


11am-12 noon Sat Dec 3, 2011
in Colorado Room




Social Media

What are the Limits on Employee Discipline?

NMSBA Annual Convention
December 2-3, 2011

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Modern Times

- According to a 2009 CareerBuilder survey of 2600 hiring managers-
- 45% of employers regularly use social networking sites such as Facebook, LinkedIn, MySpace and Twitter as a factor in their hiring process
- 11% plan to do so in the near future
- 35% of employers claimed that they rejected applicants based on such information
- 18% reported that they have found content on social networking sites that influenced them to hire the candidate

What is social networking?

An online community of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. Most social network services are web-based and provide a variety of ways for users to interact, such as e-mail and instant messaging services






Modern Times


- 43% of U.S. office workers access social media at work
- 51% spend one or more hours per week on the sites
- 5% of workers maintain a personal blog
- 16% of employees who maintain personal blogs have posted information critical of their employers, supervisor, co-workers, customers or clients.
- Only 15% of employers have policies on work-related blogging or social networks.

What is social networking?

- Wikipedia lists 142 major active social networking websites. The most popular are:
 - Facebook
 - Twitter
 - LinkedIn
 - My Space
 - Flickr
 - Blogspot
 - Tagged.com
 - You Tube



When employees go wild on the web




Is this a problem?

- 2008 Washington Post Article entitled "When Young Teachers Go Wild on the Web"
 - One Montgomery County SPED teacher displayed a poster on Facebook that depicts talking sperm and invokes a slang term for oral sex.
 - One William County kindergarten teacher posted a satiric shampoo commercial with a half-naked man having an orgasm in the shower.
 - D.C. educator offered this tip on her Facebook Page: "Teaching in DCPS—Lesson #1: Don't smoke crack while pregnant."


Is this a problem?

- The Columbus (Ohio) Dispatch ran an expose entitled, "Teachers' Saucy Web Profiles Risk Jobs." One 25-year-old female bragged on her MySpace site about being "sexy" and "an aggressive freak in bed." Another confessed that she recently got drunk, took drugs, went skinny-dipping, and got married.
- A SPED teacher wrote on her page to a student, "You're a retard, but I love you," and posted a photo of herself "sleeping" with a bottle of tequila.
- A San Antonio newspaper reported that college student "Mahka" posted pictures of herself in various stages of drunkenness with the catchy caption, "Can U say wasted?" She also wrote: "Drinking and partying is my life. I'm gonna be a high school English teacher one day."


Is this a problem?

- Newspapers across the country have begun trolling social networking sites for embarrassing and titillating postings by local teachers.
- And there's a treasure trove of material to be mined: 

Question presented

- Do inappropriate or risqué pages matter if the teacher's or employee's performance is not hindered and if students, parents and school officials don't see them? 
- At what point are these employees judged by the standards for public officials?

Is this a problem?

- The Charlotte Observer reported that an afterschool staffer from Charlotte was fired for his Facebook comment that he likes "chillin' wit my niggas" and a "suggestive exchange" with a female friend. 
- Two probationary teachers faced termination for their Facebook musings that "I'm feeling pissed because I hate my students," and I'm "teaching in the most ghetto school in Charlotte."

School District Liability

- "Retard" posting as a basis for liability.
- *Schroeder v. San Diego Unified Sch. Dist.*, 2009 U.S. Dist. LEXIS 40422 (S.D. Cal. 2009)
 - Tutor in a SPED classroom had a MySpace page with derogatory comments about SPED students. School disciplined tutor for the comments but tutor remained in the classroom.
 - Tutor later sexually molested a student in the SPED classroom
 - Summary Judgment was denied to the school district, in part based on School's knowledge of tutor's attitude towards SPED students as shown on the MySpace Page.

Teachers and Photographs

- Tamara Hoover is an art teacher who was forced to resign from her position at Auston High School in Texas, for allegedly being the subject of explicit photos that had been posted on Flickr, a public photograph sharing website, by her girlfriend.
- The photos came to light in April, 2006. Students who had seen the pictures notified another teacher, who then notified school officials. The offending photographs have been removed from the site.
- Hoover was put on paid administrative leave on May 17, 2006. In August 2006, Hoover agreed to resign, with the school board paying her \$14,850.



Blurring the Boundaries

- Sexual grooming is defined as a five step process:
 - Identify a vulnerable child
 - Engaging the child in peer-like involvement
 - Desensitizing the child to the conduct
 - Isolating the child
 - Making the child feel responsible.

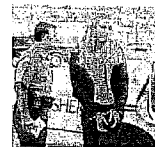
Blurring the Boundaries

- What happens when the lines between teachers and students become blurred on social networking sites?
 - Studies show that 10% of female students “report being sexually harassed or abused by a school employee.”



Pamela Rogers

- Former gym teacher found guilty of having sex with a 13-year old boy and served 6-months in jail
- Arrested again after she sent sexy video and pictures to the boy as well as contacted him indirectly through her MySpace website.
- Sentenced to and addition two years and required to serve entire seven year original sentence.



Blurring the Boundaries

- There are two kinds of child molesters, the “grabbers” and the “groomers”
 - Social networking sites allow an unmonitored opportunity for the blurring of boundaries between teacher and students giving the “groomers” unfettered access to students outside of the school environment.
 - “The process of sexual grooming involves finding a suitable vulnerable student and engaging in increasingly invasive boundary invasions behaviors with that student. The boundary invasions reveal which students may be taken advantage of.


U.S. Constitution Amendment I

- The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. Amend. 1.




U.S. Constitution Amendment I

- "Speech is protected by insuring its full expression . . ."
Nichol v. Arin Intermediate Unit 28, 268 F. Supp. 2d 536, 548 (W.D. Pa. 2003).
- "Speech" encompasses verbal and written expression, as well as "symbolic speech" expressed through symbols and conduct. See *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).



Cyber-Speech by Teachers: The Legal Foundation

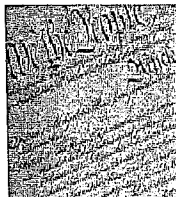
"The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."



Pickering v. Board of Education, 391 U.S. 563, 568 (1968)


U.S. Constitution Amendment I

- "Symbolic speech" is protected under the First Amendment if (1) the "speaker" intends to convey a message, and (2) there is a "great likelihood" that observers will understand the message. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).
- The teacher's display of him or herself or placing his or her thoughts on the Internet the Free Speech Clause of the First Amendment.



Cyber-Speech by Teachers: The Legal Foundation

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



Public employee's First Amendment rights not violated when she was fired for circulating a questionnaire about internal office affairs.

Only one question touched on a matter of public concern. When speech does not touch on matter of public concern, retaliatory action by the public agency generally does not violate employee's First Amendment rights.

When speech does touch on matter of public concern, the Pickering balancing test applies:

interest of the employee in commenting on matters of public concern weighed against the government's interest in efficient operation of the workplace.

Cyber-Speech by Teachers: The Legal Foundation

- Up to 87 percent of teenagers (ages 12 to 17) have access to the Internet, and 55 percent of those individuals use social networking websites.
- The bottom line is that the use of social networking websites is widespread and is a phenomenon that school district administrators and school boards cannot ignore.
- Social media has benefits that can assist school districts in decision-making, but administrators must also be on guard to protect students, teachers, and the school district from negative aspects of social media use.

Cyber-Speech by Teachers: The Legal Foundation

Garrett v. Ceballos, 547 U.S. 410 (2006)

Public employee claimed violation of First Amendment rights when he was retaliated against for writing memo recommending dismissal of a case based on governmental misconduct.

Court held speech not protected.


"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

547 U.S. at 421.

Cyber-Speech by Teachers: Caselaw

Spanierman v. Hughes, 576 F. Supp. 2d 292 (D. Conn. 2008)


- Teacher's contract not renewed after school district found he was using MySpace to interact with students.
- Garcetti did not apply:**
 - Teacher's MySpace comments not made pursuant to his responsibilities as a teacher.



Cyber-Speech by Teachers: Caselaw

Snyder v. Millersville University (cont.)


- Student treated as teacher for purposes of First Amendment analysis.
- Student's decision to sue MU instead of the high school did not affect the court's analysis.
- No matter of public concern involved, so speech not protected:
 - "[I]nsofar as Plaintiff's posting touched on any matter of public concern, it was protected by the First Amendment," but since the student "conceded at trial . . . that her posting raised only personal matters," MU's response did not violate the student's First Amendment rights.



Cyber-Speech by Teachers: Caselaw

Spanierman v. Hughes (cont.)

- MySpace postings generally did not involve matters of public concern:
 - MySpace page consisted of "personal conversations"
 - Only exception was poem teacher wrote about the war in Iraq
- Court found no evidence that school district intended to retaliate against the teacher because of the views he expressed in the poem:
 - Teacher "failed to establish the necessary causal connection between his exercise of the right to free speech and the allegedly retaliatory action taken against him."




F. Supp. 2d. at 311. 576

Cyber-Speech by Teachers: Practical steps

Questions to ask when addressing a specific incident:


- Does the School District have a policy on the monitoring of social networks?**
 - Does the school district ban the contacting of students by teachers using a social network?
- Is the speech a matter of public concern?**
 - If no, speech not protected by First Amendment
 - If yes, court balances teacher's interest in speaking as a citizen with school district's interest in operating effectively and efficiently



Cyber-Speech by Teachers: Caselaw

Snyder v. Millersville University, 2008 WL 5093140 (E.D. Pa. 2008)

- Stacey Snyder, a student at Millersville University (MU), was assigned to complete her student teaching at an area high school.




Despite warnings, Snyder criticized her cooperating teacher on her MySpace page.

When high school refused to allow Snyder to continue her student teaching placement, MU did not award her teacher education degree.


Cyber-Speech by Teachers: Practical steps

- Was the teacher's speech made pursuant to his or her duties as a teacher?**
 - If yes, speech not protected by First Amendment
- Does the teacher's speech represent the airing of personal grievances against an employer?**
 - If yes, generally not matter of public concern




Cyber-Speech by Teachers: Practical steps

- **Was the teacher's speech touch on an issue of public concern?**
 - If yes, speech is protected by First Amendment
- **Does the teacher's speech represent the airing of grievances that any citizen or parent could make against the school district?**
 - If yes, generally it is a matter of public concern




Cyber-Speech by Teachers: Practical steps

- Imposing moral standards is gelatinous at best when distilled within the legal process.
- Even the U.S. Supreme Court has had difficulty setting standards for what constitutes "obscenity" in the extreme case of free speech.
- "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that. - Justice Potter Stewart, concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), regarding possible obscenity in the movie *The Lovers*."



Cyber-Speech by Teachers: Practical steps

- **Do we really need a policy?**
- The use of a board policy incorporating the PED Code of Ethical Responsibility and Standards of Conduct would most likely be challenged for vagueness under a First Amendment analysis.
- The void for vagueness doctrine also prevents arbitrary and discriminatory enforcement. *Smith v. Goguen*, 415 U.S. 566, 573 (1974).
- "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. . . ." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).
- Here, the argument would be that the school district is acting as the "morality police."




Cyber-Speech by Teachers: Practical steps

- The Supreme Court in *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1983), set forth a balancing test to determine whether the government had a legitimate interest in regulating the speech of its employees that "differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568.
- The Pickering balancing test considers "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). The test also takes into account the extent of authority entailed in the employee's position. *Id.* at 390.

Cyber-Speech by Teachers: Practical steps

- While we can all agree that certain photos or comments are inappropriate. The issue is what can a school district do when the photo was not taken or the comment was not made on school time or at school facilities.
- What standards apply with it does not appear that the employee submitted the photo or comment with the intent of being distributed or viewed by students, parents or school officials?
- What if the speech can be connected to a matter of public concern?



Cyber-Speech by Teachers: Practical steps

- In evaluating First Amendment retaliation claims in light of the Pickering balancing test, a reviewing court will make the following inquiries:
 - (1) was the employee's speech on a matter of public concern, and if so, did his or her interest in the speech outweigh the governmental interest in providing efficient and effective service;
 - (2) was the speech a substantial or motivating factor in the alleged retaliatory action; and,
 - (3) would the employer have taken the adverse action had the employee not spoken out publicly. *Curinga v. City of Clairton*, 357 F.3d 305, 310 (3rd Cir. 2004).
- Facing discharge, we would suspect that the teacher will argue that his or her "speech" is of public concern.

Cyber-Speech by Teachers: Practical steps

- The School District's interest in addressing a teacher's photo or comment on the Internet will require a substantial showing of disruption.
- The School District will need to marshal evidence that establishes that the teacher's photograph or comments had the effect of materially and substantially disrupting the operations of the School District. *See Ravitch v. City of Philadelphia*, 2009 U.S. Dist. LEXIS 44352, at *30-32 (E.D. Pa. 2009).
- In *Tinker*, the Supreme Court pointed out at length how wearing black armbands in protest against the Vietnam War was passive and did not create "disorder or disturbance" and therefore did not interfere with the school's work or collide with other students' rights "to be secure and to be let alone." 393 U.S. at 508.

Model Policy

- **Interactions with Students.** State statutes and regulations and School Board-adopted ethical and professional policies and standards require that professional educators and School District employees establish strict, appropriate and professional boundaries in their conduct and communications with students. To that end, School District employees shall not use Social Networking Websites as a means of communication with any School District student for purposes unrelated to the school curriculum or school programs, and in the absence of approval as specified in Paragraph ? below.

Cyber-Speech by Teachers: Practical steps

- "Of course, a mere desire to avoid 'discomfort and unpleasantness' was an insufficient basis to regulate the speech; there had to be disruption in the sense that the speech 'would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 572 (4th Cir. 2011), quoting, *Tinker*, 393 U.S. at 509.
- Please note that "in cases such as this involving speech on matters of significant public concern, a showing of actual disruption is required." *Zamboni v. Stanler*, 847 F.2d 73, 79 (3rd Cir. 1988), see also *Am. Postal Workers Union v. U.S.P.S.*, 830 F.2d 294, 303, n.12, (D.C. Cir. 1987).

Model Policy


- Employees of the _____ School District are hired for the purpose of taking a sincere professional interest in students. Professional ethics require that staff members avoid social situations through which they could exploit their positions of authority over students and specifically in this Policy through the use of social networking sites. Employees communicating on social networking sites on matters personal to them or personal to their individual employment on matters which are inappropriate and inconsistent with their ethical responsibilities and not of public concern or with intent to communicate personally with students outside of School District's approved instruction and supervision is prohibited. The intent of this Policy is to limit the communications between staff and students to that which is school-related and consistent with the ethics of education professionals and that employees utilize the extensive policies and procedures already existing to communicate with the School District's Administration on matters affecting their employment or the education of students whom they serve.

Model Policy

- **Use of Social Networking Websites.** Since a School District employee's interactions or dialogue with students on a Social Networking Website could be viewed as a representation of the School District by viewers and since communications on such websites are not subject to the same levels of supervision, structure or formality as the school or classroom environment, the School District strongly discourages its employees' use of Social Networking Websites as a means of conducting School District business or communicating with students, except as permitted by Paragraph ? below.

Cyber-Speech by Teachers: Applicants


- **There are new legal considerations when conducting e-due diligence**
 - Discrimination claims
 - Access to Information not in Application
 - Information on Disabilities
 - Constitutional claims
 - First Amendment
 - Fourth Amendment
 - Service and User Agreements
 - Must follow agreement on information
 - The *Kibbe* Case
 - Conduct outside the workplace that is not disruptive of the work environment



Wiretapping Laws

- **Fourth Amendment**
- **Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 *et. seq.***
 - Prohibits interception of e-mail or electronic communications in transit.
- **Stored Communications Act, 18 U.S.C. §§ 2701 *et. seq.***
 - Prohibits searching of e-mails or electronic communication in storage
 - Does not apply to employer's own e-mail systems
 - Searching a "friends only" computer server without authority violates the Act.

Contact Information



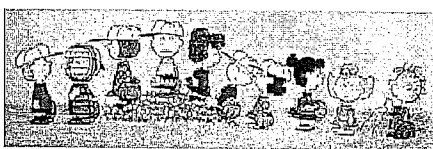
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Searches

- **Fourth Amendment**
 - Reasonable expectations of privacy
- **Computers**
 - Allowed exclusive use
 - Allowed private use
- **Desks**
 - Allowed exclusive use
 - Allowed private use
- **Classrooms**

Questions



Thank you