
PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW
Breakout 1:
Free Speech –
They Said What?
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Recording Reminder
New Challenges in the New Year
PLUNKETT COONEY

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New Challenges in the New Year
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Current Statistics: Employer Use of Social Media

- 12% of employers monitor the internet, including employee blogs.
- Up to 70% of employers use social networking sites to research job candidates.
- 39% of employers have looked up profiles of current employees on social networking sites.

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Issues: On & Off-Duty Conduct & Social Networking Sites

- Hiring/firing and disciplinary issues
- Discrimination and harassment claims

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Leaves & Work-related Injuries

Courts are increasingly allowing access to even private portions of social networking sites to refute claims of workplace injuries.

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Personal vs. Work-Related

- The ubiquitous nature of social media has blurred the distinction between work-related speech and personal speech.
- Because employers, co-employees and customers often have access to an employee's personal social media, there is a diminishing ability to distinguish personal speech from work-related speech.

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EEOC v Simply Storage Mgmt
(S.D. Indiana 2010)

- Sex harassment claims by several female employees alleging "ongoing emotional distress" resulting from harassment
- Court ordered production of materials from plaintiffs' MySpace and Facebook sites limited to information that was relevant to their claims of emotional distress, depression and anxiety.
- Denied defendant's request for entire site contents

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Beye v Horizon BC/BS
(D. New Jersey 2007)

- Plaintiffs, insured under health insurance plan with defendant Blue Cross/Blue Shield, brought claims on behalf of their minor daughters to cover medical treatment for eating disorders.
- Court ordered plaintiffs to turn over their daughters' private "writings" on Facebook and emails to demonstrate disorders had emotional causes and, thus, were not covered under insurance policies at issue.

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Edinburg Schools v Esparza
Texas Court of Appeals (2020)

- Plaintiff, a school principal, terminated after nude photo she took of herself on her cell phone was distributed by third party.
- District court ruled release of photo, whether voluntary or not, violated employer's policies.
  - "The fact remains that a voluntarily taken photograph originally taken by Ms. Esparza has entered the public domain and has become an object of great controversy in the school community."

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Edinburg Schools v Esparza

- Policy provided that:
  - "If an employee's use of electronic media ... interferes with the employee's ability to effectively perform his or her job duties, the employee is subject to disciplinary action, up to and including termination of employment."
  - Further, electronic media included "all forms of telecommunication, such as landlines, cell phones, and web-based applications."

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Edinburg Schools v Esparza

- Texas Court of Appeals upheld termination.
  - "[T]he photo's dissemination among the students and community interfered with Esparza's future ability to effectively perform her job duties so as to constitute good cause to terminate her contract. It was reasonable for the school board to infer from the escalating media coverage and the fact that the photo had recently 'gone viral' that the disruption and distraction from the photo would continue and interfere with Esparza's ability to effectively perform her job duties, in violation of [the] policy."

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Hiring & Interviews

Nothing Is Ever Really Deleted

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Facebook Profile Pages Contain…

Helpful Information	"Off Limits" Information
▪ Educational & employment history	▪ Marital status & information regarding children
▪ Videos & photos	▪ Religious information
▪ Status updates	▪ Political views
▪ Friends lists	▪ Age & potentially, medical information
▪ Real-time communications between users	▪ Union or political activity
▪ Contact & residence information	

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Employers' Current Practices

- It is not, per se, illegal to access public information on social media sites of job applicants or current employees.
- In fact, employers report rejecting job applicants when they find references to drug use, heavy drinking, sexually offensive materials, violent imagery, or anything else that reflects poorly on the applicant.
- In current climate, political statements and comments on candidates can create issues for employers and applicants.

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Caution to Employers

- More than 20 states, including Michigan, have passed laws forbidding employers or potential employers from asking "employees or applicants to grant access to, allow observation of, or disclose information that allows access to personal internet accounts." (M.C.L. 37.721 et seq)
- Voluntarily disclosed information not covered by these statutes.

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Caution to Employers

- Employers may conduct an investigation when:
  - Receive specific information about activity on the employee's personal internet account
  - In order to ensure compliance with the law, regulations, or workplace misconduct rules
  - When receiving specific information about an employee's unauthorized transfer of the employer's proprietary information or financial data to a personal account

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Caution to Employers

- Anti-discrimination laws still apply.
- If employee or applicant can demonstrate that employer used information from social media site and acted on that information in discriminatory way, employer can be legally responsible.
- Third-party background checks, which include social media site checks, must follow requirements of Fair Credit Reporting Act.

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Terminations & Discipline

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Rodriquez v Walmart Stores Inc. (5th Circuit 2013)

- Plaintiff employee, already on disciplinary status, commented on co-worker's Facebook page, accusing co-worker of lying about reason for absence from work.
- Co-worker reported incident to human resources and plaintiff was subsequently terminated for violating store's social media policy.
- Court determined termination was based on legitimate and nondiscriminatory reason.

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Carter v Transport Workers Union of America Local 556 (N. D. Texas 2019)

- Plaintiff flight attendant made posts on Facebook and sent private messages—including a video of an aborted fetus—to union president after union participated in Women's March on Washington DC, which was sponsored in part by Planned Parenthood. Employee was terminated after investigation for violating company social media and anti-bullying policy.

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Carter v Transport Workers Union of America Local 556 (N. D. Texas 2019)

- Plaintiff filed grievance and proceeded to arbitration.
- Arbitrator found in favor of airline company; plaintiff filed suit in district court.
- Court held that plaintiff stated plausible claim for religious discrimination.

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Cummins v Unemployment Comp. Bd. Of Review (Pa. Commw. Ct. 2019)

- Plaintiff got into heated argument with her boss and subsequently posted on Facebook that she "would [have] sliced his throat open if it didn't happen at work."
- Termination upheld
- No requirement that employee's misconduct must occur on employer's premises
- Statement was threat and expressed intent to cause physical harm

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O'Daniel v Industrial Service Solutions (5th Circuit 2019)

- HR manager made incendiary post on Facebook, referring to a man wearing a dress as "that" and commenting on his ability to use women's restroom or dressing room.
- Company owners, one of whom was a member of LGBT community, learned of post, took personal offense to it and terminated employee.

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O'Daniel v Industrial Service Solutions (5th Circuit 2019)

- Termination upheld by court; employer can dismiss an employee at any time for any reason aside from federal and state exceptions (i.e., an illegal reason).

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Pietryol v Hillstone Rest. Grp. (D. New Jersey 2009)

- Employees set up password-protected MySpace page to criticize management.
- One employee gave password to a manager, who then accessed site.
- Several employees were fired for comments.
- Jury verdict in favor of employees, because jury felt employee who gave password was "coerced."

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Hostile Work Environment Claims

- New frontier: employees claiming co-worker's social media posts outside of office create hostile work environment.
- Cases so far have held that a single post or even a couple of posts are not pervasive enough to create a hostile environment.
- Implies such a claim is possible under right circumstances.

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Public Employment Issues

Speech on Matters of Public Concern
Employee vs. Citizen

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Pickering Balancing Test

- Public employees do not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.
- However, state's interests as employer in regulating speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."
- Balance must be struck between interests of employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

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Pickering Balancing

- In *Pickering,* court held, impermissible under First Amendment, dismissal of high school teacher for openly criticizing Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about need for additional revenue. Pickering's subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." *Pickering v Board of Education*, 391 U.S. 563 (1968)

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Internal Governmental Affairs

- When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. ... [O]rdinary dismissals from government service, which violate no fixed tenure or applicable statute or regulation, are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. *Connick v Myers*, 461 U.S. 138 (1983)

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Internal Governmental Affairs

- Internal questionnaire sent to co-workers was not protected speech on matter of public concern.
  - "Myers did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. ... [T]he focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors."

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Garcetti v Ceballos
(U.S. Supreme Ct. 2006)

- When citizen enters government service, citizen by necessity must accept certain limitations on his or her freedom. When they speak out, they can express views that contravene governmental policies or impair proper performance of governmental functions.
- In memo to his supervisor, Ceballos conveyed his opinion regarding use of a warrant and was terminated.

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Garcetti v Ceballos
(U.S. Supreme Ct. 2006)

- That Ceballos expressed his views inside his office, rather than publicly, was not dispositive.
- That the memo concerned subject matter of Ceballos' employment, was also nondispositive.
- **We hold that when 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.

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Support of Political Candidates

- Constitution generally prohibits government employers from discharging or demoting employees because they support a particular political candidate. *Heffernan v. City of Paterson, N.J.*, (US Supreme Court 2016)
- There is an exception where political affiliation is "an appropriate requirement for effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507 (1980).
- Neutral and appropriately limited policies may prohibit government employees from engaging in partisan activity. *Civil Service Comm'n v. Letter Carriers* (U.S. Supreme Ct. 1973).

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The Employer's Motive

- If employer terminates or disciplines employee for speech that employer (1) reasonably believed that involved personal matters, not matters of public concern, and (2) the employer had dismissed the employee because of that mistaken belief, the dismissal did not violate the First Amendment. *Waters v Churchill* (U.S. Supreme Ct. 1994)

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The Employer's Motive

- Conversely, when employer demotes or discharges employee out of a desire to prevent employee from engaging in political activity the First Amendment protects, employee is entitled to challenge that unlawful action, even if employer makes factual mistake about employee's behavior and employee was not actually engaged in protected conduct. *Heffernan v Paterson, N.J.*, (U.S. Supreme Ct. 2016)

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Employer's Response to Social Media Postings

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Marquardt v Carlton (6th Cir. 2020)

- Plaintiff, a member of Cleveland EMS, was terminated after he allegedly made comments on his private Facebook page regarding death of 12-year-old Tamir Rice.
- Plaintiff, who was not identified as city employee, did not post while at work. His Facebook page was allegedly private.
- Although Marquardt contends he did not author post, content expressed satisfaction at Rice's killing:

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Marquardt v Carlton

- "Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the criminal f**ker."
  - Plaintiff then replies to a comment:
    - "Stop Kevin. How would you feel if you were walking in the park and some ghetto rat pointed a gun in your face. Would you look to him as a hero? Cleveland sees this felony hood rat as a hero ..."

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Marquardt v Carlton

- Posts were removed within hours and plaintiff denied he posted.
- Subject of discussion among EMS colleagues and Commissioner, the posts were cited in a complaint filed with the City of Cleveland.
- Hearing was held to determine whether Marquardt had violated City's **social media** policies. He was terminated two weeks later.
- District Court granted City's Motion for Summary Judgment, ruling Marquardt's postings were personal speech and did not address a matter of public concern.

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Marquardt v Carlton

- Sixth Circuit reversed, holding that to resolve public/private distinction:
  - We look to "content, form, and context of a given statement, as revealed by the whole record."
  - Whether speech is shocking or inappropriate is irrelevant to whether it concerns a public matter.
  - Given widespread local and national scrutiny of Rice shooting, these aspects of posts directly relate to a "subject of general interest and of value and concern to the public." Comments here addressing propriety of high-profile shooting were on matter of public concern.

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Bennett v Davidson County
(6th Cir. 2020)

- Danyelle Bennett was terminated from her position at Emergency Communications Center (ECC) of Metropolitan Government of Nashville (Metro) for Facebook comment she made on Nov. 9, 2016, the night of Presidential election.
- Bennett posted from her public Facebook profile concerning Trump's victory. In response to someone else's comment, Bennett replied using some of commenter's words: "Thank god we have more America loving rednecks. Red spread across all America. Even ni**az and latinos voted for trump too!"

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Bennett v Davidson County

- As result of Bennett—a white woman—using what Metro deemed racially-charged language, several employees and member of public complained to ECC leadership and Mayor's office.
- ECC officials determined Bennett violated three Civil Service Rules and, after paid administrative leave and due process hearing, they terminated her from her position.

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Bennett v Davidson County

- After trial, District Court found in favor of Bennett. Jury concluded:
  - Bennett's Facebook comment was not reasonably likely to impair discipline by superiors at ECC, to interfere with orderly operation of ECC, or to impede performance of Bennett's duties at ECC
  - Facebook post was reasonably likely to have detrimental impact on close working relationships at ECC and undermine agency's mission
  - That Metro terminated plaintiff "[f]or using the term 'ni**az' when expressing her views regarding the outcome of a national election on Facebook," and that doing so violated County policy.

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Bennett v Davidson County

- On appeal, Sixth Circuit held *Pickering* balancing test favored County because, while speech was couched in terms of political debate on presidential election, her comments "had no special insight" and were outweighed by disruption speech caused internally and damage caused to perception of her employer because she was identified as governmental employee.

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Can The Results Be Reconciled?

- Difference in results between *Marquardt* and *Bennett* can be explained superficially by unique facts of each case. However, legal principles are designed to reach a consistent outcome regardless of unique facts.
- In current climate, results of a balancing test, like beauty, will be in the eye of the beholder.

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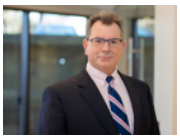
Questions?



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