447 F.3d 159 (2d Cir. 2006)
 - *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998)
 - *Bennett v. Metro Gov't of Nashville & Davidson Cty.*, 977 F.3d 530 (6th Cir. 2020)
 - Public safety employees must account for public perception. *Dible v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008)
 - *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985)

Public Perception (cont.)

- The concept comes from language in *Rankin* (found protected speech where the employee did NOT have a role that involved public contact, policymaking, or confidentiality)
 - *Rankin* references *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), Eleventh Circuit decision involving a sheriff's office clerk discharged after his participation in the KKK became public knowledge.
 - *McMullen* notes that members of a law enforcement agency "are subject to greater First Amendment restraints than most other citizens."
 - Uncontradicted evidence "that Jacksonville's black community in large part would categorically distrust the Sheriff's Office if a known Klan member were permitted to stay on in any position."

Different Analysis With Right to Associate or Assemble?

- Generally, no
- Most courts apply *Pickering* to speech, assembly, or association claims arising in government employment
- *McMullen* case cited in *Rankin* (membership in KKK)
- *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185 (2d Cir. 2003)
 - Notes several circuits' labeling of speech/association claims as "hybrid" claims (First, Second, Seventh)
 - Notes generally no distinction in analysis, but that public concern prong is ill-fitting in the hybrid context

Elements Two & Three: Adverse Action and Causation

- Adverse Action = an injury that would likely chill a person of ordinary firmness from engaging in the protected activity
 - Scope of discipline is irrelevant if it satisfies this standard
- Causation question = whether plaintiff's speech was a substantial or motivating factor in the employer's adverse action
- Do you have a *Mt. Healthy* defense?
 - Would have taken the same action notwithstanding the protected conduct
 - Affirmative defense that must be pleaded



Employees Behaving Badly

Bad timing?

- Shortly after a government agency sent around a notice to employees of mandatory training, an employee posted this on Snapchat:

*Mandatory 2 hour sexual harassment training. And they aren't even gonna show me the proper way to grab a woman's a**...*

- Employee was fired by his boss, a state senator

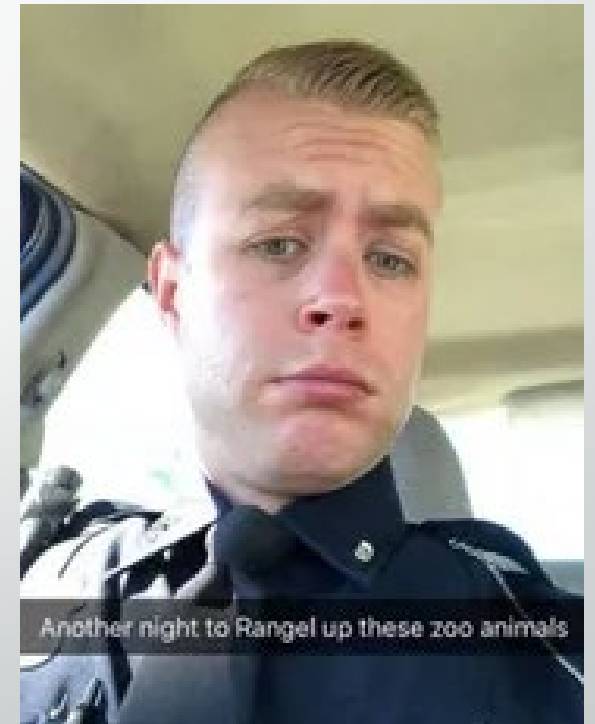
“Patient privacy, what’s that?”

A dispatcher posts a screenshot of a patient call, including name, personal information, and description of a medical emergency

Justifiable termination?

Detroit officer fired for Snapchat post

- Police officer terminated for posting a selfie with the caption:
"another night to Rangel (sic) up these zoo animals."
- Suspended a day after the post; terminated shortly after
- Department Chief said, "[t]his is not reflective of this department. . .[w]e expect a high level of professionalism when we're serving the public."



Tulsa, OK Police Officer Supporting Torture

- Citizen complaint initiated an inquiry into the officer
- Internal investigation was open for 1 hour and 15 minutes before termination decision
- Content included:
 - Pro-waterboarding messages
 - Support for Three Percent Movement
 - Islamophobic speech
- Officer graduated academy within a month of firing

Tupelo, MS Police Officer Fired for Facebook Rant about Body Cameras

- Officer posted:
"Sometimes you have to use profanity and threaten a persons [sic] well being to get their attention; sometimes you have to kill them."
- City terminated officer
- Tupelo made clear it respects the free speech of officers and employees but stated speech cannot:
"impair working relationships, impede the performance of duties, impair discipline and harmony among coworkers or negatively affect the public perception of the City, including the Police Department."

"I'm 10-15"

- Secret Facebook group of over 9,500 members created in 2016
- Group for current and former members of the Border Patrol
- Posts included:
 - Derogatory and racially charged comments about undocumented migrants.
 - Promotion of violence towards minority groups.
 - Photoshopped picture of a member of Congress performing a sexual act.
- Customs and Border Patrol is currently investigating
- National Border Patrol Council called the incident "unacceptable."

Fire Captain: Matter of public concern or disgruntled employee?

- Fire captain fired after calling the fire district's board "clueless idiots" "ruled by good old boy politics" in a Facebook comment
- He sued claiming his comments were made as a private citizen on a "matter of public concern" and protected by First Amendment
- The court disagreed, finding he was speaking as an employee disgruntled by a recent disciplinary hearing
- Because his speech was not protected, his termination was upheld

Moreau v. St. Landry Par. Fire Dist., 413 F. Supp. 3d 550 (U.S. Dist. West La. 2019), aff'd by the Fifth Cir. Court of Appeals

In Plain View Project

- Investigation of officer social media conduct by Philadelphia attorney Emily Baker-White.
- Creation of a database of police officers posting inappropriate content on social media.
- Includes information about officer:
 - Name
 - Salary
 - Date of post
 - Badge number
 - Employment status

Response to *In Plain View*

- Philadelphia:
 - 13 police officers were fired.
 - 72 police officers were put on administrative leave.
- Dallas:
 - 4 officers placed on administrative leave and 20 under investigation.
- St. Louis:
 - District Attorney will no longer accept cases from 59 officers included in the database.

Examples of Posts

 **Ben Carver** · March 16, 2011 · 🌐

Its a good day for a choke hold.

 Share

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 [Redacted] Starship troopers?
7y

 **Ben Carver** Possibly, was that in starship troopers?
7y

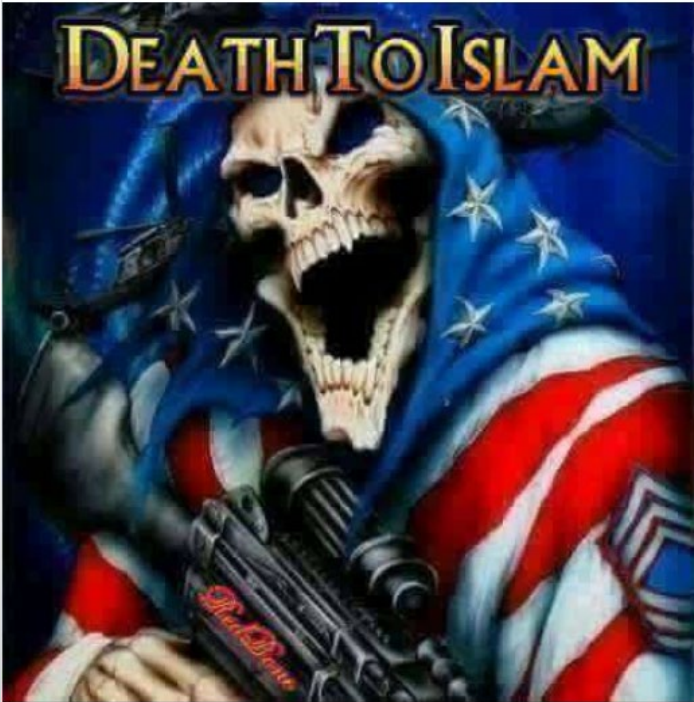
 [Redacted] Rico's Roughnecks!
7y

 [Redacted] I'm glad I didn't invite you over today.
7y

 [Redacted] I'm sure whoever is going to get choked today totally had it coming.....I mean, where do they get off walking around with their neck all exposed. They were asking for it
7y

 **Ben Carver** Gotta tuck the chin!!
7y

 **Joseph Przepiorka** shared a post. · February 21, 2017 · 🌐



[Redacted]
February 21, 2017

Campaign “like” = political speech

- Deputies reinstated after sheriff fired them for “liking” his opponent’s Facebook campaign page.
- A “like” can be speech, and political speech is protected.





Elected Officials

Elected officials – case study #1



- *Knight Foundation v. Donald Trump* (2nd Cir. Court of Appeals)
 - Persons sued after being blocked from President Trump's Twitter account @realDonaldTrumpaccount, including one who tweeted:
"To be fair, you didn't win the WH, Russia won it for you."
 - Court of Appeals held account was a "designated forum" and blocking violated First Amendment
 - Case currently on appeal to U.S. Supreme Court

Elected officials – case study #2

- *Davison v. Randall* (4th Cir. Court of Appeals)
 - Loudoun County, Va Commissioner sued after she blocked people from her personal Facebook page
 - Court found her page a public forum subject to First Amendment because:
 1. She used it to inform constituents of county business
 2. She used county staff to post on the page
 3. The county promoted the page in its newsletter
 4. Facebook page linked to county website

Elected officials – case study #3

- *Laurenson v. Hogan (Maryland Governor)*
 - Maryland Governor settled lawsuit against ACLU filed after Governor blocked persons who criticized Gov. on Facebook for \$65K
 - Following lawsuit, Governor adopted a new social media policy and established a “constituent message page”

Elected officials – case study #4

- *Morgan v. Bevin* (Kentucky Governor)
 - Contrary to the preceding cases, the Eastern District of Kentucky found Governor Bevin's social media site to be "government speech," meaning the First Amendment does not require him to maintain an open forum and he could choose the nature of the speech on his site.

Elected officials – private vs. government factors

Private factors

- Government does not maintain site or moderate posts or comments
- Site would not revert back to government when official left office
- Official did not use staff to post on official's behalf
- Activities take place outside of normal working hours

Government factors

- Official included title/position on the site
- Official's contact information listed on site
- Site linked to official government website
- Official conducted official business via site
- Official interacted with constituents on government business on site

Saving elected officials from themselves...

- Enact a social media policy for elected officials
- Explain to them that their personal social media activities, if tied to their governmental duties, could be a “public forum” subject to the First Amendment and could also implicate open records and meetings laws
- Best practice? Keep professional and personal activities separate (and campaigns, for that matter)



Social Media Policy

Employee usage policy

- Establish clear guidelines and boundaries for employee social media activities
 - Conduct on the employer's official social media sites
 - Conduct "on the job" or on employer equipment
 - Conduct outside of work that may impact employer
- Communicate whether social media use at work will be banned or minimal use allowed

Avoid overbroad policies

- A Virginia police department's social media policy was found unconstitutionally overbroad because it bans employees from speaking on "matters of public concern."
- Court had concerns with provisions that banned:
 - posts that "tend to discredit or reflect unfavorably on the department"
 - negative comments on internal operations of the department
 - discussions about specific conduct of supervisors or co-workers

Be careful not to discriminate in enforcing social media policy

Louisiana court overturned termination of a reporter, finding that TV station employer inconsistently applied its social media policy – the employer had terminated one employee for negative Facebook posts about a viewer, but did not discipline a co-worker for similar Facebook posts

TAKE HOME TIP: Zero tolerance policies are difficult to enforce. Be careful of unequal enforcement.

Employee training

- Employee training is important, particularly because technology changes so quickly

TAKE HOME TIP: Have employees sign an acknowledgment that they (1) read the policy and (2) received training.

QUESTIONS?

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