Employee Social Media Use:

Plain View Project Case Study & Constitutional Consequences

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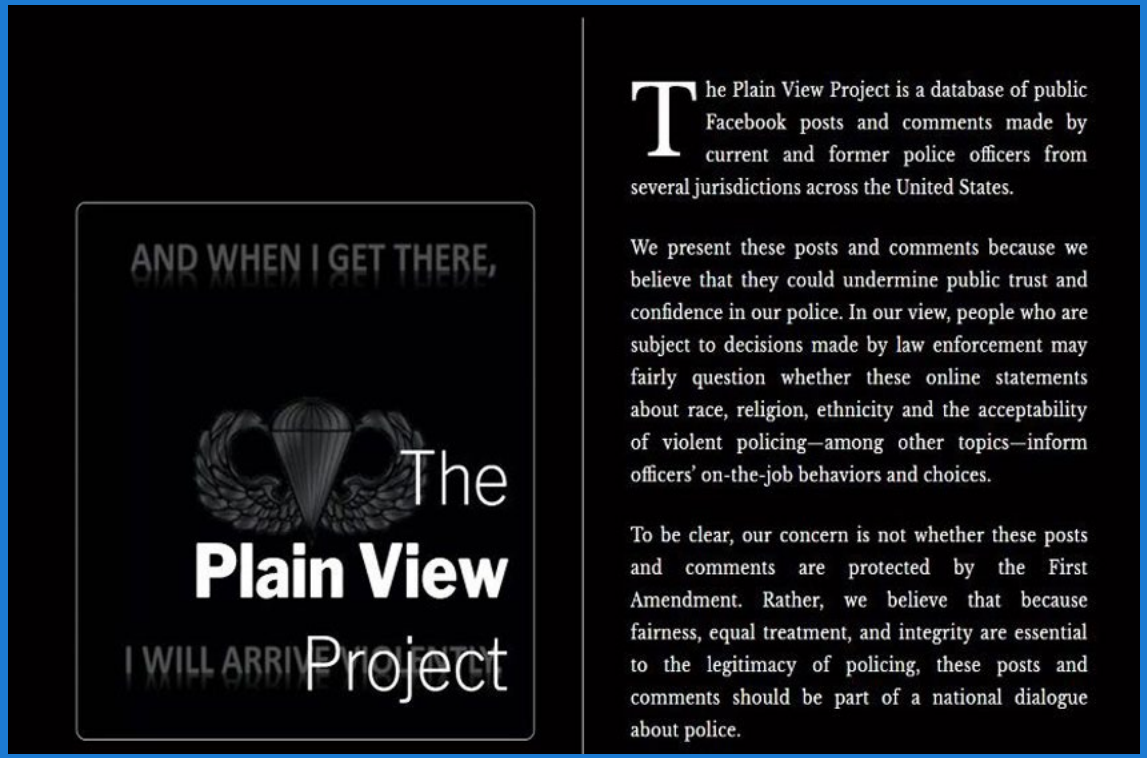
PART I

Case Study: the *Plain View Project* and PPD grievance arbitration

PART II

Fenico/Melvin First Amendment Retaliation cases

PART I: *PLAIN VIEW PROJECT* CASE STUDY



The Plain View Project is a database of public Facebook posts and comments made by current and former police officers from several jurisdictions across the United States.

We present these posts and comments because we believe that they could undermine public trust and confidence in our police. In our view, people who are subject to decisions made by law enforcement may fairly question whether these online statements about race, religion, ethnicity and the acceptability of violent policing—among other topics—inform officers' on-the-job behaviors and choices.

To be clear, our concern is not whether these posts and comments are protected by the First Amendment. Rather, we believe that because fairness, equal treatment, and integrity are essential to the legitimacy of policing, these posts and comments should be part of a national dialogue about police.

Injustice Watch Contacts PPD

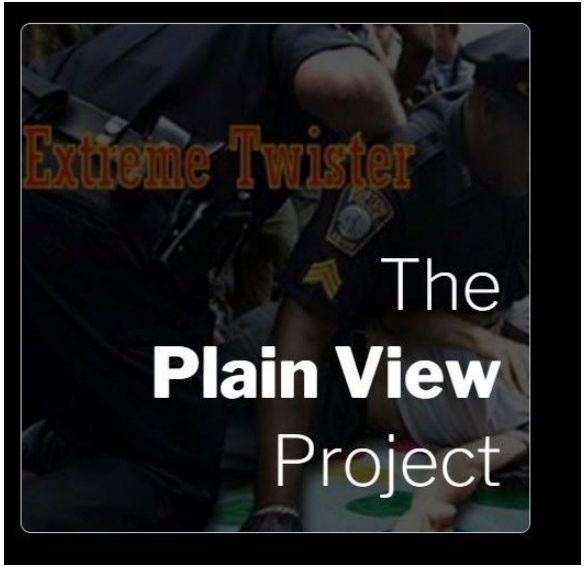
- In February of 2019 – Injustice Watch contacts the Philadelphia Police Department (PPD) via email regarding content they found on Facebook
    - Content generated by "242 sworn PPD officers that either portray bias, use dehumanizing language, promote violence, undermine due process, promote falsely testifying in court, or involve other policing issues“
- Initially, Injustice Watch provided PPD with the names of 7 officers and descriptions of 7 posts that would be included in an article that Injustice Watch was writing in collaboration with the New York Times

PPD Opens Internal Investigations

- In February of 2019, PPD Internal Affairs (IA) opens an internal investigation into the allegations made by Injustice Watch
- Investigators either could not view or did not find any offensive material on the accused officers' Facebook pages
- Injustice Watch did not specify which posts were attributed to which accused officers
- IA conducts interviews of the accused officers
- Most of the officers deny making any of the posts shared by Injustice Watch

Plain View Project Goes Live

- In June of 2019, Injustice Watch launches www.plainviewproject.com
- Database shows screenshots of offensive and inflammatory Facebook posts made by Officers around the country
- Website leads to a wave of national and local news coverage



13 Philadelphia Cops Will Be Fired For Racist And Violent Facebook Posts

The move came after the Plain View Project identified thousands of offensive and disturbing posts made by police officers around the US, sparking several investigations.



Tasneem Nashrulla
BuzzFeed News Reporter

Posted on July 19, 2019 at 3:48 pm

Exclusive: Philly police release hundreds of disciplinary records for 'Facebook cops'

The disclosure of civilian complaints for officers in the scandalizing social media database is likely the largest records disclosure in department history.

By Ryan Briggs , Max Marin · July 16, 2019



(Miguel Martinez/Billy Penn)

This group compiled police officers' offensive Facebook posts. Now departments are taking action



By Dakin Andone, CNN
Published 12:37 PM EDT, Thu June 20, 2019



The New York Times

72 Philadelphia Officers Benched After Offensive Social Media Posts

Jun 20, 2019




OFFICERS UNDER
INVESTIGATION

Internal Affairs Expands Investigations

- IA expands investigations into all officers implicated by the PVP
- Re-interview those who had been previously interviewed as well as those who were not discovered until the database was made public
- Over 3,000 posts made by 344 sworn officers were investigated
- Most officers admitted to making the posts once confronted with them by investigators

Internal Affairs/Disciplinary Process

- Posts were analyzed by outside law firm for First Amendment implications
- An executive team considered posts that were not protected by the First Amendment for disciplinary action
- Disciplinary charges were then brought through the Police Board of Inquiry or Commissioner's Direct Action



PPD Social Media Policy

- PPD Directive 6.10 "Social Media and Networking" states, in part,
  - *As members of the Philadelphia Police Department, employees are embodiments of its mission. It is, thus, essential that each member accept his or her role as an ambassador of the department. In doing so, each member must strive to maintain public trust and confidence, not only in his or her professional capacity, but also in his or her personal and on-line activities. Moreover, as police personnel are necessarily held to a higher standard than general members of the public, the on-line activities of employees of the police department shall reflect such professional expectations and standards.*
  - ***Employees are prohibited from using ethnic slurs, profanity, personal insults; material that is harassing, defamatory, fraudulent, or discriminatory, or other content or communications that would not be acceptable in a City workplace under City or agency policy or practice.***

PDD Disciplinary Code

- Bargained for and included in the Collective Bargaining Agreement
- Officers were charged with some or all of the following sections

Section	Description	Penalty Range for 1st Offense
1-§001-10	Conduct Unbecoming: Unspecified	Reprimand to Dismissal
1-§009-10	Conduct Unbecoming: Lying or attempting to deceive regarding a material fact during the course of any Department Investigation	10 Days Suspension to Dismissal
1-§021-10	Conduct Unbecoming: Any Incident, conduct, or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department	30 Days Suspension to Dismissal
5-§011-10	Neglect of Duty: Failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors	Reprimand to 5 Days Suspension

Disciplinary Outcomes

- Total officers investigated: 344
- Officers against whom IA sustained charges: 181
- Written reprimands: 63
- 1-day suspensions: 16
- 2-day suspensions: 4
- 5-day suspensions: 1
- 30-day suspensions: 9
- Transfers: 1
- Terminations (including resignations in lieu of termination): 15



Union Grieves *Plainview Project* Discipline



AMERICAN ARBITRATION ASSOCIATION®

Arbitration Results So Far:

- Upheld by Arbitrator: 1
- Overturned by Arbitrator: 0
- Discipline Reduced or Altered by Arbitrator: 7
- Withdrawn by Union: 1
- Settled: 5
- Awaiting Decision or Hearing Date: 9

Witnesses Called At Arbitration

- IA Investigators
- Special Policy Advisor to PPD
- Deputy Commissioner involved in decision-making
- Community Witnesses

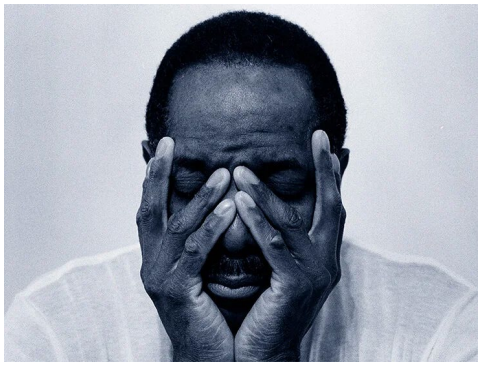






Challenges At Grievance Arbitration



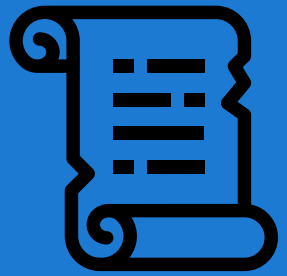


- Exemplary Performance History
- Proportionality
- Ambiguity in Language
- Disconnect with Arbitrators



PART II— CONSTITUTIONAL CLAIMS







Philly cops are fighting back 2 years after racist Facebook posts got them fired

A two-year-old scandal that brought national attention to the Philadelphia Police Department has taken new turns. One officer was reinstated. Another had his firing upheld.

FENICO V. PHILADELPHIA

- ✓ 12 officers
- ✓ 250 posts

16 former and current Philly cops disciplined for offensive Facebook posts sue, saying they were victims of discrimination

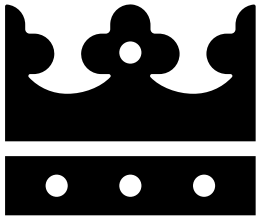
In two lawsuits, the officers claim they've been "falsely maligned and effectively branded racists." One of their lawyers says their Facebook posts were exposed as part of a plot to incite violence against cops and to "cause the breakdown of societal order."

MELVIN V. PHILADELPHIA

- ✓ 8 officers
- ✓ 300 posts

FIRST AMENDMENT—RETALIATION

GOVERNMENT AS SOVEREIGN

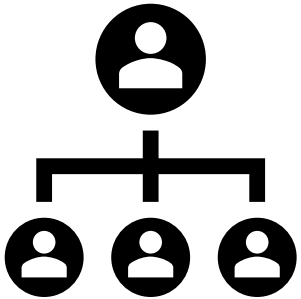


VERSUS

The government in its role as *employer* has a "freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." *Waters v. Churchill*, 511 U.S. 661, 671 (1994)



GOVERNMENT AS EMPLOYER



FIRST AMENDMENT —RETALIATION

(1) Whether the employee engage in protected speech? (*Pickering* balancing test)

(2) Whether the adverse action would discourage a person of "ordinary firmness" from engaging in the activity that led to the discipline; and

(3) Whether protected speech was a "motivating factor" in the adverse action (*Mt. Healthy*)

FIRST AMENDMENT—RETALIATION

PRIVATE CITIZEN

Speech was not "official"

PUBLIC CONCERN

Political, social, or other concern to the community; legitimate news interest

PICKERING BALANCING

> Speech value efficiency/avoiding disruption



While each prong is "fact-intensive," they are ultimately questions of law

FIRST AMENDMENT —RETALIATION:

"PUBLIC CONCERN" PRONG



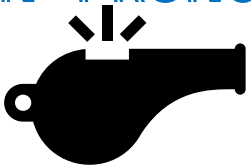


Inappropriate or controversial nature is IRRELEVANT(*Rankin*, 482 U.S. at 387) so long as post invokes public concern

FIRST AMENDMENT—RETALIATION: NOT public concern

"PUBLIC CONCERN" PRONG

Public Concern

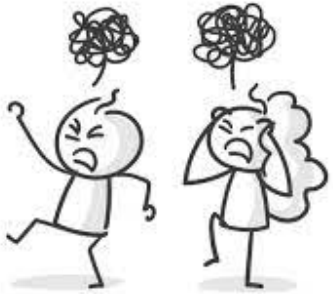
















FIRST AMENDMENT—RETALIATION

PRIVATE CITIZEN — Speech was not "official"

PUBLIC CONCERN — Political, social, or other concern to the community; legitimate news interest

PICKERING BALANCING — > Speech value efficiency/avoiding disruption



While each prong is "fact-intensive," they are ultimately questions of law

FIRST AMENDMENT —RETALIATION:

PICKERING BALANCING TEST

EMPLOYEE

- Free expression on matters of public concern, even if controversial



EMPLOYER

- **Avoiding Disruption**
- Integrity
- Discipline
- Public Trust

Employer need only show ***potential*** (*i.e.* a "reasonable likelihood" of) disruption, not ***actual*** disruption

FIRST AMENDMENT—RETALIATION:

PICKERING BALANCING TEST

EMPLOYEE

- Inappropriate or pejorative tone devalues discussion of public interest; failure to invite serious discourse.
- Speech directed at citizens served by the agency. *Munroe, 805 F.3d at 472.*



EMPLOYER

- More leeway for law enforcement and paramilitary organizations. *Kelley v. Johnson*, 425 U.S. 238, 246 (1976)

VIOLENCE:

- ✓ Public Trust: celebrates violence at hands of police; lack of respect for due process; denigrates belief that police will only use violence when necessary (external)
- ✓ Impedes prosecution (internal)

BIAS:

- ✓ Public trust: police as "oppressor, rather than protector" (external)
- ✓ "less likely to report crimes, offer testimony as witnesses, and to rely on police" (external)
- ✓ Damages working relationship between police officers (internal)
- ✓ Hinders ability to recruit diverse police force (internal)
- ✓ Impedes prosecution (internal)

ACTUAL DISRUPTION: Publicity; "Giglio" Lists

Theme	Total
Islamophobic	358
Making light of use of force	284
Mocking opposing viewpoints	253
Coded racist language	231
Extra-judicial violence	211
Dehumanizing language	181
Vigilante justice	179
Violence against protestors	132
Misogynistic/sexist	126
Racist	112
Anti-immigrant/Anti-refugee	80
Mocking socio-economic status	78
Extra-judicial justice/lack of due process	78
Anti-LGBTQ	76
Demonstrated disdain for constituents	72
Making light of rape/DV allegations	49
Mocking civilian complaints	35
Racist symbol	27
Anti-Semitic	4

AGE → Posts existed for years without disruption → *When* posts actually uncovered controls
Posts just as harmful in 2012 as today

ANONYMITY → "Private" page/pen name → *Someone* eventually connected the dots (or will)
- *Pappas* v. *Giuliani*, 290 F.3d 143 (2d Cir. 2002)

CONTEXT/ HUMOR → "This is what I *really* meant" → Context or humor/sarcasm should be apparent on its face; assume the risk

"HECKLER'S VETO" → Public's reaction shouldn't "veto" speech → Public perception ***crucial*** when employee is public facing.
- *Bennett*, 977 F.3d 350 (6th Cir. 2020)
- *Snipes*, 704 F. App'x 848 (11th Cir. 2017)
- *Rankin,* 483 U.S. 378 (1987)

E.D. Pa. Opinion – 582 F. Supp. 3d (Jan. 26, 2022)

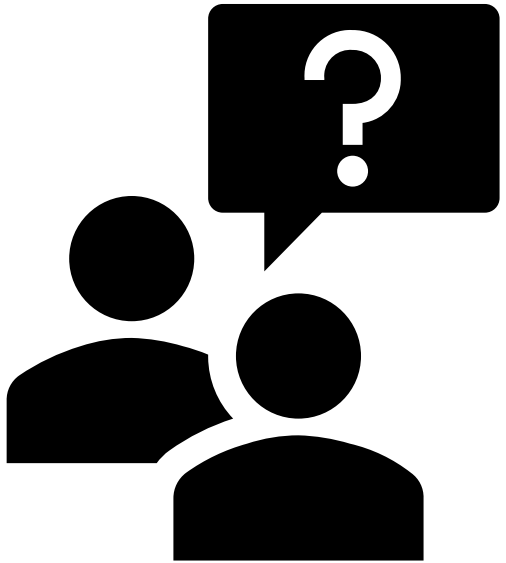
- Engaged in *Pickering* balancing - found **all posts** were unprotected because potential for disruption (and actual disruption) outweighed interest in speech

- Accepted three compelling interests: (1) public trust & diverse workforce; (2) efficient prosecution; and (3) maintaining orderly internal operations

- Found that racially-charged comments receive less protection (*Locurto*; *Grutzmacher*)
- Found actual disruption: "Giglio list" prevents them from performing essential duty to testify

- Found that current pressure on police departments also relevant

QUESTIONS?



THANK YOU!

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