LCW Liebert Cassidy Whitmore

Law Enforcement and Social Media

International Municipal Lawyers Association (IMLA) Annual Conference | September 30, 2023

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Disclaimer

- This presentation is provided as education and not legal advice
- While we hope this information is helpful, please contact your agency's legal adviser, City Attorney or County Counsel before taking any action
- Please also check all of the applicable local, state and federal law before taking any action

Agenda

- Social Media Use and Misuse
- Applicable Case Law and Analysis
- Agency Liability
- Investigations of Misconduct
- Suggestions on Policies

Social Media Is the New Public Square

- Social Media is:
  - The “modern public square.”
  - Represents a revolutionary space for civic discourse.
  - Provides “the principal sources for…current events…and otherwise exploring the vast realms of human thought and knowledge.”
  - Provides the “most important places…for the exchange of views” today.

Packingham v. North Carolina, 137 S. Ct. 1730 (2017)

Forums Where 1st Amendment Rights Are Implicated

- The public sector workplace
- Open session meetings of governing bodies
- Political activities outside the workplace that employees participate in when on or off duty
- Social media

The Plain View Project

- "The Plain View Project" (plainviewproject.org) – Watchdog group has monitored social media accounts of peace officers since 2017
- Revealed thousands of social media posts that are now publicly available

The Plain View Project

- Examples of released posts/comments from The Plain View Project:
  - "It's a good day for a chokehold"
  - Reply to a video post of how the individual "[c]an't wait to plow through" the anti-Trump protestors shown in the video
  - Comments about how apprehended suspects "should be dead" or "should have more lumps in the head"

Free Speech and Social Media

















Employee Use of Social Media

- Freedom of speech
- Constitutional right to privacy
- Common law privacy torts
- Labor laws
- Employee discipline
- Agency liability

Social Media Examples

- 9 Oakland police officers disciplined over racist, sexist social media posts (9/20/21) LA Times
- Three police officers fired for social media posts (5/28/21) Rocky Mount Telegram
- CU Boulder police officer fired over violent comments about homeless people, racist social media posts (7/12/22) CPR News
- Long Beach police officer fired over ‘graphic’ social media photos (6/5/20) KTLA.com

Pickering Test

- "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."

Pickering v. Board of Education, 391 U.S. 563 (1968)

Public Employee or Private Citizen?

- To be protected by the First Amendment, speech must be made in the employee's role as a ***private*** citizen; not as part of the officer's ***official*** capacity
- If the speech is made in an official capacity, such as comments as part of official duties, the speech is not protected by the First Amendment

Garcetti v. Ceballos , 126 S.Ct. 1951 (2006)

Speech as Private Citizen? Look to "Official Duties"

- Formal job descriptions are helpful but not dispositive
- Scope of the employee's job duties requires a case-by-case evaluation
- Speech often outside "official duties"
  - To elected officials and outside agencies
  - To media
  - On behalf of a union
  - Testifying in court or at a deposition

Speech as a Private Citizen?

- John Ellins, a police officer for the City, led a no-confidence vote of the police officers' union against the Chief of Police. The Chief subsequently delayed signing an application for a certification that would entitle Ellins to a five percent salary increase.

Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2012)

Is Speech a Matter of Public Concern?

- A matter of public concern is one upon which "free and open debate is vital to informed decision-making by the electorate."
- However, simply because a topic may be of "general interest" to the public, does not, in and of itself, raise it to a level of constitutional public concern
- Whether an employee's speech addresses a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record."

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

Is Speech a Matter of Public Concern?

- The content of the speech the greatest single factor in the *Connick* inquiry
- Speech that deals with the functioning of government is a matter of inherent public concern
- Speech that helps the public evaluate the performance of public agencies addresses a matter of public concern
- Speech discussing threats to public safety is of vital interest to citizens, and speech exposing policies that put people in jeopardy is inherently of interest to the public

Clairmont v. Sound Mental Health, 632 F.3d 109 (9th Cir. 2011)

Is Speech a Matter of Public Concern?

- Speech is NOT a matter of public concern when:
  - The speech "'deals with individual personnel disputes and grievances, and
  - When that information 'would be of no relevance to the public's evaluation of the performance of governmental agencies.'"

Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003)

Free Speech vs. Disruption – *Pickering* Test

- Must weigh the interest of the employee in free expression versus the need of the government to run efficiently and to provide harassment-free workplace
- If the balancing test weighs in favor of the employee or if the government cannot justify treating the employee differently than a private citizen, then the speech will be protected
- If the balancing test weighs in favor of the employer, then the speech will not be protected

Pickering v. Board of Education (1968) 391 U.S. 563

Disruption Analysis – Balancing Test

- A public employer must weigh the interest of the employee in free expression versus the need of the government to run efficiently and to provide a harassment-free workplace
- If the balancing test weighs in favor of the employee or if the government cannot justify treating the employee differently than a private citizen, then the speech will be protected
- If the balancing test weighs in favor of the employer, then the speech will not be protected

Pickering v. Board of Education (1968) 391 U.S. 563

Disruption Analysis – Balancing Test

Factors to consider in the *Pickering* balancing test:

1. Whether the employee's speech disrupted harmony among co-workers
2. Whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful
3. Whether the employee's speech interfered with performance of his duties

Disruption Analysis – Balancing Test

4. Whether the employee's speech was directed to the public or the media or to a governmental colleague
5. Whether the employee's statements were ultimately determined to be false

Gilbrook v. City of Westminster (9th Cir. 1999) 177 F.3d 839

Disruption Analysis – Recent Case Law

Moser v. Las Vegas Metropolitan Police Department, No. 19-16511 (9th Cir. 2021)

- A split panel of the Ninth Circuit has held that police officer's suit could proceed after he was disciplined for posting that it was a "shame" a suspect had no "holes" in him

Disruption Evidence

- Media coverage
- Statements from members of public
- Statements from fellow officers/supervisors
- Statements from DA regarding impact of speech
- Actual disruption not necessarily required
- Violation of rules or policies

Free Speech – Other Disruption Factors

- Reasonable predictions of disruption may be sufficient
- Speech by policy makers vs. speech by rank and file
- How broadly was speech disseminated

Is There a Nexus?

- Is there, or could there be, disruption to the employer's business?
- Would it reflect poorly on the employer?
- Would it impair the employee's relationships in the workplace?
- Would it harm the public trust?
- Would it impair the employer's ability to trust the employee?
- Would it pose a conflict of interest?

Case Study – *City of San Diego v. Roe*

- Police officer for San Diego
- Selling explicit videos on Craigslist.org
- Used generic police uniform
- Identified himself as being in law enforcement
- “codestud3”
- Was ***not*** speaking on a matter of “public concern”

Privacy Analysis

1. Does the employee have a reasonable expectation of privacy?
2. Was there an "intrusion" of that privacy interest?
3. Does the employer have a legitimate business need to intrude upon that which is private?
4. Does the employee's privacy interest outweigh the employer's legitimate business need?

Is There a Reasonable Expectation of Privacy?

Factors (objective and subjective):

- Social norms and customs
- Whether there are laws aimed at protecting it
- Attempts to keep it private
- Access to the private "thing" by other individuals or in other circumstances
- Whether employee was on notice that it may not be private
- Employee's ability to control the thing sought to be private
- Whether employee had subjective belief of privacy

Does the Employee's Privacy Interest Outweigh the Employer's Legitimate Business Need?

- Factors to consider:
  - What are the operational realities of the workplace?
  - Is the employer's reason for the search reasonable?
  - Does the employer have a legitimate need for the search?
  - Is the scope of the search reasonably tailored to meet that legitimate need?

Employee Discipline

- Situations where an employee's social media conduct may result in discipline:
  - Productivity/disruption
  - Harassment claims
  - Cyber-bullying/stalking
  - Improper or illegal use (e.g., release of confidential information)
  - Conduct that reflects badly on the agency
  - Safety/liability
  - Mandated reporting/action required by law

Employee Discipline

- Employee social media conduct can violate agency rules and policies:
  - Anti-Harassment Policy
  - Anti-Workplace Violence Policy
  - Electronic Communications Resources Policy
  - Collective Bargaining Agreement
  - Job descriptions
  - Drug and Alcohol Policy
  - Personnel Rules / Department Policies

Limitations on Discipline for Off Duty "E-Conduct"

- There must be a "job nexus"
- Factors to consider:
  - Type of off-duty conduct
  - Type of job duties
  - Effect on the employer, including reputation
  - Harm to public service

Agency Liability – *Naffe v. Frey*

- A prosecutor maintains a blog and Twitter account on which he writes and comments about conservative politics, and criminal law. On his blog and Twitter account, the prosecutor accuses a well-known political activist of lying, insinuates she broke the law, and posts a transcript that reveals the activist's social security number and mother's maiden name.

Agency Liability – *Naffe v. Frey* (cont'd)

The activist becomes a victim of identity theft. She sues the blogger and his county employer, claiming he abused his position as a prosecutor and violated her constitutional rights.

Is the county liable?

Agency Liability

- What's the Nexus?
  - Employee posting or purporting to post on behalf of the agency?
  - Has the agency authorized or encouraged the posts?

Investigations

- How will you gain access to the post or data?
- On duty/Off duty?
- Department equipment/personal equipment?
- Who received the post, text or data?
- What policy was violated?
- If the recipient was a department member, how did they respond?
- Public record?

Investigations

- Is a data specialist needed to extract or preserve the data?
- Who gets interviewed?
- Are other department members involved?
- Is there a history of similar conduct by subject officer or in the Department?
- Public trust damaged?

Search of Employee Electronic Devices

- Search of employer-provided computer, email account, or cellphone device
  - Is written policy in place? (e.g. “Does the employee have a reasonable expectation of privacy?”)
  - Limit scope of search

Search of Employee Electronic Devices

- Search of employee's personal computer or cellphone device used for employer purposes
  - Probably not allowed without warrant/subpoena
  - Caveat: *content* of business related messages sent/received on employer's server/computer

Search of Employee Electronic Devices

- Search of employee's personal cellphone or electronic devices where employer reimburses employee for cost for cellular service and/or data/internet charges
  - Still involves employee's personal property – probably not allowed without warrant/subpoena



Policies To Restrict Speech

- Can a public entity restrict speech through implementation of a policy?



Social Media Guidelines for Employers

- Employers should be aware:
  - Union activity online may be protected
  - Employee use of PDAs and email off-duty may have FLSA implications
  - Information from electronic and/or social media may be subject to public records requests or discovery
  - State and federal e-discovery rules

Social Media Guidelines for Employees

- Employees should not:
  - Access personal social media during work hours
  - Post false or confidential information about the agency or its employees
  - Post agency logos on their personal social networking pages
  - Use agency email address to register personal social networking page
  - Incorrectly cite that they represent the agency and/or its views

Social Media Guidelines for Employees

- Employees should not:
  - Give others their password
  - Post personal confidential information (may be stolen for identity theft reasons)
  - Invite or accept the invitation of anyone who may not be an appropriate contact
  - Have their profile public: profiles should be private to avoid unwelcome contact from those with a connection to the agency (members of the public, co-workers, council/board members, etc.)
  - Ignore their pages: audit, be proactive, delete content or links others post to your page that you do not approve of

Best Practices for Employers

- Have a social media policy that prohibits employees from using social media to violate policies or laws
- Annually update your social networking policy
- Do not be overbroad or vague
- Train employees on your social media policy
- Enforce violations of policies against employees in a consistent manner
- Maintain firewalls to prohibit access to certain websites

Social Media Do's and Don'ts

- A good social media policy may prohibit employees from engaging in some or all of the following:
    1. Disclosing the name of the agency or otherwise identifying themselves as employees of the agency on personal or social media websites (an exception may be made for professional networking sites like LinkedIn)
    2. Revealing the name of the agency on a website with sexually suggestive, violent, or otherwise offensive content
    3. Using social media sites or blogs for any unlawful purpose
    4. Publishing content on any website that disparages or defames any person, business, product or organization
    5. Disclosing confidential or proprietary information
    6. Publishing or commenting on content that would constitute a violation of any of the agency's policies applicable to employees

Social Media Do's and Don'ts

Social media policies must not overreach

- Example: "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."

Regulating Employee Social Media Use – Discipline Factors

- Is there disruption to the workplace?
  - Can the speech reflect poorly on the agency?
  - Does, or can, the speech impair professional relationships in the workplace?
  - Can the speech impact the public trust?
  - Can the speech impair the employer's ability to be trusted by co-workers?

Regulating Employee Social Media Use – Additional Discipline Factors

- How widely is the speech disseminated?
- Does the speech violate established policies (harassment/release of confidential information)?

Regulating Employee Social Media Use – Disruption Evidence

- Media coverage
- Statements from members of public
- Statements from other employees
- Actual disruption not necessarily required
- Violation of rules or policies

Policies Must Not Overreach

- Policy from Petersburg, Virginia
  - "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."

Polices Addressing Speech

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  - "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."

Policies Addressing Speech

- 2 officers disciplined under the City of Petersburg policy for saying:
  - "There used to be a time when you had to earn a promotion or a spot in a specialty unit . . . but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been 'devalued.'"

Liverman v. City of Petersburg (4TH Cir. 2016)

Policies Addressing Speech

- Policy prohibited right to speak on matters of public concern.
- “the restraint if a virtual blanket prohibition on all speech critical of the government employer.”
- While social media may “amplify” expressions of “rancor and vitriol” such sites “have emerged as a hub for sharing information and opinions with one’s larger community.”

Common Policy Restrictions

- Outside the Workplace – can warn employees:
  - Use of Internet generally private if usage not made public
  - If using a social media site that is not private then communications not private
  - Agencies can typically discipline employees for Internet usage that creates liability for the Agency

Common Policy Restrictions

- Common restrictions set forth in social media policies:
  - Do not post images of crime scenes
  - Do not engage with victims, witnesses or defense attorneys
  - Do not “friend” or follow minors encountered on the job
  - Do not post pictures “in uniform” except for ceremonial activities
  - Do not post pictures of other employees, or “tag” other officers in pictures
  - Do no post offensive or harassing pictures or content
  - Do not post or allude to confidential information

Fenico v. City of Philadelphia

- The Eastern District Court of Pennsylvania dismissed police officers' claims that their First and Fourteenth Amendment rights against the City of Philadelphia were violated.
- The free speech at issue included posted content on Facebook ranging from racial slurs, anti-Muslim rhetoric, homophobic comments, and posts advocating for vigilante justice and admiration for use of excessive force.

Fenico v. City of Philadelphia

- In reviewing the officers' claims, the Court acknowledged that the City has compelling interests for:
  - maintaining and preserving the public's trust;
  - promoting a diverse workforce;
  - efficient prosecution;
  - maintaining orderly internal operations; and
  - avoiding public disruptiveness.

Fenico v. City of Philadelphia

- The Court initially determined that:
  - (i) the posts the officer referred to were sufficient for disciplinary action;
  - (ii) were available to the public; and that
  - (iii) racially charged comments receive less First Amendment Protection.

Fenico v. City of Philadelphia

- **In denying the Officers' First Amendment claim, the Court held:**
  Promoting efficiency, mitigating the public's perception of excessive police force, preserving citizen's due process rights and rights to assemble, and discouraging ethnic and religious animus outweighs the Officers' (Plaintiffs') right to free speech.

Fenico v. City of Philadelphia

- The Officers appealed to the Third Circuit. On June 8, 2023 the Court **reversed and remanded**.
- Why? The district court needed to develop a factual record to weigh the First Amendment value of the posts against the government's interests.

Fenico v. City of Philadelphia

- The Court said it was not clear if certain posts were actually authored by the police officers. Likewise, it was not clear which posts formed the basis of the department's discipline. Finally, the record contained only speculation about the potential disruption to the department from the officers' Facebook posts, many of which had been public for years.

Fenico v. City of Philadelphia

- The Third Circuit held that it needed a more developed record to conduct the Pickering balancing test. On remand, the Circuit Court instructed the district court to develop a record which could support an individual analysis of the twelve speakers and their 250 discrete statements.

Lesson from *Fenico*

- Public employers should take stock of their social media policies and internal investigation practices. When a government employee makes a vulgar, offensive, racist, or violent post on their personal social media account, employers in the public sector should look closely at the communication and whether it concerns any social or political issues that may be of public concern

Suggestions

- Take social media allegations seriously.
- Determine whether other department members are involved.
- Conduct the investigation as quickly as possible.
- Are texts/posts a symptom of a cultural problem in the Department?
- Draft/review social media policy.
- Remember the First Amendment!

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