FIRST AMENDMENT CLAIMS AND SOCIAL MEDIA ISSUES

*Authored By**
JAY ALDIS
JESSICA LEE FREEDSON
KIMBERLY ALBERTS
BRACEWELL & GIULIANI LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 221-1381

State Bar of Texas
26TH ANNUAL
SUING & DEFENDING GOVERNMENTAL ENTITIES COURSE
July 31- August 1, 2014
Austin

CHAPTER 14

* The authors thank Courtney Barksdale Perez, of Carter, Stafford, Arnett, Hamada & Mockler, for permitting materials from her paper, *Social Media Policies and the Public Employer, Lessons from the Private Sector*, to be used in conjunction with this article.

JAY ALDIS

Jay Aldis is a Partner in the Labor Section of Bracewell & Giuliani LLP. He is listed in *Best Lawyers in America* in Labor and Employment Law and has been named a Texas Super Lawyer or Rising Star Super Lawyer in Labor and Employment Law multiple times by *Texas Monthly* Magazine.

Jay has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 1998. He has litigated hundreds of labor, employment and civil rights lawsuits.

Prior to working at Bracewell & Giuliani, Jay served for more than seven years as an Assistant County Attorney in Harris County and also served as an Instructor on Civil Rights Law at the Harris County Sheriff's Department Academy.

Jay received his Bachelor of Journalism Degree with High Honors from the University of Texas, where he was named the University's Outstanding Journalism Student. He obtained his law degree from the University of Texas School of Law.

Jay has authored or presented more than 70 papers on employment law and civil rights litigation.

JESSICA LEE FREEDSON

Jessica Lee Freedson is Counsel in the Labor Section of Bracewell & Giuliani LLP. She has been named a Top Young Lawyer or Rising Star by *Texas Monthly* Magazine four years in a row.

Jessica received her Bachelor of Arts Degree with High Honors from the University of Texas with a focus in Middle Eastern Studies. She then obtained her Masters of Arts Degree from the University of Chicago, followed by a law degree from the UCLA School of Law.

KIMBERLY ALBERTS

Kim Alberts is an Associate in the Labor Section of Bracewell & Giuliani LLP.

Kim received her Bachelor of Arts Degree with Honors from the University of Texas, graduating Phi Beta Kappa. She then obtained her law degree with Honors from the University of Texas School of Law.

TABLE OF CONTENTS

I. UNITED STATES SUPREME COURT UPDATE 1

II. FIFTH CIRCUIT AND TEXAS COURTS UPDATE 4

III. THE FIRST AMENDMENT AND SOCIAL MEDIA 7

IV. HOW EMPLOYERS (PUBLIC AND OTHERWISE) AND EMPLOYEES USE SOCIAL MEDIA 8

V. WHEN SOCIAL MEDIA GIVES RISE TO EMPLOYER LIABILITY 10

VI. DRAFTING A SOCIAL MEDIA POLICY 18

I. UNITED STATES SUPREME COURT UPDATE

In the 2013-2014 term, the United States Supreme Court decided five First Amendment cases.

First, in *McCutcheon v. Federal Election Commission*,[1] the Supreme Court in a 5-4 decision held that because aggregate limits restricting how much money a donor may contribute to candidates for federal office, political parties, and political action committees do not further the government's interest in preventing quid pro quo corruption of the appearance of such corruption, while at the same time seriously restricting participation in the democratic process, they are invalid pursuant to the First Amendment. The Federal Election Campaign Act of 1971 imposes two types of limits on campaign contributions. Base limits restrict how much money a donor may contribute to a particular candidate or committee, while aggregate limits restrict how much money a donor may contribute in total to all candidates or committees. In the 2011-2012 election cycle, plaintiff McCutcheon contributed to 16 different federal candidates, complying with the base limits applicable to each. However, he claimed that the aggregate limits prevented him from contributing to another 12 candidates and to a number of non-candidate political committees. McCutcheon and the Republican National Committee filed a complaint asserting the aggregate limits were unconstitutional under the First Amendment. The district court denied their motion for a preliminary injunction and granted the government's motion to dismiss. The district court assumed the base limits appropriately served the government's anti-corruption interest and concluded the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits. The Supreme Court reversed. Chief Justice Roberts authored the majority opinion. In it, he held that significant First Amendment interests were implicated by the aggregate contribution limits. The opinion stated that contributing money to a candidate is an exercise of an individual's right to participate in the electoral process through both political expression and political association. A restriction on how many candidates and committees and individual may support is, according to Justice Roberts, hardly a "modest restraint" on those rights. The opinion stated that, in their simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits. And it is no response to say that the individual could simply contribute less than the base limits permit because to require one person to contribute at lower levels because he wants to support more candidates or causes is to penalize that individual for "robustly exercising his First Amendment rights." The majority added that in assessing the First Amendment interests at stake, the proper focus is on an individual's right to engage in political speech, not on a collective conception of the public good. The whole point of the First Amendment is to protect individual speech that the majority may prefer to restrict, or that legislators or judges might not view as useful to the democratic process. Furthermore, the Court held the aggregate limits did not further the permissible government interest in preventing *quid pro quo* corruption or its appearance. Finally, the Court stated that the aggregate limits violated the First Amendment because they were not "closely drawn to avoid unnecessary abridgement of associational freedom."

Next, in *Wood v. Moss*,[2] the Supreme Court held that two Secret Service agents were entitled to qualified immunity from political protesters' First Amendment claims. While President George W. Bush was campaigning for re-election in Oregon, the Secret Service agents were responsible for the President's security. Local law enforcement had placed supporters and protesters on opposite sides of the Presidential motorcade route. When the motorcade made an unscheduled stop at a restaurant, the Secret Service agents directed local law enforcement to move the group of

[1] 134 S.Ct. 1434 (Apr. 2, 2014).

[2] 134 S.Ct. 2056 (May 27, 2014).

protesters two blocks away so they would be out of weapons range of the restaurant. The group of Presidential supporters were already out of weapons range. When the motorcade left the restaurant, it traveled by the supporters but the protesters were too far away to be seen or heard by the President. The protesters filed suit, claiming First Amendment violations. The two agents moved for summary judgment on qualified immunity grounds. The district court and Ninth Circuit denied the agents' motion but the Supreme Court reversed. The Court noted the overwhelming importance of safeguarding the President and stated that because officers may be faced with unanticipated security situations, the key question is whether it should have been clear to the agents that the security perimeter they established violated the First Amendment. The Court rejected the protesters' assertion that the agents violated clearly established federal law by denying them "equal access to the President." The Court stated it was unaware of any decision that would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation to make sure that groups with conflicting views are at all times in equivalent positions. The Court added that the maintenance of equal access did not make sense in the situation confronting the agents, given that only the protesters, not the supporters, had a direct line of sight to the part of restaurant in which the President was dining. The Court rejected the protesters' suggestion that agents should have moved the supporters out of the motorcade's range as well, noting there would have been no security rationale for such a move.

In *Lane v. Franks*,[3] the Supreme Court reviewed a First Amendment retaliation case. Plaintiff Edward Lane was director of a city program for underprivileged youth in Alabama. Lane conducted an audit of the program's expenses and discovered that an Alabama state representative was being paid as an employee of the youth program but was not actually showing up for work. Lane terminated the state representative and she was eventually indicted for mail fraud and theft. At trial, Lane testified about the events leading up to the termination and the state representative was convicted and sentenced to 30 months in prison. Shortly thereafter, Defendant Franks, who was President of the organization that sponsored the youth program, terminated Lane and 28 other employees, citing budget difficulties. However, a few days later, Franks reinstated all of the 28 employees, except two – Lane and one other worker. Lane filed suit, alleging First Amendment retaliation for testifying in the underlying criminal case. The district court and Eleventh Circuit granted Franks qualified immunity. The Eleventh Circuit held that Lane's testimony was not entitled to First Amendment protection because he was speaking as an employee and not as a citizen when he investigated and terminated the state representative's employment. However, the Supreme Court in a unanimous opinion by Justice Sotomayor, reversed in part and affirmed in part. It held that Lane's sworn testimony outside the scope of his ordinary job duties was entitled to First Amendment protection. The Court added that Lane's testimony was speech as a citizen on a matter of public concern. Sworn testimony in judicial proceedings, the Court noted, is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and to society at large, to tell the truth. The Court stated that whether speech is a matter of public concern turns on the "content, form and context" of the speech. Here, corruption in a public program and misuse of state funds obviously involved matters of significant public concern, and the form and context of the speech – sworn testimony in a judicial proceeding – fortified that conclusion. Under the *Pickering* balancing test, the Court added, Lane's employer provided no evidence of any government interest that would permit Lane to be disciplined for his testimony. For instance, there was no indication the testimony was false or erroneous or that Lane disclosed sensitive, confidential or privileged information while testifying. Therefore, summary judgment for the employer was inappropriate. Interestingly though, the Supreme Court held that Franks was entitled to qualified immunity for the claims

[3] 134 S.Ct. 2369 (June 19, 2014).

against him in his individual capacity. The Court recognized that the question was whether Franks reasonably could have believed that, when he fired Lane, a government employer could fire an employee because of testimony the employee gave under oath and outside the scope of his ordinary job responsibilities. The Court stated that, at the relevant time, Eleventh Circuit precedent did not preclude Franks from holding that belief, and no decision of the Supreme Court was sufficiently clear to cast doubt on controlling Circuit precedent. Any discrepancies in Eleventh Circuit precedent, the Court concluded, only served to highlight the point that the question was not beyond debate at the time Franks acted. Therefore, he was entitled to qualified immunity.

In a fourth case -- *McCullen v. Coakley*[4] -- the Supreme Court addressed the constitutionality of a Massachusetts statute that made it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any "reproductive health care facility," which was defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Massachusetts amended its Reproductive Health Care Facilities Act in 2007 to include this prohibition in an effort to reduce clashes between abortion opponents and abortion rights advocates outside clinics where abortions were performed. McCullen and several other plaintiffs sued the Massachusetts Attorney General to have the 35-foot rule declared unconstitutional. The plaintiffs were individuals who attempted to engage women approaching abortion clinics in "sidewalk counseling," which involved offering information about alternatives to abortion and help pursuing those options. The plaintiffs claimed the Act violated the First and Fourteenth Amendments, both on its face and as applied to them. The district court denied both challenges and the First Circuit affirmed. The First Circuit held the Act was a reasonable "time, place and manner" regulation and was therefore constitutional. The Supreme Court reversed. The Court noted that by its very terms, the Act restricted access to "public ways and sidewalks," places that have traditionally been open for speech activities and that the Court has therefore labeled "traditional public fora." The government's ability to regulate speech in such locations is "very limited." However, the Court held that "even in a public forum, the government may impose reasonable restrictions on the time, place or manner of public speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a legitimate governmental interest, and that they leave open ample alternative channels for communication of the information." Here, the Court unanimously held, the Act was content neutral but not "narrowly tailored" because it "burdens substantially more speech than is necessary to further the government's legitimate interests." The Court noted that the Act's 35-foot buffer zone served the Commonwealth's legitimate interests in maintaining public safety on streets and sidewalks and in preserving access to adjacent reproductive healthcare facilities. At the same time, however, they imposed serious burdens on the plaintiffs' speech, depriving them of their two primary methods of communicating with arriving patients – close, personal conversations and distribution of literature. The Court stated:

> Those forms of expression have historically been closely associated with the transmission of ideas. While the Act may allow petitioners to "protest" outside the buffer zones, petitioners are not protestors; they seek not merely to express their opposition to abortion, but to engage in personal, caring, consensual conversations with women about various alternatives. It is thus no answer to say that petitioners can still be seen and heard by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message.

[4] 134 S.Ct. 2518 (June 26, 2014).

Finally, in *Harris v. Quinn*,[5] the Supreme Court decided the issue of whether the First Amendment permits a state to compel personal care providers to subsidize speech on matters of public concern by a union they do not wish to join or support. In an opinion written by Justice Alito, the Court held that the First Amendment does not permit a state to do so, and reversed the judgment of the Seventh Circuit. In Illinois, the state created a Rehabilitation Program pursuant to which individuals who would otherwise have to be institutionalized due to their health issues may instead hire a "personal assistant" to provide homecare services tailored to the individual's needs. Illinois law established that the person receiving the home care would be the "employer" of the personal assistant. While the patients exercised predominant control over their employment relationship with the personal assistants, the State of Illinois, subsidized by the federal Medicaid program, paid the personal assistants' salaries. Another Illinois statute, the Illinois Public Labor Relations Act, authorized state employees to join labor unions and bargain collectively on the terms and conditions of employment. The Public Labor Relations Act also contained an agency-fee provision under which members of a bargaining unit who do not wish to join the union are nevertheless required to pay a fee to the union. Following a vote, SEIU Healthcare Illinois & Indiana was designated as the personal assistants' exclusive representative for purposes of collective bargaining. The SEIU union and the State then entered into collective-bargaining agreements that required all personal assistants who were not union members to pay a "fair share" of the union dues. Those payments were then deducted directly from the personal assistants' Medicaid payments. Each year, personal assistants in Illinois paid SEIU more than $3.6 million in fees. Three personal assistants in the Rehabilitation Program brought a putative class action against the State of Illinois. They sought an injunction against enforcement of the fair-share provision and a declaration that the Illinois Act violated the First Amendment insofar as it required personal assistants to pay a fee to a union that they did not wish to support. The district court dismissed the claims with prejudice and the Seventh Circuit affirmed in relevant part. The Supreme Court, however, reversed. It noted that "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves," and "compelled funding of the speech of other private speakers or groups presented the same dangers as compelled speech." Therefore, the Court stated that an agency fee provision imposes a significant impingement on First Amendment rights that cannot be tolerated unless it passes "exacting First Amendment scrutiny." Here, the Court concluded, the agency-fee provision could not survive such scrutiny because it did not serve " a compelling state interest that [could] not be achieved through means significantly less restrictive of associational freedoms." The Court concluded:

> If we accepted Illinois' argument, we would provide an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.

II. FIFTH CIRCUIT AND TEXAS COURTS UPDATE

In *Kagan v. City of New Orleans*,[6] four tour guides claimed that a City of New Orleans requirement that tour guides who charge for tours of points of interest in New Orleans must be licensed violated their First Amendment freedom of speech rights. The Fifth Circuit affirmed the district court's award of summary judgment in favor of the city and upheld the constitutionality of the licensing scheme for tour guides. The

[5] 134 S.Ct. 2618 (June 30, 2014).

[6] 2014 U.S. App. LEXIS 10213 (5th Cir. June 2, 2014)

court explained that the regulation was content neutral because it had "no effect whatsoever on the content of what the tour guides say," and therefore intermediate scrutiny was the proper standard of review. To survive intermediate scrutiny, the regulation must promote "a substantial interest that would be achieved less effectively absent the regulation." Accordingly, the court held that the statute did not violate the First Amendment because it effectively promoted government interests of requiring the licensees to know the city and not be felons or drug addicts.

In *Moussazadeh v. Tex. Dep't of Crim. Justice*,[7] the plaintiff sought Kosher meals while serving a seventy-five year sentence in Texas prison. The unit in which he was housed required that he purchase the Kosher items himself, instead of providing him with free Kosher meals, which he argued was a violation of his First Amendment freedom of religion rights. On the question of standing, the Fifth Circuit held that Moussazadeh's challenges could be heard in federal court because he exhausted his administrative remedies. The Court also determined his religious beliefs were sincere as a matter of law, even if he sometimes purchased non-Kosher foods on his own. In considering the First Amendment complaint, the court explained that where "an inmate's religious beliefs are sincere and his exercise of those beliefs is burdened, the court must determine whether [he] has established that the burden is substantial." Then, if it is, "the state must 'demonstrate[ ] that imposition of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" The court held that the burden on Moussazadeh was substantial because he was denied the generally available benefit of receiving a Kosher diet free of charge, which substantially affected his ability to exercise his religious beliefs. Since there were genuine issues of material fact regarding whether there was a less restrictive means of minimizing costs and maintaining security other than forcing Moussazadeh to pay for all of his Kosher meals, the court reversed the lower court's summary judgment and remanded the case for further proceedings.

In *Raymond v. Ector Cnty.*,[8] the plaintiff appealed a district court's grant of summary judgment in favor of Ector County. She alleged that when the County fired her for allowing her husband, a sex offender, to be at a youth detention center where she worked, it violated her First Amendment right to associate with her husband. The Fifth Circuit held that because a county juvenile board was responsible for establishing the county's employment policies, and not the youth center's director who fired her, the decision to terminate Raymond was not an official policy originating from an authorized policy maker. Therefore, the district court did not err in holding that no genuine issue of material fact existed with respect to the plaintiff's claim under § 1983. As a result, the court did not reach the merits of the First Amendment claim, but the court commented that if it had, the absence of evidence showing the director terminated the plaintiff based on her marital status would have entitled the county to judgment as a matter of law.

In *Haverda v. Hays Cnty.*,[9] a former employee of the Hays' County Sheriff's Office for over twenty years appealed the district court's grant of summary judgment for failure to establish a claim of First Amendment retaliation. Haverda supported the incumbent during a County Sheriff's Election campaign, including by writing a letter to a local newspaper supporting the incumbent. The incumbent lost, and the new Sheriff ultimately demoted Haverda, citing poor conditions at the jail in which Haverda worked. Haverda claimed this was in retaliation for his supporting the incumbent Sheriff, thus violating his First Amendment rights. The Fifth Circuit explained that to prove a First Amendment retaliation claim, a plaintiff must establish (1) that he suffered an adverse employment decision; (2) that his speech involved a matter of public concern; (3) that his interest in commenting on

[7] 703 F.3d 781 (5th Cir. 2012).

[8] 507 F. App'x 347 (5th Cir. 2013).

[9] 723 F.3d 586 (5th Cir. 2013).

matters of public concern outweighed the defendant's interest in promoting efficiency; and (4) that his speech motivated the adverse employment decision. In reversing the lower court's award of summary judgment, the Fifth Circuit held that there were genuine issues of material fact as to whether Haverda's speech was a motivating factor in his demotion, and whether there was sufficient evidence the Sheriff would have demoted Haverda in the absence of the protected speech. Finally, the court held that Haverda was speaking as a citizen when he wrote his letter because he expressed his personal support for the incumbent, recovered no compensation for writing the letter, and the letter was public and not an internal publication.

In *Ramirez v. Cotrette*,[10] a prisoner claimed his First Amendment rights were violated when prison officials interfered with his right to provide legal assistance to other inmates and limited his ability to buy stamps. The Fifth Circuit held the prisoner had no First Amendment right to provide legal assistance to other inmates.

In *United States v. Richards*,[11] the district court dismissed charges against defendants who were charged with creating and distributing "animal crush" videos, in violation of 18 U.S.C. § 48 (2010), on the grounds that the statute is facially invalid under the First Amendment. The statute makes "it a crime to knowingly create, sell, market, advertise, exchange, or distribute an "animal crush video" that (1) depicts actual conduct in which one or more non-human animals is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury and (2) is obscene. The defendants argued the statute was invalid because it proscribed speech that was neither obscene nor incidental to criminal conduct, and that the statute is not narrowly tailored to serve a compelling government interest. The Fifth Circuit reversed the lower court's ruling, and held that the statute did not violate the First Amendment because it was limited to unprotected obscenity and therefore is facially constitutional. The court's holding rested on its determination that Congress had a significant interest in preventing the secondary effects of animal crush videos, which promote and require violence and criminal activity, and that the statute is narrowly tailored to target unprotected speech that requires the wanton torture and killing of animals.

In *Buehler v. City of Austin*, the plaintiff witnessed two Austin police officers engaged in a traffic stop. When the plaintiff saw the officers removing the driver from her vehicle, he took out his phone to take pictures of the incident. According to the plaintiff, the driver screamed out in pain and asked plaintiff to record what was happening. The plaintiff contended the officers eventually approached him and asked him what he thought he was doing. According to the plaintiff, he responded that he was doing nothing wrong and he was allowed to take photos. He claimed the officers then pushed him in the chest, accused him of spitting on them, put him in a choke hold and forced him to the ground. The plaintiff was then arrested for Resisting Arrest, Search or Transportation. He filed a complaint with APD Internal Affairs but no action was taken in regard to the complaint. As a result of the incident, plaintiff formed an organization called the Peaceful Streets Project, which routinely video-tapes officer conduct. Plaintiff was subsequently arrested on two more occasions for Interference with Public Duties. In both instances his camera was seized and not returned. He claimed the arrests were in "retaliation for the formation of an organization that empowers citizens to know their civil rights." He filed suit alleging the arresting officers violated his First and Fourteenth Amendment rights "when they interfered with [his] efforts to exercise his First Amendment right to film and publish [the Officers'] conduct." He also alleged false arrest, excessive force, unlawful search and seizure, malicious prosecution, various tort claims and violations of the Texas Constitution. Defendants filed a motion to dismiss. The court granted the motion in part, dismissing plaintiff's malicious

[10] 2014 U.S. App. LEXIS 11167 (5th Cir. June 16, 2014).

[11] 2014 U.S. App. LEXIS 11044 (5th Cir. Tex. June 13, 2014).

prosecution, excessive force, ratification and Texas Constitution taking claims. However, the court concluded the First Amendment protects the right to videotape police officers in the performance of their official duties, subject to reasonable time, place and manner restrictions. In denying the officers qualified immunity, the court stated:

> If a person has the right to assemble in a public place, receive information on a matter of public concern, and make a record of that information for the purpose of disseminating that information, the ability to make photographic or video recording of that information is simply not a new right or a revolutionary expansion of a historical right. Instead, the photographic or video recording of public information is only a more modern and efficient method of exercising a clearly established right.

III. THE FIRST AMENDMENT AND SOCIAL MEDIA

Social media services and applications perform a simple purpose: they provide a platform to create online communities that allow people to connect and share information and ideas.[12] As straightforward as this concept may seem, there is no denying that social media has profoundly changed the speed, ease and manner in which people can discover and share news, information, opinions, content and ideas. Social media enables a person to act not only as a member of the online audience, but also as the author or generator of his or her own shareable content. Without question, social media has transformed relationships, including those between employers and employees, and, in the process, raised many legal questions that courts and legislators have been slow to address.

Though the term "social media" encompasses an ever-growing number of websites and applications (including web-based magazines, internet forums and chat rooms, blogs and micro-blogs, podcasts and video and image-sharing websites, to name a few) the phrase is perhaps most widely associated with social networking. Social networking websites allow users of social media to join together in an online community – in doing so, users are able to see profile information about the people to whom they are connected and sharing information.[13]

At present, the five most popular social networking sites are Facebook, Twitter, LinkedIn, Pinterest and Google Plus.[14] In 2013, Americans spent an average of 37 minutes per day using these services.[15] And, according to Neilson's 2012 social media report, Americans spend more time on social networking websites (20% of all time spent online via personal computers, 30% of all time spent online via mobile services) than any other category of site.[16] These figures make sense given that 73% of online adults now use a social networking site of some kind, and 42% of online adults now use multiple social networking sites.[17]

---

[12] Soon Ae Chun & Luis F. Luna Reyes, *Social Media in Government*, 29 Gov't Info. Q. 441, 441 (2012).

[13] *Id.*

[14] *See Top 15 Most Popular Social Networking Sites July 2014*, http://www.ebizmba.com/articles/social-networking-websites (last visited July 8, 2014) (analyzing monthly average of each website's *Alexa* Global Traffic Rank and U.S. Traffic Rank from *Compete* and *Quantcast* data).

[15] Felix Richter, *Social Networking Is the No. 1 Online Activity in the U.S.*, Statista, Aug. 14, 2013, http://www.statista.com/topics/1164/social-networks/chart/1238/digital-media-use-in-the-us/.

[16] *State of the Media: The Social Media Report 2012*, Neilson, Dec. 4, 2012, http://www.nielsen.com/us/en/reports/2012/state-of-the-media-the-social-media-report-2012.html.

[17] Maeve Duggan & Aaron Smith, *Social Media Update 2013*, Pew Research Internet Project, Dec. 30, 2013, http://www.pewinternet.org/2013/12/30/social-media-update-2013/#fn-6228-1.

With respect to when and where users access social media, it should come as no surprise that the answer is routinely "at work." Neilson reports that 51% of people aged 25-34 access social networking websites while in the office.[18] A separate study shows that 75% of workers access social media on the job from their personal mobile devices at least once a day, and 60% access it multiple times.[19] This statistic indicates that blocking, restricting, or monitoring social media sites at work does little to curtail employees' use of social media during the workday.[20]

The results of a survey of 110 domestic and international businesses show that the majority of employers neither actively block access to, nor monitor the use of, social media sites at work.[21] Those companies that do restrict social media use cite productivity loss and security concerns as justifications for their policies.[22] Recent studies, however, suggest that the commonly-held belief that social media access reduces productivity is a myth,[23] as employees now rely on social media to connect and collaborate with coworkers and customers.[24] Additionally, employees who used social media outside of work have been found to be more creative and collaborative *at* work, and thus more productive.[25]

IV. HOW EMPLOYERS (PUBLIC AND OTHERWISE) AND EMPLOYEES USE SOCIAL MEDIA

A. Use in General

Realizing the breadth of and access to information provided by social media, government officials have begun to use social media resources to improve services and communication with citizens, particularly those that were previously difficult to reach and underrepresented.[26] Local governments now use social media to fill open job positions, provide breaking crime or severe weather alerts, and increase participation in local council meetings.[27]

Government employees' use of social media, on the other hand, typically falls into one of three categories: official agency use, professional use or personal use.[28] "Official agency use" refers to an employee's use of social media for the express purpose of communicating an agency's broad interests or specific programmatic and policy interests. "Professional use" implies that an employee's use of social media is for the purpose

[18] *State of the Media: The Social Media Report 2012*, *supra* note 5.

[19] *Social Media and Workplace Collaboration*, Silkroad (2012), http://pages.silkroad.com/rs/silkroad/images/Social-Media-Workplace-Collaboration-SilkRoad-TalentTalk-Report.pdf (reporting results of 1,105 surveyed employees).

[20] *Id.*

[21] *2013/14 Survey – Social Media in the Workplace, Around the World 3.0*, Proskauer Rose LLP (2014), http://www.proskauer.com/files/uploads/social-media-in-the-workplace-2014.pdf.

[22] *Microsoft Survey on Enterprise Social Use and Perceptions*, Microsoft (2013), https://www.microsoft.com/en-us/news/download/presskits/enterprisesocial/docs/escresearchsumppt.pdf.

[23] Nancy Baym, *Get Over IT! Social @Work is Smart (and Inevitable)*, Social Media Collective, June 3, 2013, http://socialmediacollective.org/2013/06/03/get-over-it/.

[24] *Social Media and Workplace Collaboration*, *supra* note 8.

[25] Jeanne Meister, *Want to be a More Productive Employee? Get on Social Networks*, Forbes.com, April 18, 2013, http://www.forbes.com/sites/jeannemeister/2013/04/18/want-to-be-a-more-productive-employee-get-on-social-networks/.

[26] Andrea L. Kavanaugh *et al.*, *Social Media Use by Government: From the Routine to the Critical*, 29 Gov't Info. Q. 480, 480 (2012).

[27] Michael Wolfe, *10 Ways Local Government Can Use Social Media*, Jan. 29, 2014, http://blog.civicplus.com/blog/bid/275460/10-Ways-Local-Government-Can-Use-Social-Media.

[28] *Designing a Social Media Policy for Government: Eight Essential Elements*, Center for Technology in Government, May 12, 2010, http://www.ctg.albany.edu/publications/guides/social_media_policy/social_media_policy.pdf.

of furthering their specific job responsibilities or professional duties through an externally focused site. "Personal interest use" is, as the name implies, the use of social media for reasons wholly unrelated to an employee's job duties.[29]

B. Screening Applicants Based Upon Social Media Presence

In a sign of the changing times, employers have begun to rely on social networking sites to research job candidates. In 2014, 43% of employers report using social networking sites to investigate potential hires, and an additional 12% that don't currently research candidates on social media indicate that they plan to start doing so.[30] In addition to social networks, 45% of employers use search engines to research job candidates.[31] Most startling is that of those employers who conduct social media research, 51% reported finding content that caused them not to hire the candidate.[32] Some of the most common reasons these employers passed involved a candidate:

- Posting provocative photos;
- Posting information about drinking or drug use;
- Bad-mouthing a previous employer or colleagues;
- Posting material demonstrating poor communication skills;
- Lying about qualifications or being linked to criminal behavior; or
- Having an unprofessional screen name.[33]

From an employer's perspective, it's easy to see the benefits of researching an applicant's social media presence – first and foremost, doing so allows an employer to get a glimpse of the candidate outside the interview room. Reviewing social media profiles gives employers the opportunity to see whether the applicant conveys a professional image, is creative, well-rounded or has strong communication skills.[34] Of course, it also allows employers to look for reasons *not* to hire the candidate.[35]

C. Terminating Employees Based Upon Social Media Usage

Perhaps more well-known are those cases in which an employee was terminated by his or her employer based upon the employee's off-duty social media activity. One such example is the 2011 firing of a New Jersey first-grade teacher, who was terminated based on comments she posted to her Facebook page. At the time of her posting, the teacher had a class of twenty-three students, all of whom were either Latino or African-American.[36] The teacher posted two statements to her personal Facebook page, the first of which read, "I'm not a teacher – I'm a warden for future criminals!" while the second stated "[t]hey had a scared straight program in school - why couldn't (I) bring (first) graders?"[37] The teacher's posts were widely available to her more than 300 Facebook friends (which included

[29] *Id.*

[30] *Press Release - Number of Employers Passing on Applicants Due to Social Media Posts Continues to Rise* (June 26, 2014), CareerBuilder.com, http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=6/26/2014&id=pr829&ed=12/31/2014.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Jacquelyn Smith, *How Social Media Can Help (or Hurt) You in Your Job Search*, Forbes.com, April 16, 2013, http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search/.

[35] *Id.*

[36] *In re O'Brien*, 2013 WL 132508, *1 (N.J. Super. Ct. App. Div. Jan. 11, 2013).

[37] *Id.* The teacher later claimed that she was speaking out because of her frustration and fear for her students, who had documented behavioral problems, as opposed to their race. *Id.* at *2.

family members, friends from high school, friends in the school district and "friends of friends"), and ultimately caused extreme outrage in the community.[38] A charge was filed against the teacher, and she was suspended without pay.[39] The matter was referred to the Office of Administrative Law for a hearing before an Administrative Law Judge ("ALJ"). The ALJ found that the teacher's comments "were not expressing a matter of public concern, but were a 'personal expression' of dissatisfaction with her job."[40] However, even if the teacher's remarks were found to be a matter of public concern, her right to express those views "was outweighed by the district's need to operate its schools efficiently."[41] The ALJ ordered the teacher removed from her tenured position. The teacher unsuccessfully appealed to both the Acting Commissioner and the Superior Court of New Jersey.[42]

While an employer's use of social media to assist in both the screening and monitoring of its employees may seem like a logical use of available resources, doing so is not entirely risk-free. The potential benefits an employer gains by glimpsing into a potential hire's life via his or her social media presence must be weighed against the risks. Specifically, employers must be conscious of the fact that information acquired from social media sites could result in liability, should they become aware of an applicant's protected information that they might not otherwise have known were it not for social media. These issues are explored in more detail below.

[38] *Id.* at *1-2

[39] *Id.*

[40] *Id.* at *2.

[41] *Id.* at *3.

[42] *See generally In re O'Brien*, 2013 WL 132508.

V. WHEN SOCIAL MEDIA GIVES RISE TO EMPLOYER LIABILITY

A. Discrimination Against Job Applicants

Many social media users make a significant amount of personal information available via their social network profiles. While some users have enabled privacy controls that restrict a stranger's ability to view their profiles, a 2012 report showed that almost 13 million Facebook users said they had never set, or didn't know about, Facebook's privacy tools.[43] Moreover, 28% of Facebook users post content to their profiles that is shared with an audience wider than just those with whom they are Facebook friends.[44] For potential employers who choose to review an applicant's social media profile, access to such information raises serious issues with respect to employment discrimination laws.[45]

Among the personal information made public via social media is a person's "protected status" characteristics. "Protected status" refers to an individual's attributes (such as sex, race, color, religion, national origin and pregnancy status) that give rise to statutory protection from employment discrimination in based on those characteristics.[46] Age, disability status, veteran

[43] *Facebook and Your Privacy*, Consumer Reports (2012), http://www.consumerreports.org/cro/magazine/2012/06/facebook-your-privacy/index.htm.

[44] *Id.*

[45] In addition to discrimination issues, an employer vetting candidates via social media must also consider two more basic questions: (1) Whether the employer is certain that the Facebook page it is reviewing actually belongs to the person being considered for the position, and (2) whether the information posted on an applicant's social media profile is accurate.

[46] *See* 42 U.S.C. § 2000e-2 (2012) (Title VII of the Civil Rights Act of 1964) ("Title VII") (prohibiting discrimination on the basis of race, color, sex, national origin and religion); *see also* 42 U.S.C. § 2000e-k (The Pregnancy Discrimination Act) (defining "because of sex" to include "pregnancy, childbirth, or related medical conditions"); Tex. Labor Code § 21.051 (2012) (prohibiting

status and genetic information are also protected.[47]

Employment discrimination laws aim, in part, to prevent disparate treatment in hiring. In a typical job interview, a number of the protected attributes – religion, national origin, pregnancy status and genetic information, among others – are not immediately or obviously known to the potential employer, and employers are prohibited from making pre-employment inquiries into these matters.[48] The same is true for job applications – when Employer X receives a job application from Jane Doe, it may have no information concerning her protected status, if any. However, if Employer X finds Jane Doe's Facebook page, it may discover that Jane Doe is a middle-aged Latina woman who is pregnant with her first child. If, after learning these facts, Employer X decides not to offer Jane Doe an interview, it could face liability for making an adverse hiring decision based upon information obtained from Jane Doe's Facebook page that showed she is a member of a protected class.

A real-world example further illustrates this point: in 2007, the University of Kentucky posted notice of its intent to establish an observatory with a combination of state and private support, and to hire a founding director to lead the operation.[49] The plaintiff, a professional astronomer, applied for the position, and, as the court noted, "based on his application, [plaintiff] was a leading candidate for the position."[50] Plaintiff's application was rejected, however, after another employee circulated an email to hiring committee members detailing plaintiff's religious views, which were visible on plaintiff's personal website.[51] Plaintiff brought a Title VII suit against the University, alleging religious discrimination. The University filed a motion for summary judgment, which the court denied, having found that plaintiff raised "a triable issue of fact as to whether his religious beliefs were a substantial motivating factor in [the University's] decision not to hire him."[52] As this case illustrates, employers should be aware that the act of accessing a candidate's impermissible information – whether or not such information is used in determining the candidate's employment status – can, by itself, indicate improper motive.[53]

In addition to disparate treatment claims, an employer's use of social media to screen potential employees could give rise to disparate impact claims, which arise when an employer's facially-neutral employment practice adversely affects members of a protected class. For example, social media sites have lower percentages of Latino and African-American users than are in the general population.[54] Thus, only considering applicants who have a social media profile, while seemingly innocuous, could give rise to liability under the disparate impact theory.

---

discrimination on the basis of race, color, sex, national origin, religion, age and disability).

[47] *See id.*; *see also* Americans with Disabilities Act, 42 U.S.C. § 12112 (2012) (prohibiting discrimination on the basis of an actual or perceived disability); Rehabilitation Act of 1873 § 503, 29 U.S.C. § 701 (prohibiting discrimination in employment against federal employees); Vietnam Area Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212 (2012) (prohibiting discrimination against veterans by federal contractors and subcontractors).

[48] *Prohibited Employment Policies/Practices*, U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/laws/practices/index.cfm#pre-employment_inquiries (last visited July 10, 2014).

[49] *Gaskell v. Univ. of Kentucky*, No. CIV.A. 09-244-KSF, 2010 WL 4867630, *2 (E.D. Ky. Nov. 23, 2010).

[50] *Id.* at *3.

[51] *Id.* at *4-5.

[52] *Id.* at *9.

[53] In a mixed-motive case, "a plaintiff can win simply by showing that the defendant's consideration of a protected characteristic 'was *a* motivating factor for any employment practice, *even though other factors also motivated the practice.*" *Gaskell*, 2010 WL 4867630, *10 (quoting *White v. Baxter Healthcare Corp.,* 533 F.3d 381, 401 (6th Cir. 2008)) (emphasis in original).

[54] Steve Bates, *Use Social Media Smartly When Hiring*, Society for Human Resource Management, Mar. 19, 2013, http://www.shrm.org/hrdisciplines/technology/articles/pages/be-smart-when-using-social-media-for-hiring.aspx.

Considering the potential pitfalls listed above, employers who nevertheless want to perform social media screenings of job applicants would be wise to take the following precautions:

1. Hire a third-party to conduct the social media search.

Hiring someone else to do the social media screen is perhaps the easiest way an employer can protect itself against a discrimination claim. A third party can establish search parameters that will pull up any items the employer deems relevant – both negative (aggressive or violent acts, unlawful or discriminatory activity, etc.) and positive (awards, accolades, etc.). Third parties are also equipped with software that can review and pull information from more websites that a typical employer could – thereby expanding the screen far beyond Twitter and Facebook. The caveat? If a third party conducts a screen, the Fair Credit Reporting Act (FCRA) is triggered, as are an employer's obligations under it (*e.g.*, disclosure, authorization, adverse notices).[55]

2. Establish a Written Policy and Stick With It.

Employers should draft a social media policy that outlines how the employer will conduct the search. The policy should include establishing a wall between the person conducting the search and the person making the hiring decision (so as to prevent the decision maker from knowing any of the applicants' protected characteristics). The policy should also contain a list identifying the social media websites that will be searched, and what criteria will be considered in the hiring process. Employers must be careful that the items screened for/against correlate with the candidate's fitness for the job.[56]

3. Inform Applicants You Will Be Conducting a Social Media Search.

Employers should let potential candidates know that their social media activity will be scrutinized. Employers can also list the specific sites that will be reviewed. If a third-party will conduct the search, employers must make the disclosures necessary and obtain the applicant's consent under the FCRA.[57]

4. Don't Ask For Passwords.

An employer who requests an applicant's social media passwords runs two big risks. First, a number of states have made such a practice illegal. Second, it could discourage qualified applicants from wanting to work for an employer who they view as overstepping privacy bounds.[58]

5. Document the Process.

Employers should create a template or otherwise document each step of the hiring process, including what social media sites were searched and what the results showed.[59]

B. Harassment of Employees

As employers are undoubtedly aware, employees' conduct, whether on or off employer premises, could potentially result in liability for public and private employers. The same is true when the conduct in question occurs online. Social media-focused harassment can occur when a co-worker, supervisor, or manager posts a sexually inappropriate remark about a personal photo or status update on a coworker's social networking profile; harassment also entails sending an

[55] Sara H. Jodka, *The Dos and Don'ts of Conducting a Legal, Yet elpful, Social Media Background Screen*, American Bar Association, http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/september13/the-dos-and-donts-of-conducting-a-legal-yet-helpful-social-media-background-screen.html (last accessed July 10, 2014).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

unwelcome sexual comment or sexually explicit picture by e-mail, text, or instant messaging, which causes the employee to feel uncomfortable in the workplace or suffer mental distress.[60] In workplaces where the employer monitors employees' use of social media, the employer may find itself subject to suit if, through its monitoring, it knew or should have known of harassment (sexual or otherwise) by one employee against another.[61] In contrast, those employers who quickly respond to claims of harassment by taking appropriate action can reduce their potential liability.[62]

C. Retaliation Against Employees

Employees' complaints about their employers may also be protected by the anti-retaliation provisions in Title VII, the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), the Genetic Information Nondiscrimination Act (GINA) and, more locally, the Texas Labor Code.[63] These statutes prohibit employers (both public and private) from taking adverse employment action against employees for engaging in "protected activity."[64] An employee will be found to have engaged in "protected activity" if he or she has either: (1) opposed any practice made an unlawful employment practice; or (2) made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under the statutes.[65] The U.S. Supreme Court takes an expansive view of "opposition" for purposes of retaliation claims arising under federal anti-discrimination statutes.[66] These protections extend online as well, and employers who take action against employees based upon an employee's protected activity on social media

[60] Lydell C. Bridgeford, *Q&A: Employee Sexual Harassment Can Creep into Social Media Connections*, Bloomberg BNA Labor & Employment Blog, Jan. 3, 2012, http://www.bna.com/qa-employee-sexual-b12884906748/.

[61] *See Burlington Indus. v. Ellerth*, 542 U.S. 742 (1998) (holding that an employer is negligent with respect to sexual harassment if it knew or should have known about the conduct, but failed to stop it); *see also Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000) (reversing summary judgment for employer on a hostile work environment claim brought by an employee who was the subject of coworkers' harassing, retaliatory, and defamatory postings to an electronic bulletin board used by the company's employees; the court found that although an electronic bulletin board may not have a physical location within the workplace, it nevertheless might have been so closely related to the workplace environment and beneficial to the employer that continuation of harassment on the forum should be regarded as part of the workplace; further, when an employer has notice that employees engage in retaliatory harassment toward another employee, employer has a duty to remedy the harassment).

[62] *See Amira-Jabbar v. Travel Services, Inc.*, 726 F. Supp. 2d 77 (D. P.R. 2010) (granting employer's motion for summary judgment against plaintiff's hostile work environment claim; the court found that the employer's remedial action – instructing its IT contractor to block access to Facebook from all office computers after allegations of Facebook-based harassment were raised – constituted a prompt and appropriate response to employee's complaint).

[63] *See* Title VII, 42 U.S.C. § 2000e-3(a) (2012); ADA, 42 U.S.C. § 12203(a)-(b) (2012); ADEA, 29 U.S.C. § 623(d) (2012); GINA, 42 U.S.C. § 2000ff *et. seq*. (2012).

[64] *See* Title VII, 42 U.S.C. § 2000e-3(a) (2012); ADEA, 29 U.S.C. § 623(d) (2012) (nearly identical to Title VII's anti-retaliation provision); 42 U.S.C. § 12203(a)-(b) (2012) (providing that no person shall discriminate against an individual because such individual has opposed any act or practice made unlawful by the ADA or because such individual made a charge, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under the ADA); *see also Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 n.9 (1st Cir. 1996) (noting that "[t]he analytical framework for ADEA discrimination and retaliation cases was patterned after the framework for Title VII cases.").

[65] Title VII, 42 U.S.C. § 2000e-3(a) (2012); *see also Haynes v. Pennzoil Co.*, 207 F.3d 296 (5th Cir. 2000).

[66] *See Crawford v. Metropolitan Gov't of Nashville and Davidson Cnty, Tennessee*, 555 U.S. 271, 276 (2009) (the Court concluded that an employee's mere answering of questions during an investigation of a sexual harassment complaint constituted "opposition" under Title VII, and therefore could form the basis of a retaliation claim); *see also Thompson v. North America Stainless, LP*, 131 S. Ct. 863, 870 (2011) (finding that the plaintiff was an "aggrieved person" under Title VII, despite the fact that he had not personally engaged in protected activity, and holding that Title VII's anti-retaliation provision prohibited employer from taking adverse employment action against the plaintiff for his fiancé's protected activity).

websites may be vulnerable to retaliation lawsuits.[67]

Other federal statutes with anti-retaliation provisions (such as the Fair Labor Standards Act (FLSA), the Occupational Safety Health Act of 1970 and the Employment Retirement Income Security Act of 1974) may provide additional protections for employees from adverse employment action based upon information an employer gleans from social media.[68] For example, the FLSA prohibits an employer from discharging or discriminating in any other manner against an employee because he or she has "filed any complaint" or instituted any proceeding under the Act.[69] The U.S. Supreme Court has interpreted the FLSA's requirement that a complaint be "filed" to include protection from retaliation for oral complaints.[70]

Public employers in particular must be especially conscious of employee complaints on social media. Employee complaints alleging that governmental entities have engaged in unlawful activity may give rise to protection under the Texas Whistleblower Act or federal whistleblower statutes such as Sarbanes-Oxley.[71] Notably, the Texas Whistleblower Act limits protection from retaliation to reports made to an "appropriate law enforcement authority"; however, the Act does not specify the medium through which an employee must make his report to trigger protection under the Act.[72] It is not unreasonable to think that an employee's posting of a comment to a Facebook page maintained by "appropriate law enforcement authority" could be considered sufficient to trigger the Act's protection. If an employer took retaliatory action against the employee for such a posting, the employee may have a claim under the Texas Whistleblower Act.[73]

D. Investigation of Employees

Employers may at times find themselves reviewing an employee's social media activity for information relating to legitimate business concerns. While understandable, the employer must ensure that whatever investigation or monitoring it conducts is done in accordance with the law. Of particular concern is whether the employer's activity violates the Stored Communications Act (SCA). The SCA imposes criminal and civil liability against whomever "intentionally accesses without authorization a facility through which an electronic communication service is provided," or "intentionally exceeds an authorization to access that facility," and by doing so, "obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."[74] The SCA does not, however, expressly prohibit an employer from accessing employee's stored electronic communications where the communications are stored on the employer's systems. But, under the SCA, an employer may only access an employee's stored communications if: (1) the entity is the provider

[67] *See Deneau v. Orkin, LLC*, No. 11-00455-B, 2013 WL 2178045, at *15 (S.D. Ala. May 20, 2013); *see also Stewart v. CUS Nashville, LLC*, No. 3:11-CV-0342, 2013 WL 456482, at *1 (M.D. Ten. Feb. 6, 2013).

[68] *See* NLRA, 29 U.S.C. § 158(a)(4) (2012); FLSA, 29 U.S.C. § 215(a)(3) (2012); OSHA, 29 U.S.C. § 660(c)(1) (2012); ERISA, 29 U.S.C. § 1140 (2012).

[69] 29 U.S.C. § 215(a)(3).

[70] *Kasten v. Saint-Gobain Performance Plastics Copr.*, 563 U.S. 1325 (2011).

[71] *See, e.g.*, Tex. Gov't Code §§ 552.001, 554.035; *see also* Sarbanes-Oxley, 18 U.S.C.§ 1514A (2012).

[72] Tex. Gov't Code § 554.002; *see also* State v. Lueck, 290 S.W.3d 876 (Tex. 2009).

[73] *See, e.g.*, *Gresham v. City of Atlanta*, Civil Action No. 1:10-CV-1301-RWA-ECS, 2011 WL 46011022, at *13-14 (N.D. Ga. Aug. 29, 2011) (applying Georgia Whistleblower Act and holding that plaintiff's Facebook post did not give rise to liability under the Act because it was not made to "a supervisor or other governmental agency" as required by the Act) *report and recommendation adopted in part, rejected in part*, No. 1:10-CV-1301-RWA-ECS, 2011 WL 460101 (N.D. Ga. Sept. 30, 2011).

[74] 18 U.S.C. § 2701.

of the service; or (2) the entity is the user of the service and the communication is from or intended for that user.[75] Likewise, the SCA does not prohibit an employer from intercepting communications with the employee's consent.[76] However, employers who access employees' non-work email accounts or private social media websites without the owner's permission, or who pressure employees to provide access to same, risk violating the SCA.[77]

In *Lazette v. Kulmatycki*, plaintiff, a former Verizon employee, alleged that after returning her company-issued phone to her former employer, the employer (through plaintiff's ex-supervisor) read some 48,000 of plaintiff's personal Gmail emails in the eighteen months following her departure from the company.[78] Plaintiff brought suit alleging violations of the SCA and intentional infliction of emotional distress. Plaintiff claimed that Verizon provided her with a company-issued Blackberry, and told her that she could use the phone to access her personal email, which she did.[79] When plaintiff later turned the Blackberry in to her supervisor (with the understanding that the phone would be "recycled" for use by another employee), she believed she had deleted her personal email account from her phone; however, she later learned that the supervisor had been accessing her personal emails for nearly eighteen months.[80] The employer and supervisor sought dismissal of the case, arguing that plaintiff failed to state a claim under the SCA.[81]

In denying the motion to dismiss, the court ruled that the SCA applies to unauthorized access of employees' personal e-mail accounts and not just large-scale computer hacking, as the defendants had argued.[82] The court found that plaintiff did not authorize defendants to view her e-mails, and "the mere fact that [defendant] used a company-owned [B]lackberry to access plaintiff's e-mails does not mean that he acted with authorization when he did so."[83] The court likewise ruled that plaintiff's failure to scrub the phone before returning it to the company did not constitute implied consent to defendants' continued access to her personal e-mail.[84] The court also found that, for purposes of the SCA, plaintiff's Gmail account – rather than the Blackberry device – was a "facility." Interestingly, it determined that the SCA's protection of items in "electronic storage" applied only to plaintiff's *unopened* e-mails, and not those that she opened before the defendants did.[85] Lastly, the court held that plaintiff sufficiently asserted, and defendants admitted, that the supervisor was acting within the scope of his employment and in furtherance of the employer's interests when he accessed plaintiff's emails and thus, the employer was vicariously liable for the supervisor's actions.[86] Under these facts, public and private employers could find themselves liable for violations of the SCA where they have monitored an employee's social media activity if they do so without the employee's clear consent.

---

[75] 18 U.S.C.§ 2701(c)(1)-(2).

[76] 18 U.S.C. § 2701.

[77] In *Pietrylo v. Hillstone Restaurant Group*, an employer was held liable under the SCA where two supervisors pressured an employee into providing her MySpace account password so that they could access a private, invitation-only chat room in which employees vented their frustrations about working at the company, and continued to access the chat room after realizing the employee had reservations about providing her password. CIV.06-5754(FSH), 2009 WL 3128420, *1 (D.N.J. Sept. 25, 2009). The jury found for the plaintiff and awarded punitive damages against the employer. Id. at 4-6.

[78] 949 F. Supp. 2d 748, 751 (N.D. Ohio 2013). Plaintiff further alleged that the supervisor disclosed the contents of some of the e-mails to others. *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 752.

[82] *Id.* at 753.

[83] *Id.* at 754-55.

[84] *Id.* at 757.

[85] *Id.* at 758-59.

[86] *Id.* at 759.

E. Constitutional Protections for Public Sector Employees

Unlike the private sector, social networking by government employees is also subject to protections under the First Amendment. This constitutional protection constitutes "a floor of liberty" that has been supplemented in some jurisdictions (including Michigan, Florida and New York) through legislative measures granting collective bargaining and tenure rights.[87] For public employees in jurisdictions without these type of protections, "the First [Amendment is] the central, if not sole, legal bulwark against adverse workplace actions resulting from social networking."[88]

The First Amendment restricts workplace retaliation based upon the content of a public employee's social media posts that touch upon issues of public concern,[89] and limits the scope of employer policies that might chill constitutionally protected speech.[90] Constitutional protections for speech and association by public employees are strongest when the activities are off-duty, related to social and political issues, and not directly connected to the workplace.[91] To be protected, the substance of the speech must be more than an individual's complaints about the workplace (such as finding the work boring, or not liking his or her supervisor) – it must touch upon a matter of public concern.[92] Whether speech is a matter of public concern is determined by the form, content and context of expression. If the speech is political, social or a concern to the community, then it is likely public.[93] If the speech concerns a purely personal interest, however, the First Amendment does not afford protection. Additionally, if the speech is made by a public employee pursuant to official duties, the speech is devoid of First Amendment protections.[94]

If a public employee's speech was not in furtherance of official duties, and did touch upon an issue of public concern, it must still be weighed against the government's interest in the effective and efficient fulfillment of its responsibilities to the public.[95] Specific consideration is given to whether a statement "impairs discipline, disrupts workplace harmony, has a detrimental impact on close working relationships, impedes the performance of the employee's duties, or otherwise interferes with the operations of the public agency."[96] The government may permissibly restrict the speech if the government's interest in an efficient workplace outweighs the employee's First Amendment interests.[97]

---

[87] William A. Herbert, *Can't Escape From the Memory: Social Media and Public Sector Labor Law*, 40 N. Ky. L. Rev. 427, 482-83 (2013).

[88] *Id.* at 483.

[89] *Id.*

[90] *Id.* at 496 ("In the public sector, the First Amendment also places legal limitations on policies that prohibit or restrict potential speech through social media.").

[91] *Id.* at 486-87.

[92] *Id.* at 487.

[93] *Connick v. Myers*, 461 U.S. 138, 146 (1983).

[94] Herbert, *supra* note 77, at 487.

[95] *Connick*, 461 U.S. at 150.

[96] Herbert, *supra* note 77, at 493 n.423.

[97] *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See also Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008) (court found a school superintendent did not violate the First Amendment rights of a non-tenured high school teacher by refusing to renew the teacher's contract when the teacher friended students on MySpace to communicate about homework, but posted pictures of naked men and engaged in peer-to-peer level exchanges; the court found the teacher's behavior to be disruptive of school activity and the school's interest in preventing this activity outweighed the teacher's speech protection); *Richerson v. Beckon*, 337 F. App'x. 637 (9th Cir. 2009) (Ninth Circuit held that a school district did not violate the First Amendment rights of an administrator by demoting her to a teaching position as a result of her postings on a personal blog, which contained negative comments about fellow school employees, the union, and the school district; the court determined these postings severely impaired her ability to effectively supervise and work with others, and held that the school district's legitimate interest in the wellbeing of the workplace outweighed the administrator's

Lastly, in cases of alleged retaliation, if a public employee's speech was not in furtherance of official duties, did touch upon an issue of public concern, and the government's interest in an efficient workplace was determined to not outweigh the employee's First Amendment interests, the employee must still show that his speech was the substantial or motivating factor for his termination. He must prove that "but for" his speech he would not have been terminated or disciplined.[98]

Speech is not limited to online written postings or photographs. The Fourth Circuit recently ruled that "liking" something on Facebook is a form of speech protected by the First Amendment.[99] In *Bland v. Roberts*, the Fourth Circuit sided with Daniel Carter, a former deputy sheriff in Hampton, Virginia, who alleged that he was fired for "liking" the Facebook page of a man running against his boss (the incumbent) for Sheriff.[100] This ruling reversed the district court's grant of summary judgment in favor of the defendant, in which the lower court had concluded that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection…."[101] The Fourth Circuit found that "liking a political candidate's campaign page communicates the [Facebook] user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."[102] Clicking the "like" button "literally causes to be published the statement that the [u]ser 'likes' something, which is itself a substantive statement… That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."[103] Having determined that Carter's conduct constituted free speech, the court further found that (1) Carter was speaking as a private citizen on a matter of public concern; (2) Carter's interest in expressing support for his favored candidate outweighed the Sheriff's interest in providing effective and efficient services to the public; and (3) Carter had created a genuine factual issue concerning whether his Facebook support for his former boss's opponent was a substantial factor in his termination.[104] Carter's claims were therefore reinstated and remanded.[105]

---

interest in engaging in her blog speech); *Snyder v. Millersville University*, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008) (student teacher's posting of a photograph of herself wearing a pirate's hat and holding a cup with a caption that read "drunken pirate" was found not to touch upon a matter of public concern based upon the teacher's admission at trial that the posted photograph was personal in nature).

[98] *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

[99] *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013), as amended (Sept. 23, 2013).

[100] Upon winning reelection, the Sheriff reappointed 147 of his 159 full-time employees. *Id.* at 372. Those not reappointed included the six Plaintiffs. *Id.* Mr. Carter was the only plaintiff to assert that a "like" amounted to protected speech. The claims by the other five plaintiffs dealt with more conventional First Amendment issues.

[101] *Bland v. Roberts,* 857 F.Supp.2d 599, 603 (E.D. Va. 2012).

[102] *Bland v. Roberts*, 730 F.3d at 386 (citing *City of Ladue v. Gilleo,* 512 U.S. 43, 54–56 (1994)).

[103] *Id.* The court further noted that in addition to constituting pure speech, "liking" was considered a "symbolic expression." *Id.*

[104] *Id.* at 387-88.

[105] *Id.* at 394. The Fourth Circuit nevertheless noted that "the district court properly ruled that the Sheriff was entitled to qualified immunity on [Carter's] claims seeking money damages against the Sheriff in his individual capacity, and that the Sheriff was entitled to Eleventh Amendment immunity against those claims to the extent they seek monetary relief against him in his official capacity. The Sheriff is not entitled to Eleventh Amendment immunity, however, on [Carter's] claims to the extent the remedy sought is reinstatement." *Id.*

VI. DRAFTING A SOCIAL MEDIA POLICY

The pervasiveness of social media has changed the legal landscape for public and private employers alike. While incorporating social media into the workplace offers any number of benefits, the risks and areas of potential employer liability should be not only considered, but proactively addressed. Perhaps the best way to do so is with the creation of a sound social media policy. A well-drafted policy can mitigate the risks associated with employer and employee professional and personal use of social media. By drafting a policy that takes into account the following eight elements, public employers can address many of the common concerns surrounding the use of social media in the workplace:[106]

1. Employee Access.

The employer must determine which employees will be permitted to access which social media site. Some employers control the number or types of employees who are allowed access to social media sites, while others limit the types of sites that are approved for employee access. Other employers allow all employees to access a pre-approved list of social media sites, or have no restrictions at all.

2. Social Media Account Management.

Account management encompasses the creation, maintenance, and termination of social media accounts. The lack of a clearly-defined account management policy could result in a situation where employer leadership does not have a handle on what types of social media accounts are being established, maintained, or closed by their employees for professional or official use. Therefore, it is critical to establish who may set up an employer or professional social media account, as well as the actual procedure for establishing an account.

3. Acceptable Use.

A prudent acceptable use policy will clearly outline an organization's position on how employees are expected to use employer resources, how they are to behave and present themselves online, restrictions on use of social media for personal interests during work hours and consequences for violating the policy.

4. Employee Conduct.

Rather than draft an employee conduct provision specific to social media, many employers refer to previously established ethical code of conduct policies. Alternatively, codes of conduct can be tailored to the online context (such as respecting terms of service, behaving in a professional and transparent manner, etc.). Either way, the policy should include prohibitions on discriminatory, harassing, or retaliatory behavior.

5. Managing content.

Employers must establish who is allowed to post on behalf of the employer, and designate those responsible for ensuring the accuracy and appropriateness of social media posts and user comments.

6. Security.

As with employee codes of conduct, an employer can choose to address social media security issues by referring to those IT policies already in place. Regardless, the employer should ensure that the security policy addresses password security, functionality, authentication of identity, and virus scans.

7. Managing customer/citizen-generated conduct.

Public employer/employee interaction with the public at large is essential for a successful social media presence. Employers must decide how best to elicit feedback (will the public be allowed

[106] *See Designing a Social Media Policy for Government: Eight Essential Elements*, Center for Technology in Government (May 2010), http://www.ctg.albany.edu/publications/guides/social_media_policy/social_media_policy.pdf.

to post comments in real-time, or will each comment require approval prior to going live?), and whether rules for acceptable conduct need to be developed and posted.

8. Legal considerations.

Employers must consider how they will ensure compliance with applicable state, federal and local laws; how they will protect their intellectual property or other confidential information; and what policies need to be put in place for data and document retention purposes. Additionally, employers should advise their employees that they should not have any expectation of privacy when using social media on company equipment or property, and that any and all information is subject to disclosure.

That said, employers would be wise to also include a disclaimer that the social media policy is not intended to restrict an employee's right to discuss the terms and conditions of his or her employment, nor will employees be disciplined or retaliated against for engaging in lawful conduct consistent with the employer's social media policy.