By John J. Davis

BLOGS, SOCIAL NETWORKS, AND THE FIRST AMENDMENT

Public Employers Retain Certain Rights to Take Action Based on Online Speech

Millions of Americans chronicle the events of their daily lives, from the significant to the mundane, through a seemingly endless variety of Internet blogs and social networking sites such as Facebook, MySpace, and Twitter. Included among these posters are public school teachers, police officers, correctional officers, health agents, inspectors, public works foremen, and supervisors and administrators, as well as other elected and appointed government officials. As the popularity of blogging and social networking expands exponentially, so too does the risk that government employees may post confidential information, disparaging or defamatory remarks, or images or other material potentially disruptive to the operations of the schools, departments, or agencies in which they work. When that occurs, the question is whether the government employer has a right, consistent with the protections of the First Amendment, to discipline the employee for posting inappropriate information. As one might expect, the answer is: "It depends."

The First Amendment to the United States Constitution provides, in relevant part, that, "Congress shall make no law … abridging the freedom of speech." This prohibition was made applicable to the states and their political subdivisions by the Fourteenth Amendment. When a public employee is subjected to an adverse employment action because of something she posted on the Internet—for example, comments on a Facebook page or MySpace profile—she may choose to bring suit against her supervisors and/or employer under the Federal Civil Rights Act of 1871 (more commonly known as Title 42, Section 1983) claiming infringement of her First Amendment rights. Thus, in Connecticut, a high school teacher whose contract was non-renewed following the discovery of certain images and conversations with students on his MySpace profile sued the superintendent of the school district and others, alleging a violation of his rights to free speech [Spanierman v. Hughes, 576 F. Supp. 2d 292 (D. Conn. 2008)]. And in Pennsylvania, a student teacher who was denied her teaching certificate because of comments and an image posted on her MySpace profile sued university administrators for damages and injunctive relief on the grounds that they violated her First Amendment right to freedom of expression [Snyder v. Millersville University, 2008 WL 5093140 (E.D. Pa. 2008)]. Yet, in both cases, the courts ruled in favor of the defendants; no First Amendment violations were found.

The truth is, the First Amendment rights of public employees are not unrestricted. While some public employee speech is protected, other speech is not. This dichotomy reflects an ongoing struggle by courts to balance the concerns of government employers—who, like other employers, have a genuine interest in discouraging disruptive speech or remarks that simply cast the public employee, her co-employees or employer in an unfavorable light—against the not unreasonable desire of public employees to express themselves without fear of getting fired. Out of a reluctance to "constitutionalize" all government restrictions on public employee speech, courts therefore afford greater First Amendment protection to speech that relates to the operations or business of government. Thus, a court will ask: Was the speech on a matter of "public concern"? In other words, did it relate to the political, social, or other concerns of the

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community? If so, it is more likely to enjoy First Amendment protection. (We don't want to discourage public employees, as citizens, from speaking out on matters of concern to the community at large.) But, if public employee speech is not on a matter of "public concern" and, instead, involves something entirely personal, it most likely is not protected under the First Amendment.

The fact that Spanierman and Snyder were both unsuccessful should serve not only as a warning to government employees about the public nature of social networking, but also as a signal to government employers who may wish to restrict certain Internet speech that could be considered harmful to the efficient provision of government services (just as they restrict certain comments to the press or letters to the editor).

Blogging and Networking Risks

A blog is the online equivalent of a personal diary, the principal difference being that the public is expressly invited to read and follow a blog. A blogger may use his personal Web site as a forum to comment on political or public events, to express his innermost thoughts or desires, or merely to vent about his in-laws, neighbors, favorite sports teams, boss, or co-workers. Often, blogs contain regular updates, musings and reflections, as well as graphics, photographs, videos, and/or links to other Web sites.

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A social networking site allows a subscriber to create a personal profile (either public or semi-public) complete with photographs, video, text, and music. By connecting with other users, or "friends," a subscriber may share his personal news, information, or photographs with an entire network, or communicate with others through e-mail or sections devoted to commentary.

For government employees, the risks of blogging and social networking are inherent in the public nature of the Internet. At the mere touch of a button, a teacher, police officer, or other government employee may post a picture or a comment that results in disciplinary action or could even end a career. Here are several examples:

- In June 2006, a Florida sheriff's deputy was fired for showing a picture of himself in uniform and bragging about his sexual and alcoholic feats on his MySpace profile.
- In November 2008, a North Carolina elementary school teacher was suspended for listing "teaching chitlins in the ghetto of Charlotte" in the "About Me" section of her Facebook page.
- In August 2009, a Georgia high school teacher was forced to resign for including an expletive and pictures of herself holding beer mugs and glasses of wine on her Facebook page.
- In February 2010, a Nebraska State Penitentiary guard was suspended for posting the following comment on his Facebook page: "When you work in a prison, a good day is getting to smash an inmate's face into the ground. … For me today was a VERY good day."
- In February 2010, a sociology professor at a Pennsylvania university was placed on administrative leave for making a joke on her Facebook page about hiring a hitman.

As these examples illustrate, a posting need not be work-related to get a government employee into hot water; it may concern matters that are entirely personal. While employees are entitled to First Amendment protection, that protection remains subject to the interests of government in exercising some degree of control over the words and actions of employees in order to safeguard the efficient provision of government services.

The First Amendment

In the fall of 2005, Jeffrey Spanierman, an English teacher without tenure at a high school in Ansonia, Connecticut, opened a MySpace account to communicate with students about homework and, he said, to conduct casual discussions with them on non-school-related topics. Under the name "Mr. Spiderman," Spanierman's profile included a picture of him taken ten years earlier, as well as pictures of naked men with comments beneath them. Spanierman also engaged in online exchanges with students on a peer-to-peer level. In one exchange, he teased a student about "getting any" (presumably sex); in another he threatened a student (albeit facetiously) with a detention. When a guidance counselor warned Spanierman that some of the material on his MySpace profile appeared "inappropriate," Spanierman closed the "Mr. Spiderman" page, then created a new profile under the name "Apollo68" containing the same material. After the guidance counselor reported the new profile to the school principal, an investigation ensued in which it was found that Spanierman had exercised "poor judgment as a teacher." In the spring of 2006, Spanierman was told the school district did not intend to renew his contract for the 2006-2007 school year.

Spanierman filed suit in federal court, claiming that school officials violated his rights to free speech as guaranteed by the First Amendment. The court dismissed his case. Even if some of Spanierman's speech was protected (for example, a poem written in opposition to the war in Iraq), such speech, stated the court, was not the reason for the school district's decision not to renew his contract. Evidence introduced by school officials showed that the content of Spanierman's MySpace page was "disruptive" to school activities. Specifically, the peer-to-peer exchanges made some students who viewed the page "uncomfortable" and demonstrated a potentially unprofessional rapport with students. In short, school officials were free to conclude that Spanierman's online communications with students could disrupt the learning atmosphere of the school. In the court's view, such disruption sufficiently outweighed any value in his MySpace speech [Spanierman, 576 F. Supp. 2d at 312-313].

Another test of First Amendment protection regarding online

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speech arose in Pennsylvania. In order to earn her bachelor's degree in education from Millersville University and receive a favorable recommendation for certification, Stacey Snyder was required to complete a full-time student teaching placement prior to graduation. In January 2006, at the start of the second semester of her senior year, Snyder was assigned to student-teach English and literature at Conestoga Valley High School in Lancaster, Pennsylvania. The assignment did not go well. According to her teaching supervisor, Snyder experienced considerable difficulty with regard to preparation, competence, knowledge of the subject matter, and "over-familiarity" with students. At times, Snyder's efforts to share her personal life with students crossed into the realm of "unprofessional," her supervisor said. A posting on Snyder's MySpace page made matters worse. Commenting on why she did not intend to apply for a full-time job at Conestoga Valley High School, Snyder implied that the "real reason" was her teaching supervisor. An accompanying photograph showed Snyder wearing a pirate hat and holding a plastic cup with the caption "drunken pirate." Questioning Snyder's "professionalism," Conestoga administrators immediately barred Snyder from the high school campus. When Snyder wrote an apology to the high school, replete with misspellings and grammatical errors, school administrators recommended to Millersville University officials that she "not pass" her student-teaching requirement. Millersville subsequently allowed Snyder to graduate with a bachelor of arts degree in English, but refused her a degree in education.

Snyder sued Millersville University for damages and injunctive relief, claiming the university had violated her First Amendment rights to freedom of expression. After a two-day bench trial, the judge ruled against Snyder. Comparing Snyder's role as a student teacher at Conestoga Valley High School to that of a public employee, the judge concluded that the content of her MySpace page did not touch on a matter of "public concern"; rather, it raised only personal matters. Consequently, the court was not required to consider whether the posting was disruptive to school activities. Quite simply, the posting was not protected by the First Amendment. Hence, any decisions made on the basis of the posting, such as the university's decision to deny her a teaching degree, did not violate Snyder's civil rights [Snyder, 2008 WL 5093140, *16].

The Three-Part Test

The Spanierman and Snyder decisions confirm that government employers may discipline employees for "inappropriate" Internet activity consistent with the proscriptions of the First Amendment. But what sort of activity will be considered "inappropriate"? To answer this question, courts will apply a three-part test.

1. First, is the speech the expression of a "citizen" on a matter of "public concern" [Garcetti v. Ceballos, 547 U.S. 410, 419 (2006)]? In other words, when he commented on his blog or posted pictures on his Facebook page, was the employee speaking in his capacity as a government employee (e.g., DPW director, firefighter, librarian) or as a private citizen (e.g., parent, taxpayer, abutter)? If the former, then such speech does not belong to the employee but, instead, to the employer, who, in turn, has every right to restrict it. For example, in the recent decision of Foley v. Town of Randolph [2010 WL 816169 (1st Cir. 2010)], the First Circuit Court of Appeals held that when the Randolph fire chief complained of inadequate funding and staffing of the Fire Department, while in full uniform and on duty at the scene of a fatal fire, he did so in his capacity as a public employee, not as a private citizen. Therefore, the Board of Selectmen was entitled to discipline him for his intemperate remarks. Whether speech is on a matter of "public concern" depends on the content, form, and context of the expression. If it is on a matter of political, social, or other concern to the community, then it is regarded as "public" [Connick v. Myers, 461 U.S. 138, 146 (1983)]. But if it is on a matter of purely personal interest, the First Amendment affords no protection.

2. If an employee's blog or social networking comment is the expression of a "citizen" on a matter of "public concern," it may still be restricted (or otherwise made the subject of employer discipline) if the government's legitimate interest in the efficient performance of the workplace (e.g., school, police station, health department) outweighs the employee's First Amendment interests as combined with the interests of the public [Pickering v. Board of Education, 391 U.S. 563, 568 (1968)]. While balancing such interests is often an inexact science, a court is likely to consider whether the speech is disruptive of workplace harmony or discipline, as well as its effect on employee loyalty, public confidence, and the operation of the workplace in general. In paramilitary organizations (such as police and fire departments), where government interest in the efficient performance of the workplace runs high, employees are typically subject to greater First Amendment restraints than are most other citizens. Thus, in Dible v. City of Chandler [515 F.3d 918 (9th Cir. 2008)], the Court of Appeals went to great length to describe the disruption that a police officer's sexually explicit Web site had on the entire department, even though the speech was not on a matter of public concern and, therefore, unprotected under the First Amendment.

3. Finally, even if the balance established in the Pickering case tips in favor of an employee, a government employer may still escape civil rights liability if the employee cannot demonstrate that his speech was the substantial or motivating factor in the government's adverse employment action. In short, the employee must also show that, "but for" his speech, he would not have been terminated or otherwise disciplined by his employer [Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 287 (1977)].

Given the exacting nature of this three-part test, it is easy to understand how government employers can, with some measure of confidence, draw a hard line when it comes to employee posting of "inappropriate" material on blogs and social networking sites. This is not to say, however, that the First Amendment is the only shield a government blogger can raise against an unhappy

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employer. For example, in Massachusetts, government employees may, under certain circumstances, be entitled to raise the protections of the privacy statute (M.G.L. Ch. 214, Sect. 1B), or the whistleblower statute (M.G.L. Ch. 149, Sect. 185), against disciplinary action. Further, while union employees may find protection in a collective bargaining agreement, tenured teachers can invoke the limited grounds for dismissal set forth in Chapter 71, Sections 38 and 42, of the General Laws.

By the same token, government bloggers and social networkers protected against employer "retaliation" are not thereby free to disclose confidential student information without running afoul of federal and state statutes and regulations (See 20 U.S.C. Sect. 1232g; M.G.L. Ch. 71, Sect. 34D; 603 C.M.R. Sect. 23.10, et. seq.). Nor are they immune from the provisions of the privacy statute (M.G.L. Ch. 214, Sect. 1B), or such tort remedies as defamation, negligent infliction of emotional distress, or intentional infliction of emotional distress.

Most government employers have adopted computer-use policies that define and restrict the personal use of government-owned computers and related equipment by public employees. If they haven't already, municipalities and other governmental entities would be wise to amend such policies to advise public employees that personal use of personal computers or other electronic media may also have consequences if the information or material posted is considered confidential, disparaging, defamatory, or otherwise "inappropriate." Of course, defining what is taboo may prove tricky. But listing as "inappropriate" information or images that demonstrate "conduct unbecoming" a police officer, firefighter, teacher, bus driver, etc., may be good place to start.

Teachers, police officers, firefighters, and other government employees should beware; even if their employer cannot terminate or otherwise discipline them for posting a reckless comment on a community blog or personal Facebook page, this does not mean there will be no consequences. The public nature of the Internet effectively guarantees that what they post can come back to haunt them.

LAYOFF STRATEGIES *continued from page 23*

oral examination and/or role playing) to the promotion process. State law (M.G.L. Ch. 31, Sect. 5(l)) allows municipalities to seek and obtain a delegation agreement from the Human Resources Division. Where a municipality develops and conducts its own examination pursuant to a delegation agreement, it is still required to comply with Chapter 31; Section 27 of Chapter 31 provides that, in making an appointment or promotion, the appointing authority is limited to selecting from among only the three highest-scoring candidates willing to accept promotion (i.e., the "2n + 1" rule). Moreover, the delegation agreement will not, in and of itself, prevent lawsuits.

It's important to remember that if the promotional process is insulated from an attack based on discrimination, a future layoff that follows seniority based on the exam process should also be insulated.