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Social Media, First Amendment, and Employee Discipline

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Social Media & the First Amendment

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I. Introduction

Government agencies have fully embraced social media since its inception less than 20 years ago. Public works departments are using Twitter to let residents know about street closures, police departments are posting videos on Facebook seeking crime tips, and cities are establishing their own YouTube channels to post meeting videos. Planning departments are using social media to inform the public about pending development projects, and to solicit public input about proposed zoning and plan amendments, among other topics.

The growth of social media applications in the government context has an impact not only on government officials who use social media, but also the increasingly information-hungry general public, who expect local, state, and even the federal government to use these technologies to more effectively disseminate information and allow a forum for comment. In fact, social media provide the public sector a wealth of opportunity to communicate with the public, with interested stakeholders, and with each other about new proposals and ideas. Additionally, social media may be used by all parties interested in public sector decision making, including developers, applicants, individual advocates, non-profit organizations, and governmental entities.

However, the general benefits of these fairly new technologies—which include the promise of greater transparency and greater public participation—must be weighed against the potential drawbacks, such as truthfulness and accuracy of posted information, the source of the posted information, and the longevity of inaccurate information in cyberspace. Additionally, there are a number of issues to consider when public officials and employees choose to utilize social networking tools, as well as a host of legal issues when organizations choose to create and host these sites. So, while government social media is a great way to disseminate information in real-time and to engage residents who might not otherwise attend meetings or otherwise participate in government, it is important that agencies understand the potential legal risks in using social media.

II. First Amendment

The First Amendment provides individuals with the right to engage in protected speech without government interference. If an agency has established a social media site to communicate with the public about agency business, the First Amendment will apply to the comments and posts made by others on that site. So, the moderator of the agency page cannot simply delete, hide, block, or ban posts or people based solely on the content of the message that was posted.

That does not mean that "anything goes" on government social media sites. Agencies can adopt rules on public comments so long as the rules do not implicate protected speech. For example, agencies might restrict commercial advertising on its site, prohibit discriminatory comments, and ban all links to third party sites. However, removing posts that are simply critical of the agency or its

activities could be subject to challenge as a violation of the First Amendment. Many agencies find it helpful to look at social media moderation along the same lines as moderation of comments at a public meeting – while it is acceptable for the public to criticize and disagree with agency actions, if the speech becomes disruptive, agencies will enforce "rules of decorum."

III. Employee Use of Social Media

Public employees have the right to exercise their First Amendment speech rights, to comment on working conditions, and to speak on matters of public concern. As a general rule, however, social media posts that fall more into the category of an "individual gripe" about the employee's job or supervisor will not be considered protected and could result in discipline and even termination. As a result, agency employees (like anyone else) should always think before they post.

Government employers continue to walk a tightrope when regulating the use and content of the electronic communications of its employees and when taking employment action based on the use or content of its employees' electronic communications. The law is well settled that a public employee has limited or no expectation of privacy in their office, desk, locker, or even their telephone calls at work. Unfortunately, the law moves slowly and is far from addressing the balance of rights of employees and employers in the context of electronic communications.

A. Constitutional Protections

Public employees do not surrender all of their First Amendment rights, particularly their speech rights, merely because they are employed by the government. However, the speech of public employees can be subject to certain restrictions by the government, because it has a different—and more significant—interest in regulating the speech of its employees than the general public.

The U.S. Supreme Court has outlined a two-step analysis for determining whether the speech of public employees is protected by the First Amendment. First, it must be determined whether the employee spoke as a citizen on a "matter of public concern." *Pickering v. Board of Education,* 391 U.S. 563 (1968). If the speech is a matter of public concern, then the court must engage in the *Pickering* balancing and decide whether the government was justified for treating the employee's speech differently from the general public.

Courts decide whether speech is a matter of public concern based on "the content, form, and context of a given statement, as revealed by the whole record." Of these three factors, the content of the statements have generally been acknowledged to be the most important, although the form and context can help make a statement one of public concern if the speech at issue occurs in an unconfined space. Matters that have been found to be of "public concern" include speech relating to public safety and policy protection, governmental wrongdoing and misconduct, or

speech which seeks to expose wrongdoing by government officials.

Pickering balancing has been used in Internet postings. In *Curran v. Cousins*, 509 F.3d 36, 49 (1st Cir. 2007), a corrections officer was terminated for postings he made on a union website. This website was owned and controlled completely separately from the public employer and featured a public discussion board which allowed registered users to "post comments and statements. Any person with access to the Internet—whether a member of the union or not—could register, post, and read messages." The officer, who had been suspended a week earlier for "threatening and menacing" co-workers, posted messages to the website that made unfavorably comparisons to the current sheriff and his personnel decision-making to Adolf Hitler and the Nazis during World War II. The employee was fired due, in part, to his posting on the website. The First Circuit noted that although most of the content of the posting was not a matter of public concern, a part of the posting that addressed the sheriff making personnel decisions based on political affiliations, rather than merit, was a matter of public concern. However, in balancing the speech of the employee and the later actions of his employer to fire him, the court found that the government was plainly justified in firing the employee. In the posting, the employee referenced the plot of Hitler's generals to kill him and urged a similar plot by analogizing the current sheriff to Hitler. Further, the court found that "[s]peech done in a vulgar, insulting, and defiant manner is entitled to less weight in the *Pickering* balance."

A more recent dealt with the issue of whether employee activities on social media were protected under the First Amendment and involved political activities by employees of a sheriff's department. That case involved employees of the local sheriff who supported the sheriff's opponent in the election. To the employees' misfortune, their supported candidate lost the election, and the sheriff terminated them. The employees sued, claiming that the sheriff retaliated against them in violation of their First Amendment rights by terminating them for engaging in protected speech activities - in this case, clicking "like" on the candidate's Facebook page. The district court judge ruled in favor of the sheriff, finding that the mere action of clicking "like" on Facebook was not "speech."

The employees appealed to the Fourth Circuit Court of Appeals. That court reversed the district court and held that the employees did engage in protected speech activities in their conduct on the sheriff's opponent's Facebook page. *Bland v. Roberts,* 730 F.3d 368 (4th Cir. 2013).

First, the court reviewed the Supreme Court political speech retaliation cases in determining which of the employees were protected and which employees were exempt as occupying a "policymaking or confidential position." Under the Supreme Court's decisions in *Elrod v. Burns* and *Branti v. Finkel*, a public employee who has a confidential, policymaking, or public contact role has substantially less First Amendment protection than a lower level employee. The purpose of the Elrod-Branti test is to ensure loyalty with employees in certain policymaking or confidential positions. In this case, the court determined that the

deputy sheriffs were not in policymaking positions where their political allegiance to the sheriff was a job requirement.

Second, the court looked at the conduct of the employees to determine whether their activities (supporting the sheriff's opponent on the opponent's Facebook page) were a substantial motivation for the sheriff's decision not to reappoint the employees. The court looked at the sheriff's conduct as well, including his statements to employees that those who openly support his opponent would lose their jobs, and specifically referencing his disapproval of the decision of some employees to support his opponent's candidacy on Facebook.

Third, the court addressed the question whether the employees' activities were speech. As noted above, the district court had ruled that merely clicking "like" on Facebook was not speech. The appellate court disagreed, however, stating that "clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement." Particularly in this context, clicking "like" on a candidate's Facebook page sends a message that the user approves the candidacy. The court found this to be pure political speech, as well as symbolic expression - a "thumbs up" symbol that the user supports the campaign by associating the user with it. As the court noted, liking a candidate's campaign page "is the Internet equivalent of displaying a political sign in one's front yard."

The lesson from the *Bland* case is that employers should be cautious in taking disciplinary action against an employee for the employee's social media activities that might be protected First Amendment speech. In this particular case, the comments and "likes" on Facebook were considered protected political speech.

C. Discipline of Current Employees

Evidence of misconduct related to work performance that is gathered from social network sites may be an appropriate basis for action against current employees. Like pre-employment considerations, the misconduct must impact, or have a nexus, to the reputation of the employer or the employer's ability to deliver services to the citizens. So, for example, the police officer or teacher who posts obscene pictures of himself or herself on their Facebook page, or photos of obvious illegal conduct, likely serves an appropriate basis for disciplinary action.

Government employers, like other bosses, are struggling with critical social media posts by employees. Can an employer terminate or discipline a worker for complaining about his or her boss or company on Facebook? Will social media policies protect an employer? The answers to these questions are not yet clear, because there is little case law on this issue. However, the National Labor Relations Board (NLRB) has been active in this area recently. While the National Labor Relations Act does not apply to government employers, the NLRB rulings can provide government employers with some guidance.

In one case, the NLRB ruled that a nonprofit employer unlawfully discharged five employees who had posted comments on Facebook relating to allegations of poor job performance that had been previously expressed by one of their coworkers. The workers were found to be engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow co-workers on Facebook. The NLRB cited the *Meyers* ruling that an activity is concerted when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." In this case, the discussion was initiated by one worker in an appeal to her coworkers on the issue of job performance, resulting in a "conversation" on Facebook among coworkers about job performance. The NLRB ruled similarly in a number of other cases.

In another case, however, the NLRB ruled that a reporter's Twitter postings did not involve protected concerted activity. Encouraged by his employer, a reporter opened a Twitter account and began posting news stories. A week after the employee posted a tweet critical of the newspaper's copy editors, the newspaper informed the employee he was prohibited from airing his grievances or commenting about the newspaper on social media. The reporter continued to tweet, including posts about homicides in the City and a post that criticized an area television station. The newspaper terminated the reporter based on his refusal to refrain from critical comments that could damage the goodwill of the newspaper. The NLRB found that the employee's conduct was not protected and concerted because it (1) did not relate to the conditions of employment and (2) did not seek to involve other employees on issues related to employment. The NLRB issued a similar ruling in a case involving a bartender who posted a Facebook message critical of the employer's tipping policy, finding the posts mere "gripes" that are not protected.

Two recurring themes have come out of the NLRB rulings. First, individual gripes or venting by employees is not protected and employers can discipline, and even terminate, employees for this conduct. Second, the NLRB is taking a very narrow view of social media policies and striking down a number of policies for being overbroad where the policies could be interpreted to prohibit protected conduct.

For some time, we only had NLRB opinions to provide guidance on employee discipline for social media activities. More recently, we are seeing some case law, including in the government employment context. For example, the Sixth Circuit Court of Appeals issued a ruling in 2020 that upheld the government employer's termination of the employee for posting a comment on Facebook after the City determined that the comment was racially charged. *Bennett v. Metropolitan Government of Nashville & Davidson County, Tennessee,* 977 F.3d 530 (6th Cir. 2020).

In 2016, Bennett, a government employee, posted a racial slur on her personal Facebook account right after the 2016 General Election. Bennett was an emergency dispatcher of the Metro Government Emergency Communications Center (ECC). Bennett's Facebook referenced that she was a Metro Government

employee and included information that she was a dispatcher at the ECC. After friends expressed concerns about the post, she deleted it from her Facebook post; however, several of her coworkers had already seen the post before it was deleted and reported the activity to department supervisors.

When approached by supervisors about the incident, Bennett stated she made the comment in jest. Supervisors expressed concern about the racially charged comment and noted its impact on an agency that regularly interacts with the public. Bennett was placed on paid administrative leave while an investigation was conducted. An administrative hearing found that Bennett violated three provisions of the ECC's social media policy, and she was terminated.

Bennett filed a lawsuit against her employer in federal court claiming that the termination violated her First Amendment rights. The case went to trial, and a jury found in Bennett's favor, holding that her Facebook comment was not reasonably likely to impair discipline by Bennett's supervisors at ECC, interfere with the agency's orderly operation, or impede Bennett's job duties. The jury awarded her $6,500 in back pay and $18,750 for humiliation and embarrassment.

ECC appealed to the 6th Circuit Court of Appeals, which overturned the district court's ruling. The Court of Appeals applied the *Pickering* balancing test (a Supreme Court ruling that balances the weight of an employee's speech with the weight of a government agency's ability to maintain operations) and concluded that Bennett's use of a racial slur was not protected speech under the First Amendment.

The Court of Appeals also noted that the record showed that Bennett exhibited little to no remorse for her use of the slur. She even called her fellow employee's hypocrites and stated she would not apologize because some employees took her use of the slur the wrong way. The Court also found that Bennett's use of the slur was detrimental to the ECC's close working relationships, and the use of the slur "detracted from the mission of ECC" as an agency that provides vital services to constituents. A critical determination in the case was that Bennett's comment was made on her public-pacing profile while listing her employer as ECC. The court found that if her Facebook profile were private, it would have diminished the argument for her termination.

Finally, the Court rejected Bennett's argument that the comment was political because she used the slur while discussing the outcome of the presidential election the day after the results were released. Her employer conceded Bennett was making a political statement on the post but argued that use of the slur was "not purely political" and should not have garnered a high level of protection from the trial court. The Court of Appeals agreed and found that Bennett's speech did not reach the highest level of protection. As of the date of this article, this case is on appeal to the U.S. Supreme Court.

IV. Elected Officials on Social Media

One issue that has been getting a lot of attention lately is the interplay between the First Amendment and the use of social media by elected officials. The law is pretty clear that government social media sites and accounts are considered a limited or designated forum for First Amendment purposes, meaning that governments must be careful not to "censor" protected speech on its sites and accounts. The question that has been raised (and answered) in a few recent cases is whether the First Amendment extends to personal social media sites and accounts and activity of elected officials.

The first case addressing this issue involved a county official in Virginia. A county commissioner was sued after she deleted critical posts and blocked a poster from her Facebook page. In that case, the district court found that the county official had violated the First Amendment rights of the poster because (1) the official used her Facebook page as a "tool of governance" for keeping constituents informed of county activities and to solicit feedback from constituents; (2) the official used county resources to support her page because county staff had access to post on the page; (3) the county's official newsletters promoted the elected official's Facebook page; and (4) the official's Facebook page included numerous references to the official's position, linked to the county's website, and the majority of the posts related to county business. Because the county official was acting in her official capacity when she engaged in these Facebook activities, the court found she had engaged in viewpoint discrimination in violation of the Firsts Amendment when she banned a user from her page.

The county official appealed the decision to the Fourth Circuit Court of Appeals, which issued its opinion on January 7, 2019. In short, the Court of Appeals upheld the ruling that the county official's Facebook page was a "public forum" and that she had violated the First Amendment when she deleted critical posts and banned a user. The Fourth Circuit rejected the official's and county's argument that the Facebook site was not a public forum because it was "private property." The Court also rejected the argument that the official's Facebook page was "government speech" because the site was an interactive space where comments could be posted by others. *Davison v. Randall,* 912 F.3d 666 (4th Cir. 2019).

A similar ruling was issued in the case filed against President Trump to challenge his blocking of users from his Twitter account, which the users argued violated their First Amendment rights. The federal district court ruled in plaintiffs' favor, finding (1) that President Trump's @realDonaldTrump account was a public forum subject to the First Amendment and (2) that his actions in blocking users from that account violated the First Amendment rights of those blocked users.

The President appealed that ruling to the Second Circuit Court of Appeals. The Second Circuit issued its opinion, upholding the district court's ruling that the President's actions in blocking critics from his @realDonaldTrump Twitter

account violated the First Amendment. *Knight First Amendment Institute v. Donald J. Trump,* 928 F.3d 226 (2d Cir. 2019). Specifically, the Second Circuit stated as follows:

> The President contends that the Account is exclusively a vehicle for his own speech to which the Individual Plaintiffs have no right of access and to which the First Amendment does not apply. Secondarily, he argues that, in any event, the Account is not a public forum and that even if the Account were a public forum blocking the Individual Plaintiffs did not prevent them from accessing the forum. The President further argues that, to the extent the Account is government- controlled, posts on it are government speech to which the First Amendment does not apply. We are not persuaded. We conclude that the evidence of the official nature of the Account is overwhelming. We also conclude that once the President has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with.

To the extent a government official establishes a Facebook, Twitter or other social media presence to communicate about government issues, a court could find that the sites are considered a "public forum." That means that censorship of those sites (i.e., deleting or hiding posts or blocking or banning users) could rise to the level of a First Amendment violation. It's important to note that these rulings were not restricted to only the "official" pages or sites of the government entity, but could include even personal social media sites or pages used by an official to communicate about government issues or activities.

V. Importance of a Social Media Policy

Governments participating in social networking sites must start with the realization that what is posted on social networking sites is public information. That means that government employees and officers should not post information that neither they nor the government would want everyone to know. By realizing the public nature of the information being published, confusion, lawsuits, and other problems can be more easily avoided.

All governments that use any form of online communication should develop, implement, and enforce a website and social networking policy. That policy should include a well-defined purpose and scope for using social media, identify a moderator in charge of the site, develop standards for appropriate public interaction and posting of comments, establish guidelines for record retention and compliance with sunshine laws, and include an employee access and use policy. The government should also post express disclaimers on its websites reserving the right to delete submissions that violate the comment policy, so long as that policy does not prohibit protected speech. Finally, the government should train employees regarding appropriate use of social networking and how use might

impact the employer.

In crafting a social media policy, an employer should be careful not to implicate the First Amendment rights of its employees nor violate any applicable federal or state employment laws protecting employees. An example of this type of situation involved a settlement between the National Labor Relations Board and an ambulance service in Connecticut that fired an employee in 2009 for venting about her boss on Facebook. The ambulance company argued that the employee's Facebook criticism violated the company's social media policy barring workers from disparaging the company or their supervisors. The NLRB argued that the National Labor Relations Act protects an employee's discussion of conditions of his or her employment with others, and that co-workers' comments on the employee's Facebook page implicated those protections. As part of the settlement, the company stated it would change its policy so it did not restrict employees from discussing work and working conditions when they are not on the job.

As discussed above, the NLRB has struck down a number of social media policies for being too broad, so employers should take care in crafting a social media policy that avoids these issues.

A government might also consider providing examples of acceptable or unacceptable conduct in both employee and public usage of social media to illustrate the type of conduct that is regulated and why a particular regulation is in place. In addition, all employees should be required to sign a written acknowledgement that they have received, read, understand, and agree to comply with the social media policy.

A checklist for drafting a social media policy can be found on Appendix A.

Appendix A

Checklist for Drafting a Social Media Policy

A government considering establishing a Facebook, Twitter, or other social networking site should first adopt a social media policy to govern the administration and monitoring of site content, set ground rules for public input and comments, and adopt policies for employee usage of social media.

1. Purpose

The policy should contain a statement that the use of social media by the government entity is for the purpose of obtaining or conveying information that is useful to, or will further the goals of, the government.

2. Approval and Administration

The policy should provide for an administrator to oversee and supervise the social media networking sites of the government. The administrator should be trained regarding the terms of the policy and his other responsibilities to review content to ensure that it complies with the policy and furthers the government's goals.

3. Comment Policy

The policy should identify the type of content that is not permitted on a social media site and that is subject to removal. This policy must be carefully crafted so that it does not prohibited protected speech, and only limits speech that does not implicate the First Amendment, such as obscenity; discriminatory content; threats; content that violates a copyright or trademark; and any content in violation of federal, state, or local law. The policy should also contain a disclaimer that any comment posted by a member of the public is not the opinion of the government. Finally, the policy should include language that reserves the right of the administrator to remove content that violates the policy or any applicable law.

4. Compliance with Laws

The policy should include language regarding compliance with applicable federal, state, and local laws, regulations, and policies. It should be made clear that content posted on a government site is subject to freedom of information and record retention laws. In addition, content posted on social media sites may be subject to e-discovery laws. Finally, information that is protected by copyright or trademark should not be posted or maintained on a social media site unless the owner of the intellectual property has granted permission.

5. Employee Usage Policy

A social media policy should clearly establish guidelines and boundaries to enable employees to anticipate and understand company expectations and restrictions

regarding social media usage. Although each employer should create a social media policy tailored to the particular employer's workplace, the following are some suggested employee usage provisions:

a. The policy should clearly communicate to employees whether social media use in the workplace will be prohibited, monitored, or allowed within reasonable time limits. The policy should be careful not to excessively restrict the content of employee social media postings to the extent that protected speech among the company's employees would be prohibited. For example, a social media policy should not ban "inappropriate discussions" about the company, management, working conditions, or coworkers that would be considered protected speech in another form or forum.

b. The policy should also caution employees that they have no expectation of privacy while using the Internet on employer equipment. If employees will be monitored, the policy should inform employees of such monitoring.

c. The policy might also require employees who identify themselves as employees of a particular government or company to post a disclaimer that any postings or blogs are solely the opinion of the employee and not the employer.

d. The policy should also address the protection of confidential and sensitive government information, as well as personal information relating to government officials and employees, customers, or residents.

e. Prior to taking any adverse employment action against an employee on account of the content of the employee's social media posting, consider whether the employee's comments (1) were posted on a public site accessible to a large number of people; (2) disclosed confidential information about the employer, its employees, residents, or others; or (3) were directed at coworkers in a serious effort to discuss working conditions or were simply a venue for the employee to vent personal frustration. Any decision to take adverse employment action against an employee on account of social media use should be made in consultation with legal counsel.

f. Finally, all employees should be required to sign a written acknowledgment that they have received, have read, understand, and agree to comply with the social media policy.



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