

facebook

v.

**The First
Amendment**



Traci I. Park / Kelly A. Trainer
Burke, Williams & Sorensen, LLP

Session Overview

1. Speech On Social Media
2. Overview Of The First Amendment
3. First Amendment
4. “Liking”
5. Cyber-Harassment & Stalking
6. Cyber-Threats
7. Best Practices
8. Public Entity Social Media Presence



What Kind Of Speech Is Found On Social Media?



Social Media Users Love To Share!

- Birthdate
- Place of Employment
- Relationship Status
- Family Members
- Places Visited
- Home and Email Addresses and Phone Numbers
- Photos
- Political, Religious, Social Viewpoints and Causes
- Schools Attended
- Clubs, Civic Activities, Networking Groups
- Friends and Contacts



Social Media Users Love To Share!

- **How much they hate their boss**
- **How much they hate their job**
- **How much they hate their employer**
- **What they did on their day off**
- **What they did the day they called in sick**
- **How much they drank over the weekend**
- **Sexually provocative photos**
- **How they will destroy their ex's life**
- **That the DUI test was rigged**
- **How high their new meds make them**
- **Offensive costumes and remarks**
- **And on, and on, and on**



But, I Have Privacy Settings!

- **30% of social media users do not utilize any privacy controls**
- **One has no reasonable expectation of privacy in information intentionally broadcasted to the world on Twitter. *State v. Harris* (2012)**
- **The sharing of personal information is the very nature and purpose of social networking sites, else they would cease to exist. *Romano v. Steelcase, Inc.* (2010)**



Overview Of The First Amendment



Pickering v. Board of Education

[1968]

- 1. Matter of public concern?**
- 2. Private citizen or public employee?**
- 3. Motivating factor?**
- 4. Adequate justification for treating employee differently than members of general public?**
- 5. Take same adverse action absent the protected speech?**



Basic First Amendment Test

- **Is the employee speaking as an employee in the course of his/her job duties?**
 - If so, no protection.
- **Is the employee speaking on a matter of public concern?**
 - Consider context, form, and content
 - Personal grievances (unprotected) vs. issues with a broader public purpose (protected)

Connick v. Myers (1983) 461 U.S. 138
Garcetti v. Ceballos (2006) 547 U.S. 410

Protected Speech Must Be Balanced Against The Employer's Interest

- **Employer's Interest – Providing Effective and Efficient Government Through Its Employees**
 - Context of the speech;
 - Employee's role in the agency;
 - Extent to which the speech disrupts the operation and mission of the agency; and
 - Whether the employee has a confidential, policymaking, or public contact role



Factors To Consider

- **Whether the speech...**
 - **Impairs discipline by superiors;**
 - **Impairs harmony among co-workers;**
 - **Has a detrimental impact on close working relationships;**
 - **Impedes the performance of the public employee's duties;**
 - **Impairs the operation of the agency;**



Factors To Consider



- **Whether the speech...**
 - **Undermines the mission of the agency;**
 - **Is communicated to the public or to co-workers in private;**
 - **Conflicts with the responsibilities of the employee within the agency; and**
 - **Makes use of the authority and public accountability the employee's role entails.**

The First Amendment & Employee Discipline



Common Fact Patterns



- Employee misuse of sick and protected leaves of absence
- Disparaging remarks about supervisors, co-workers, vendors, clients, the workplace, etc.
- Harassment by co-workers
- Inappropriate comments or content that implicate the workplace
- Breach of confidentiality or other employer policies

Rankin v. McPherson (1987)

Discipline may be appropriate if 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, impedes performance, or interferes with operations.”



Roe v. City of San Diego (2004)

San Diego did not violate the First Amendment when it terminated a police officer for selling sexually explicit sex tapes and other police items on eBay.



Spanierman v. Hughes

(D. Conn. 2008)

Teacher who used MySpace account to communicate with students and used it to engage in inappropriate conversations with students was not retaliated against for exercising his free speech rights because his speech was not protected.



Clairmont v. Sound Mental Health (9th Cir. 2011)

**Legitimate government interests include
“promoting efficiency and integrity in the
discharge of official duties and
maintaining proper discipline in the public
service.”**



Shepherd v. McGee (D. Ore. 2013)

Social worker who posted highly critical remarks on Facebook about the families on welfare who she is supposed to serve was properly terminated because her comments would have to be disclosed to opposing counsel in cases in which she testifies.



Gresham v. City of Atlanta

[11th Cir. 2013]

Police officer is properly terminated in violation of the police department's "criticism" policy after posting this comment on Facebook: "Who would like to hear the story of how I arrested a forgery perp at Best Buy only to find out later that he was the nephew of an investigator who stuck her ass in my case an obstructed it? Not to mention the fact that while he was in my custody, she took him into another room alone before I knew they were related. Who thinks this is unethical?"

Debord v. Mercy Health Systems **(10th Cir. 2013)**

Employee who posted false accusations related to wage payments and potential sexual harassment on Facebook, then lied about it, was properly terminated.



In Re Tenure Hearing of J. O'Brien (N.J. 2013)

**Elementary school teacher properly
terminated for referring to students as
“future criminals” on Facebook.**



Rodriguez v. Wal-Mart (N.D. Tex. 2013)

Supervisor was properly terminated for calling subordinate employee a liar on the employee's Facebook page instead of handling it in-house.



“Liking” And The First Amendment



Bland v. Roberts (4th Cir. 2013)

- **The Under-Sheriff campaigns against the reigning Sheriff and establishes a campaign page on Facebook**
- **Several members of the department “Like” the campaign page and some post photos of them attending a fund-raiser for the Under-Sheriff**
- **Sheriff wins the election, and fires everyone who “Liked” his opponent’s campaign page**
- **Sounds legit, right?**



Bland v. Roberts (4th Cir. 2013)

- **Held: Clicking “Like” on Facebook is sufficient speech to trigger constitutional protection**
- **“Liking” on Facebook is the modern day equivalent of a bumper sticker or front yard campaign sign**
- **“Liking” is both pure and symbolic speech**
- **Campaign was a matter of public concern**
- **Department’s interest in “maintaining harmony” was not sufficient here**



Three D v. NLRB (2nd Cir. 2015)

- **A former employee posted on Facebook that the employer miscalculated tax withholdings:**
 - “They can’t even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!”
- **Two current employees “Liked” the post and one commented on the post that she also owed money.**
- **Both were fired for violating the employer’s policy prohibiting “inappropriate discussions about the Company, management and/or co-workers.**



Three D v. NLRB (2nd Cir. 2015)

- **Under Section 7 of the NLRA, an employee's rights to engage in concerted activity must be balanced against the employer's interest in protecting its business.**
- **Here, the Facebook discussion concerned workplace complaints about tax liabilities and did not disparage the company and were not maliciously untrue.**
- **"Liking" and responding to the former employee's post was protected conduct under the NLRA.**



Heffernan v. City of Paterson

(3rd Cir. 2015)

- **Police Officer Paterson was observed picking up a campaign sign for the candidate opposing the incumbent mayor.**
- **Supervisor confronted him, and Paterson claimed he was picking up the sign for his mother.**
- **Heffernan was demoted because his actions were deemed “overt involvement in political activities.”**



Heffernan v. City of Paterson

(3rd Cir. 2015)

- Heffernan sued, claiming violations of freedom of speech and association.
- The 3rd Circuit affirmed the District Court's granting of summary judgment to the City, finding that there was no evidence that he actually associated with the candidate, which Heffernan admitted.
- The US Supreme Court heard oral arguments in January 2016 to answer the question of whether the First Amendment prohibits the government from demoting a public employee based on a supervisor's *perception* that the employee supports a political candidate.
- What does this have to do with social media?



Cyber-Harassment And Stalking



Examples Of Cyber-Misconduct

- **Unwanted/unsolicited threatening or harassing emails**
- **Unwanted and/or disturbing pages, instant messages, text or sext messages**
- **Posing as another person in a chat room and writing things on behalf of that individual that are intended to anger other chat room participants**
- **Posting embarrassing, or humiliating information about the alleged victim**



Examples Of Cyber-Misconduct

- **Posting personal information (including a phone number, address, workplace, etc.) about another person encouraging others to harass that person**
- **Logging into on-line accounts to empty a person's bank account or ruin a person's credit**
- **Creating fake social media profiles in someone else's name**



Cyber-Stalking & Harassment

- **“Cyberstalking” or “on-line harassment” is stalking that takes place via an “electronic communication device.”**
- **California’s anti-stalking laws prohibit harassing or threatening another person to the point where that individual fears for his/her safety or the safety of his/her family. Penal Code Sec. 646.9.**



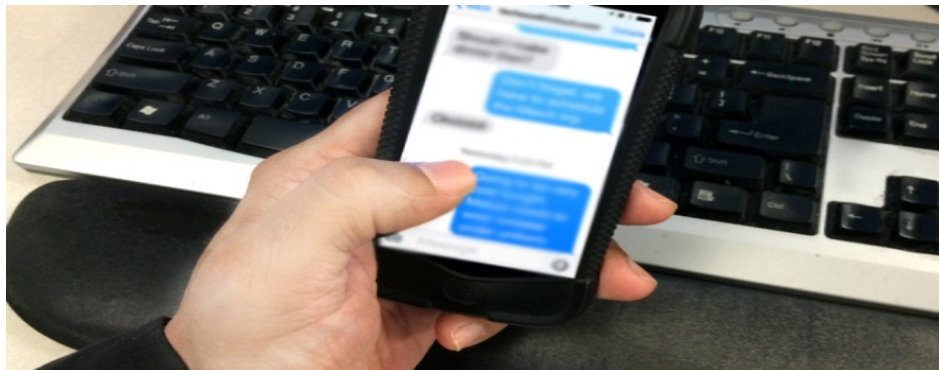
Cyber-Harassment

- **California defines the workplace very broadly.**
- **When employees engage with each other on line, their conduct and communications can be considered “workplace.”**
- **This means that employees using Twitter, Facebook and other social media websites to engage in misconduct can face criminal and disciplinary penalties.**



Cyber-Stalking & Harassment

- **California law prohibits threats or harassment that are communicated via:**
 - the Internet,
 - e-mail,
 - text messages,
 - the phone (either cellular or a landline),
 - a fax machine,
 - a video message, or
 - any other electronic device.



Malicious On-Line Impersonation

- **Penal Code Sec. 528.5: Any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense.**



Posting Personal Information To Cause Fear

- **Penal Code Sec. 653.2: Any person who electronically posts or transmits:**
 - **personal identifying data of another person, or**
 - **a harassing message about another person**
 - **with the intent to cause the other person to reasonably fear for his or her safety or the safety of family members commits a misdemeanor crime in California.**



Penalties For Cyber-Stalking & Harassment

- **Cyber-stalking is a “wobbler” which means it can be prosecuted as a felony or misdemeanor.**
 - **Misdemeanor = Up to a year in a County jail and/or fines up to \$1,000**
 - **Felony = Up to five years in a State prison, fines up to \$1,000 and possible lifetime registration as a sex offender**
 - **Possible confinement to mental facility**
 - **Restraining orders**



Facebook Has Rules

Facebook's "Community Standards"

Violence and Threats:

Safety is Facebook's top priority. We remove content and may escalate to law enforcement when we perceive a genuine risk of physical harm, or a direct threat to public safety. You may not credibly threaten others, or organize acts of real-world violence.



Facebook Has Rules

Facebook's "Community Standards"

Bullying & Harassment:

Facebook does not tolerate bullying or harassment. We allow users to speak freely on matters and people of public interest, but take action on all reports of abusive behavior directed at private individuals. Repeatedly targeting other users with unwanted friend requests or messages is a form of harassment.



Facebook Has Rules

Facebook's "Community Standards"

Hate Speech:

Facebook does not permit hate speech, but distinguishes between serious and humorous speech. While we encourage you to challenge ideas, institutions, events, and practices, we do not permit individuals or groups to attack others based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or medical condition.



Facebook Has Rules

Facebook's "Community Standards"

Identity & Privacy:

On Facebook people connect using their real names and identities. We ask that you refrain from publishing the personal information of others without their consent. Claiming to be another person, creating a false presence for an organization, or creating multiple accounts undermines community and violates Facebook's terms.



Cyber-Threats & Social Media





Elonis v. United States

- **Decided by the U.S. Supreme Court on June 1, 2015.**
- **Anthony Elonis (aka “Tone Dougie”) separated from his wife in 2010 and began posting violent statements about her and law enforcement, prompting the FBI to begin monitoring his posts.**
- **He also lost his job after posting a photo of him holding a toy knife to a co-worker’s neck with the comment, “I wish.”**

Elonis v. United States

After he posted graphic violent descriptions, he was charged under a federal law that prohibits threatening to inflict bodily harm via “interstate commerce”—in this case, the Internet.





Elonis Posted Rap Lyrics About His Wife

**“If I only knew then what I know now . . .
I would have smothered your ass with a
pillow. Dumped your body in the back
seat. Dropped you off in Toad Creek and
made it look like a rape and murder.”**

Elonis Posted Rap Lyrics About His Wife

**“There’s one way to love ya but a thousand
ways to kill ya. I’m not gonna rest until
your body is a mess, soaked in blood and
dying from all the little cuts...”**



...And Kindergarten Classes

That's it, I've had about enough
I'm checking out and making a name for myself
Enough elementary schools in a ten mile radius
to initiate the most heinous school shooting ever
imagined

And hell hath no fury like a crazy man in a
kindergarten class

The only question is . . . which one?





...And Law Enforcement

So the next time you knock, you best be serving
a warrant

And bring yo' SWAT and an explosives expert
while you're at it

Cause little did y'all know, I was strapped wit'
a bomb

Why do you think it took me so long to get
dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and
pat me down

Touch the detonator in my pocket and we're all
goin'

[BOOM!]



Elonis v. United States

- **A jury convicted Elonis under the federal statute, and he spent more than three years in prison.**
- **He asserted the “I didn’t mean it” defense at trial.**
- **The jury was instructed to convict Elonis if it was reasonable for him to see that his ex-wife would interpret his posts as a serious expression of intent to harm her.**

Elonis v. United States

- **The defense argued that a person can only be prosecuted if there is “subjective intent”- in other words, that the person intends to harm another person.**
- **The defense lawyer told the Court that Elonis was merely trying to work through his pain after the separation and that the posts were tied to his recent interest in rap lyrics; therefore, he should be protected under the First Amendment.**



Elonis v. United States

- The prosecution argued Elonis' posts did not constitute rap lyrics meant for entertainment, and he should be convicted if a reasonable person would interpret the posts as threats.
- The essential question is whose point of view matters: the speaker or the listener?
- *Or, stated differently:* What matters more: one person's freedom to express violent rage, or another person's freedom to live without the burden of fear?



The background of the slide is a stylized American flag. It features a dark blue field at the top with white stars, and a red and white striped field at the bottom. The stars are arranged in a curved pattern, following the shape of the flag's canton. The text is centered in the blue field.

What If Public Employees Are Involved In Cyber Threats?

Employee Cyber-Threats

- ***Elonis* did not occur in a workplace**
- **The ability of the government to take action based on an individual's speech is different when the government is acting as an employer vs. when the government is acting as the sovereign**
- **A public employer would have to balance the protections being afforded to an employee's online speech and the obligation to provide a safe workplace**



Employer Obligations

- **Employers are required to provide a safe workplace**
- **Once on notice of conduct, the employer has a duty to protect employee**
- **Time off for victim (required for victims of domestic violence)**
- **Obtain a temporary restraining order (“TRO”)**



What Is A TRO?

- Requested by the Employer on behalf of Employee(s)
- Based on actual violence and/or “credible threats of violence” in the workplace
- Credible threat = words or conduct that would make a reasonable person fear for their safety and/or safety of family members
- No contact and stay-away orders
- Requires surrender of firearms



Best Practices

- **Evaluate policy violations: Electronic communications, workplace harassment, workplace violence**
- **Train employees and encourage reporting**
- **Retain relevant documentation**
- **Conduct a prompt and thorough investigation of all complaints**
 - **Consider using an outside investigator**
- **Be prepared to take appropriate disciplinary action**



Best Practices To Avoid Free Speech Claims



Free Speech Best Practices

- **Address social media and other forms of communication in policy**
 - **Avoid total bans on posting as an overbroad restriction is likely to be found to be a prior restraint on speech**
 - **Work with legal counsel to develop a legally defensible policy**
 - **Update policy when laws and technologies change**
- **Train supervisors and employees**
- **Consult with counsel before discipline**



Public Entity Presence on Social Media



Public & Limited Public Forums

- A traditional website pushing out information in one direction—to the public—does not establish a public forum, and that means the entity does not risk violating First Amendment rights when it excludes content.

Vargas v. City of Salinas (Cal. 2009)

FREE
SPEECH



Public & Limited Public Forums

- In a true public forum, speech restrictions are subject to the highest level of scrutiny and must be narrowly drawn to effectuate a compelling government interest.

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)

FREE
SPEECH



Public & Limited Public Forums

- In a limited public forum, a public entity has somewhat greater latitude to regulate speech. However, any restrictions still must be reasonable and neutral as to the speaker's viewpoint.

Christian Legal Soc. Chap. of the Univ. of Calif. v. Martinez, 561 U.S. 661 (2010)

**FREE
SPEECH**



Hawaii Defense Foundation v. City & County of Honolulu (D. HI. 2014)

- **The Honolulu Police Department operated a Facebook page described as “a forum open to the public” and encouraged users to “share your experiences with us, either good or bad.”**
- **The page administrator deleted comments and banned two users from further posts because of comments critical of the Department.**
- **The two users sued for First Amendment retaliation in federal court.**



Karras v. Gore (S.D. Cal. 2014)

- **The San Diego Sheriff's Department operated a Facebook page inviting users to post comments, but requesting they remain "civil, respectful, and on-topic."**
- **Despite the Department's posting guidelines indicating that it was not opposed to "dissenting opinions," it had a practice of removing unfavorable comments.**
- **In litigation, hundreds of posted comments in favor free speech of were deleted, and the Department shut down the entire page.**



First Amendment Constraints

- **Public entities *likely can* prohibit:**
 - Commercial promotion
 - Illegal activity or promoting illegal activity
 - True threats
 - Pornography and obscenity
 - Copyright violations
 - Hate speech
 - Conduct contrary to written policies
 - Content that compromises safety/security
 - Confidential and personal information



First Amendment Constraints

- The “Gray Areas” Include:
 - Profanity
 - “Defamatory” statements
 - “Offensive” statements
 - Implied threats
 - Personal attacks
 - Off-topic comments



First Amendment Constraints

- Public entities cannot prohibit:
 - Comments critical of you or your Agency based on policy issues
 - Comments based on the viewpoint expressed

THE FIRST AMENDMENT
CONGRESS SHALL MAKE NO LAW RESPECT-
ING 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.



Public Forums & Take Down Policies

- Establish a *limited* public forum
- Post user guidelines
- Take down policies must be narrowly tailored
- No view-point discrimination
- Critical comments must be tolerated



Questions?

