NATIONAL ACADEMY OF ARBITRATORS
SOCIAL MEDIA PRESENTATION

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I. CASES

The following are cases relied upon for this presentation:

- *Durstein v. Alexander*, 2022 WL 4360049 (S.D.W. Va)
- *Marquardt v. Carlton*, 971 F.3d 546 (6th Cir. 2020) (Ohio)
- *Boscarino v. Auto Club Group*, 2023 WL 3170021 (E.D. Mich. 2023) (Appealed to Sixth Cir.)
- *Hamm v. Williams*, WL 5462959 (N.D. Ohio 2016)
- *Bertram v. Ohio Dept. of Rehabilitation,* 2015-SUS-12-0229
- *Sargraves v. Ohio Dept. of Rehabilitation and Correction,* No. CVF-07-4559
- *Spears v. Ohio Dept. of Rehabilitation and Correction,* No. 22CV-782
- *Fenico et al., v. City of Philadelphia,* 2023 WL 3878396 (3rd Cir. 2023)
- *Mahanoy Area School Dist. v. B. L. by and through Levy,* 141 S.Ct. 2038 (2021)
- *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407 (2022)
- *Pickering v. Bd. Of Ed. Of Twp. High Sch. Dist.*, 391 U.S. 563 (1968)
- *Tinker v. Des Moines Indep't Comm. Sch. Dist.*, 393 U.S. 503 (1969)
- *Mt. Healthy City School Dist. Bd. Of Educ. V. Doyle*, 429 U.S. 274
- *Hernandez v City of Phoenix,* 432 F. Supp. 1039, 1068-69 (D. Ariz. 2020
- *Carney v City of Dothan,* 158 F.Supp.3d 1263, 1285-86 (M.D. Ala. 2016)
- *Liverman v. City of Petersburg,* 844 F.3d 400 (4th Cir. 2016)

II. GENERAL OVERVIEW OF SOCIAL MEDIA POLICIES

In April 2022, the City of Columbus revised the External Communications and Civic Engagement Policy. It seeks to provide employees with practical guidance for their personal conduct and communications to the extent they may impact the City's mission, operations, and legal responsibilities. The following is a summary of the policy:

A. APPLICATION

- Applies to all personal, external communications from Department employees regardless of the medium.
    - Examples: books, articles, email, Facebook, Twitter, Instagram, TikTok, News releases
- Violations may result in disciplinary action, including termination.

B. GENERAL PRINCIPLES

- All employees have a responsibility to communicate accurate information in a professional manner and must follow all relevant policies.
- Statements intended as personal opinions may be mistaken for official expressions or employer's policy or position.
- The Employer respects the rights of its employees to express themselves as private citizens under the First amendment to the degree their speech involves matter of public concern.
- The Employer is not seeking to control purely personal content when the content is posted during non-working time and by employee's own equipment; is unrelated to the employee's position with the Employer; does not impair working relationships and is not otherwise disruptive to the Employer's operation.
- Employees shall immediately report communication that the employee believes violates this Policy.
- This Policy prohibits taking disciplinary action against employees who report a possible violation or cooperate in a related investigation.

C. GUIDELINES

- Be accurate.
    - Employees are prohibited from positing any information or rumors which a reasonable person would know to be false or misleading.
    - Employees must ensure they are always honest and accurate when making public statements or posting on the internet.

- Be respectful.
    - Employees must be courteous and respectful at all times.
    - Employees shall not engage in name-calling or personal attacks.

- Employees shall avoid using statements, photographs, videos, and other mediums that can reasonably be viewed as malicious, obscene, threatening, or intimidating.
- Employees shall report discrimination, harassment, or other misconduct in violation of applicable laws or policies.

- Be transparent.
  - Employees should include a disclaimer to clarify that their communications reflect personal views if confusion or doubt will likely arise in regard to public statements or social media activities.
    - However, using a disclaimer will not take their statements outside of this Policy nor does it protect them from discipline if it violates this Policy.
  - Employees must not suggest or imply that their speech represents the Employer's position.
    - This includes not linking or tagging (hashtags) personal accounts to present an Employer's "position" on a topic.

- Be compliant.
  - Employees shall not disclose any confidential or proprietary information concerning the City in any public medium.
  - Employees shall respect copyright, business, and financial disclosure laws.
  - Unless authorized, employees must refrain from using social media on work time or with equipment that is provided by the Employer for work purposes.
  - An Employer's email address shall only be used for business purposes.

- Seek authorization.
  - Employees are not to speak to the media on the Employer's behalf without first contacting and receiving authorization from the proper official or supervisor.

III. LEGAL CHALLENGES TO SOCIAL MEDIA POLICIES

A. Violation of Free Speech – First Amendment

- Public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Bd. Of Educ.*, 391, U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1986).

- Plaintiffs need to show that the social media policy's existence "is calculated to discourage the exercise of any constitutional right beyond simple restrictions since public institutions maintain their own interests. *Booth v. Fink,* 2022 WL 17404884 (E.D. Mich.)

- A lack of clarity in a social media policy, which does not provide a reasonable opportunity for an employee to comply with the policy so that the employer's average employee may experience challenges even in the exercise of commendable good faith effort to fully comply, may render the policy invalid. *Sargraves v. Ohio Dept. of Rehabilitation and Correction,* No. CVF-07-4559.

- The Supreme Court has established a framework to balance the free speech rights of government employees with the government's interest in avoiding disruption and maintaining workforce discipline. *Pickering v. Bd. Of Educ.*, 391, U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1986).

- Under the *Pickering* framework, the plaintiff first must establish that:
  - (1) they spoke on a matter of public concern;
  - (2) they spoke as a private citizen rather than a public employee;
  - (3) their interests as a citizen in speaking on the matter outweighed the Defendant's interests as an employer, in promoting the efficiency of the public services it performs through its employees; and
  - (4) the relevant speech was a substantial or motivating factor in the adverse employment action.

- **Public Concern**
  - Whether or not a particular speech is a matter of public concern depends on if the speech can be fairly considered as relating to any of political, social, or other concern to the community. *Hamm v. Williams.*

  - The Supreme Court has cautioned that "[t]he inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

- Just because the speech was uttered by a police officer does not affect the extent to which it might touch on matters of public concern. It is undiminished by the fact a state employee was the speaker. *Fenico v. City of Philadelphia.*

- **Speaking as a Private Citizen**
  - Statements are made in the speaker's capacity as a citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform. *Eng v. Cooley*, 552 F.3d 1062, 1071-72 (9th Cir. 2009).

- **Balance between Interests of Employee and the State:** "In conducting the *Pickering* balancing, courts must give government employers 'wide discretion and control over the management of their personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."

  - This need to regulate conduct is particularly high with policy employers, which have an interest in maintaining discipline, esprit de corps, morale and uniformity. See *Cochran v. City of L.A.*, 222 F.3d 1195, 1201 (9th Cir. 2000).
  - Courts give a wide degree of deference to the reasons law enforcement agencies articulate for what is necessary to accomplish the public safety mission. *Connick*, 461 U.S. at 152, 103 S.Ct. 1684.

- Notedly, speech by government employees is less protected than speech by members of the public. *Amalgamated Transit Union Loc. 85 v. Port Auth. Of Allegheny Cnty.*, 39 F.4th 95, 103 (3rd Cir. 2022). This does not mean that public employees surrender all of their First Amendment rights simply because of their employment status. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 465 (3rd Cir. 2015).

- If the employee establishes a prima facie case, the burden then shifts to the employer to demonstrate "by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct."

B. Retaliation – First Amendment

- First Amendment Retaliation claims: First Amendment retaliation law has evolved since the Supreme Court's decision in *Pickering*, resulting in a sequential five-steps series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

- Essentially, to plead a First Amendment retaliation claim, a government employee must allege:
    - (1) that the activity in question is protected by the First Amendment, and
    - (2) that the protected activity was a substantial factor in the alleged retaliatory action.

- **Adverse Action**
    - When arguing that an adverse action was motivated, at least in part, by protected conduct, a plaintiff "may not rely on the mere fact that an adverse employment action followed speech that the employer would have liked to prevent. Rather, the employee must link the speech in question to the defendant's decision to dismiss her." *Bailey v. Floyd Cty. Bd. Of Educ. V. Doyle,* 429 U.S. 274, 287 (1977).

- **Within Schools**
    - Public school officials cannot censor student expression unless they can reasonably forecast that the speech will substantially disrupt school activities or invade the rights of others. *Tinker v. Des Moines Indep't. Comm. Sch. Dist.,* 393 U.S. 503 (1969).

    - Only a reasonable apprehension of disruption is required when analyzing when speech by a teacher can be censored, as opposed to a substantial disruption standard in *Mahanoy.*

- **"Heckler's Veto"**
    - The "heckler's veto" applies when the threat the speech assertedly posed to public employer interests was not internal disruption by the speech itself, but external disruption by third persons reacting to the speech.

C. Facial Challenge to Policy – First Amendment

- A facial challenge to a public-employer's policy that creates a prospective restriction on speech is similar to a retaliation claim, but it assesses the policy's impact on all prohibited employee speech rather than merely the plaintiff's interest in the specific speech that would result in his discipline. Courts thus apply a modified version of the *Pickering* framework.

- First, courts assess the policy's breadth by examining its text to determine "whether the restriction reaches speech on a matter of public concern, and ... whether [it] reaches speech only within the scope of a public employee's official duties."

- Courts then look to the public employer's justification for the policy, weighing "the impact of the ban as a whole – both on the employees whose speech may be curtailed and on the public interest in what they might have to say – against the restricted speech's necessary impact on the actual operation of the government.

- "Unlike an adverse action taken in response to actual speech, a prospective restriction chills potential speech before it happens. The government therefore must shoulder a heavier burden when it seeks to justify a prospective restriction as opposed to an isolated disciplinary action."

- Additionally, there must be a "close and rational relationship between the policy and legitimate government interests."

D. Municipal Liability - § 1983

- A municipality can be liable under § 1983 if "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Dep't of Soc. Serv. of N.Y.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

- To prove a municipality violated a constitutional right, such liability will attach to the municipality only if the municipality itself has inflicted a constitutionally significant injury be executing a policy or custom. *Bellecourt v. Cleveland,* 104 Ohio St.3d 439, 2004-Ohio-6551, 820 N.E.2d 309, 311.

- However, a municipality cannot be liable under theories of respondeat superior or vicarious liability – only where the municipality *itself* causes the constitutional violation. *Gordon v. Mr. Carmel Farms, LLC,* 20201-Ohio-1233, WL 1343085 (Ohio Ct. App. 2021).

E. Void for Vagueness

- The prohibition against vague laws is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments. *See United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

- A statute or a policy can be impermissibly vague for either of two independent reasons. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

- "In the public employment context, the Supreme Court has reiterated that the vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge." *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992) (citing *Arnett v. Kennedy*, 416 U.S. 134, 159, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)).

IV. SUMMARY OF SOCIAL MEDIA POLICY CASES

A. *Durstein v. Alexander*, 2022 WL 4360049 (S.D.W. Va)

Facts: Plaintiff worked as a teacher between 1999 and 2017. Plaintiff taught world studies to a diverse classroom which discussed various cultures and examined unique features of different cultures histories. In January of 2017, a journalism student retweeted some of plaintiff's older tweets which contained conservative rhetoric. Those posts include:

- A retweet of conservative commentator Ann Coulter containing a photograph of two men and five women, some of whom were wearing hijabs with a caption "Deport them." One of the men in the photo was Mohammad Abdulazeez, who had opened fire on two military instillations in Tennessee.
- A response to a tweet with the language "Exactly !!!!!!" to a meme showing two photos; one of the U.S. President Barack Obama laying a wreath in Japan with the caption "Obama in Japan memorial weekend apologizing," the other was an image of the U.S.S. Arizona memorial at Pear Harbor with the caption "this is where you belong you Muslim douchebag."
- A post with the comment "Too funny not to retweet!" with a picture of a man with his arms around a woman in a full burka/niqab and the text "Islamist advantage: when you divorce your wife and remarry, you can still keep the same photo on your desk."

There were many more photos of similar narrative and focus. Many of the posts were brought to the attention of the school board when the posts were tweeted at the Twitter accounts associated with the high school and other neighboring schools. Plaintiff and school/district officials met to discuss the tweets shortly thereafter. Plaintiff then deactivated her account and was asked not to speak to the media. Upon renewing her license, the board decided to withhold renewal of plaintiffs teaching license pending an investigation. Plaintiff filed suit alleging a violation of her First Amendment rights.

Procedural History: The court looked at various charges by plaintiff including (1) the decision to terminate, (2) Heckler's Veto, and (3) curtailing employees' speech through requesting their Twitter be deactivated.

Holding: In order as listed above:

- (1) The board's decision to terminate plaintiff was **justified.**
- (2) Plaintiff's termination was not the result of a mere heckler's veto but an 'example of the government's accounting for the public's perception of the officers' actions when it considered the potential for disruption of the department's functions." Plaintiffs motion was **denied.**
- (3) Having plaintiff shut down their Twitter account was within defendants' scope of authority.

Legal Analysis: In using the *Pickering* balancing test, the court analyzed the plaintiff's role as a world studies teacher finding that her tweets conflicted with her role and responsibilities (and the mission of the school generally). Additionally, the school board had a *social media* policy which prohibited staff from engaging on social media inside or outside of the classroom and any "behavior that constitutes a violation of district or county policy or that is detrimental to health and welfare of the students." The court found that only a reasonable apprehension of disruption is required as opposed to a substantial disruption standard in *Mahanoy*.

The court also found that the "heckler's veto" didn't apply because such concept is only applicable when "the threat [the speech] assertedly posed to employer interests was not internal disruption by the speech itself, but external disruption by third persons reacting to the speech." However, the court found this not to be the case as there was a disruption to students and staff within the school. As for the Twitter account, the court found the action to be within the discretionary authority of the assistant superintendent due to the circumstances of the situation and the relevant statutory law allowing action to be taken upon religious/ethnic harassment. The court also determined that qualified immunity was applicable to Alexander's actions regarding the Twitter account.

B. *Marquardt v. Carlton*, 971 F.3d 546 (6th Cir. 2020) (Ohio)

Facts: A city employee who was a captain for the city's Emergency Medical Service (EMS) brought a claim under § 1983 action against the city alleging that he was terminated in retaliation for exercising his First Amendment free speech rights when he commented on a social media posting addressing a high-profile police shooting which were mixed with profanity and racially insensitive language as well as expressing regret that he was not able to be the one who did the shooting.

The posts did not identify the plaintiff as an employee of the City, nor were the postings made during the work week. Additionally, the posts were only visible to those whom the plaintiff had as a "friend" on Facebook.

Procedural History: A hearing was held, and it was determined that the plaintiff violated the City's social media policies and was later terminated due to his speech not being "a matter of public concern." Plaintiff then brought a § 1983 claim and the district court granted summary judgment for defendants. Plaintiff appealed.

Holding: The Sixth Circuit **reversed** and **remanded** summary judgment, finding a factual dispute about the whether the speech was public or private and whether plaintiffs interests outweigh the interests of the EMS in its efficient administration of its duties.

Legal Analysis: The court began by analyzing the content of the speech, explaining that since the post was discussing a well-documented shooting that reasonably related to the officers' handling of the encounter, the subject of the post related to that of a general interest and of the value and concern to the public. Explaining that matters do not become personal simply because they are phrased in first person or reflect personal desires.

The court then looked to the form of the speech. The court noted that while the posts were available only to plaintiffs Facebook friends, such communication does not need to be communicated to the general public to be a matter of public concern. Social media's genesis is the ability to exchange ideas on public issues.

Lastly, the court looked at the context of the post. Noting that since the posts were deleted shortly after their coming into existence, the information is limited. While limited, however, there was no indication that the speech concerned primarily a matter of the plaintiffs own personal interests.

C. *Boscarino v. Auto Club Group*, 2023 WL 3170021 (E.D. Mich. 2023) (Appealed to Sixth Cir.)

Facts: Plaintiffs were all Caucasian and served as claims representatives for defendant. One plaintiff made a post about Black Lives Matter ("BLM") protestors lying in a road. Other plaintiffs, also employed by the defendant, commented on the post saying, "speed bumps… these peeps need to get a life or a job… better idea go work at a kids shelter and be a mentor and change this vicious cycle of black violence." (Internal quotations omitted). None of the posts indicated that any plaintiff worked for the defendant. The defendant then conducted an investigation after being anonymously informed of the posts and fired all four plaintiffs. The termination report indicated the factors that contributed to the termination, in pertinent part, were not in accordance with defendant's social media Policy requiring individuals to responsibly conduct themselves in a professional manner that does not adversely affect the defendant's brand and image.

Defendants' social media policy warns against sharing communications that are contrary to the defendants' code of conduct which covers materials that are harassing, discrimination based on race, as well as offensive remarks, jokes, and slurs directed toward protected classes/characteristics.

Procedural History: Plaintiffs brought discrimination claims under § 1981 and ELCRA. The case is currently appealed to the Sixth Circuit.

Holding: The district court **granted** defendants motion for summary judgement finding plaintiffs arguments insufficient to establish their race as the reason for their termination.

Legal Analysis: Plaintiffs cite little supporting case law with much of their arguments based on assumptions.

- (1) Plaintiff first content that plaintiffs were fired because they were Caucasian, arguing that a Hispanic individual who also commented on the post was not fired or even investigated. Defendants countered that this individual declared on company records that they are Caucasian. The court found this to be an insufficient comparator for purposes of § 1981.
- (2) Plaintiffs then also contended that by the substantial evidence of (1) the defendants expressed goal in its code of conduct for the growth of diversity and inclusion, and (2) that plaintiffs were terminated shortly after defendant announced its commitment to diversity

and inclusion and development of a new division dedicated solely to promoting racial equity and inclusion. The court failed to find this to be evidence of racial discrimination against plaintiffs.

- (3) Plaintiffs made many more arguments of this nature, all of which failed.

D. *Hamm v. Williams*, WL 5462959 (N.D. Ohio 2016)

Facts: Plaintiff is a Sergeant and Officer-in-Charge of the Policy Unit in the Cleveland Policy Department. After a highly publicized police chase resulting in police shooting the two unarmed occupants in the car, police involved were indicted. Plaintiff made a post using his own computer and while off-duty expressing support for his fellow officers. A week later, plaintiff posted again commenting that an unidentified individual was upset about his comments and that the individual reported plaintiff to his supervisors. After an investigation, the plaintiff was suspended for ten days without pay for violating nearly thirty provisions of the divisions policies.

Procedural History: Plaintiff filed suit under § 1983 alleging defendants retaliated against his constitutionally protected expression.

Holding: Plaintiff was engaged in constitutionally protected speech and that plaintiff was subject to adverse employment action when he was suspended for ten days without pay. Having successfully presented a prima facie case, the burden shifts to the defendant to provide evidence that the decision would have been the same absent the protected conduct. Plaintiff was **granted** summary judgment regarding this count.

Legal Analysis: In discussing the issue of First Amendment retaliation, there must be a balance between the interests of the employee, as a citizen, in commenting upon public matters, and interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees. When the speech is ordinarily not within the scope of the public employee's duties, they speak in their role as a citizen even if the speech involves the subject matter of their employment. Whether or not it is a matter of public concern depends on whether the speech can be fairly considered as relating to any of political, social, or other concern to the community.

E. *Bertram v. Ohio Dept. of Rehabilitation*, 2015-SUS-12-0229

Facts: Appellant was suspended for ten days due to a social media post consisting of the White House superimposed with a confederate flag with the caption "[n]ow that's more like it! And the South shall rise again!" A co-worker of the appellant saw the post and reported it to the appellee. The post resulted in the appellee disciplining appellant, *inter alia,* for potentially hindering appellant's ability to discharge his duties as well which could bring discredit to appellee.

Procedural History: After investigation, appellant was given a ten-day suspension by appellee. The Review & Recommendation (R&R) recommended that the suspension of Appellant be disaffirmed. Appellant appealed to the State Personnel Board of Review. The State Personnel Board of Review issued a ruling.

Holding: The board **Modified** appellant's suspension to a five-day suspension for violating R.C. 124.34, a disciplinable offence of Failure of Good Behavior to better balance between appellant's actual level of culpability and appellee's own need to review and amend Rule No. 37 and 39.

Legal Analysis: Public employees do not leave their First Amendment rights at the door. The confederate flag is considered a political symbol and is a continuing source of public debate and controversy. The board found there is a heightened need for appellees need for discipline as a quasi-law enforcement organization. Thus, the level of disturbance resulting from appellant's post was sufficient to warrant curtailment of his speech. However, the board also found issues with the **ambiguous** and **broad** rules (37&39) that chill protected speech in some instances.

- Rule 37: any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties.
- Rule 39: Any act that would bring discredit to the employer.

Appellee appealed to the Court of Common Pleas arguing the Board did not have jurisdiction to impute a five-day suspension. It was found that the Court of Common Pleas did not have jurisdiction.

F. *Sargraves v. Ohio Dept. of Rehabilitation and Correction*, No. CVF-07-4559

Facts: Appellant was a Correction Lieutenant at the Madison Correctional Institution ("MCI"). An unidentified individual reported numerous social media postings by Appellant to the Department of Rehabilitation and Correction ("DRC"). The posts consisted of the following:

- A photo of a man kneeling with a gun to head captioned "Shoot your local pedophile."
- A photo of Deadpool, a fictional character, with a hypothetical statement "there's 20 rioters coming at us! 1911 guys with one mag to spare... I only have fifteen bullets so some of you will have to share!"
- An image of a cat at a dinner table commonly used for comedy joking about use of force by police.

- A post depicting a Cartoon Network image of a character slamming his head into a grave with the phrase, "Aramark... How it feels trying to explain things to people at work." Aramark being a nickname of a coworker but also the name of facilities cafeteria services business partner.

At all times appellants Facebook page was viewable by "friends" and "friends of friends." The Review and Recommendation (R&R) conducted by the State of Ohio State Personnel Board recommended termination of employment for appellant arguing that the social media posts were inappropriate and could compromise his ability to effectively carry out his job responsibilities as well as for violating the Departments social media Policy.

Procedural History: Appellant argued that his Facebook page used the anonymous name "Shawn Graves" and thus did not tie him to the DRC. The board found that the fact an individual identified his page despite the use of a fake name was sufficient to show a failure to disconnect appellant from the DRC. The R&R board recommended termination which appellant challenged. The State Personnel Board of Review (the "Board"), after further hearings and objections, modified its decision to a demotion. ODRC then appealed that Final Order to the Court of Common Pleas. The Court of Common Pleas disaffirmed and remanded the matter back to the Board on the basis of an error as a matter of law.

Holding: The Board ordered that appellee's removal of appellant be **Modified** and appellant was **Reduced** to the rank of Correction Officer on the instructions of the Court of Common Pleas not to consider evidence of disparate treatment.

Legal Analysis: The Board noted a lack of clarity in the Appellee's Social Media policy which did not provide a reasonable opportunity for an employee to comply with the policy. The lack of clarity created a lack of notice so that appellee's average employee may experience challenges even in the exercise of commendable good faith effort to fully comply.

Additionally, the court explained that the consideration of disparate treatment was not appropriate as O.A.C. § 124-9-11(A) allows for the State Personnel Board of Review to hear evidence of disparate treatment between *similarly situated employees of the same appointing authority*. For an employee to be similarly situated, they must "have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances..." *Sargraves*, at 21. The court found that the Board erred when accepting appellant's comparators for mitigating purposes. The comparators were employed at different institutions and disciplined by different appointing authorities. Thus, the appellants disparate treatment argument was invalid.

Finally, the Board noted that the initial decision failed to show any demonstration of impact on the appellee's operations.

G. *Spears v. Ohio Department of Rehabilitation and Correction*, No. 22CV-782

Facts: Appellee was a Correctional Lieutenant with the Ohio Department of Rehabilitation and Correction ("ODRC") and had three posts in question on his Facebook page.

- (1) Images of LGBTI and the Confederate Flag with the caption, "If they can fly theirs, we deserve the right to fly ours."
- (2) An image of the Confederate Flag with the caption, "I challenge all of my friends on Facebook to repost this to show that we will not back down from our heritage."
- (3) An image of the Confederate Flag with the caption, "Never apologize for being white."

An officer whom appellee supervised felt that the posts on the Facebook page were inappropriate and offensive and that they violated the ODRC's Anti-Discrimination Policy and Anti-Harassment Policy, resulting in the compromise of appellee's ability to effectively carry out his duties as a public employee in addition to bringing discredit to the ORDC. Appellee was later terminated following an investigation by the ORDC.

Procedural History: Appellee appealed the decision of ORDC. The Administrative Law Judge ("ALJ") found that the appellee violated Rule 12A, 37, and Rule 50. The ALJ concluded that appellee did not violate the ORDC's Anti-Discrimination and Anti-Harassment Policy. The ALJ found the ORDC's punishment to be overly harsh and recommended a sixty-day suspension followed by a reinstatement of the rank Correction Lieutenant. The ORDC appealed to the Court of Common Pleas.

Holding: The Court of Common Pleas **Affirmed** the SPBR's decision.

Legal Analysis: Pursuant to R.C. 119.12, the reviewing court must affirm the order of the SPBR if it is supported by reliable, probative and substantial evidence and is in accordance with law. After review, the court found the decision by SPBR to be reliable, probative and decided with substantial evidence. In determining whether the punishment decided on by SPBR was considered to be consistent with similarly situated individuals, the Court of Common Pleas found that the comparators used were similarly situated – affirming the SPBR.

H. *Fenico et al., v. City of Philadelphia*, 2023 WL 3878396 (3rd Cir. 2023)

Facts: In 2019, the City of Philadelphia reprimanded twelve Appellant police officers for using their Facebook account to publicly denigrate various minority groups and glorify the use of violence. The topics of the posts were said to have violated the Philadelphia Police Department's ("the PPD") Social Media and Networking Policy which prohibited the use of profanity, ethnic slurs, personal insults, "material that is harassing, defamatory, fraudulent, or content that would otherwise not be acceptable in a City workplace..." The posts in question covered multiple various topics such as protesters and their treatment, the use of violence against child molesters, Islam and its followers, refugees, police brutality, and much more. All of the plaintiffs maintained a private Facebook account and engaged in social media activity. They created or commented on posts that

the PPD viewed as insulting, derogatory, and violated the Department's Polices and Code of Ethics.

Procedural History: Because of the PPD's discipline, plaintiffs allege that the City violated their First and Fourteenth Amendment rights as well as rights under the Pennsylvania Constitution. The City filed a Motion to Dismiss. The court found that:

- (1) it was not a violation of the First Amendment since the PPD had an interest in maintaining and preserving public trust, promoting diversity, efficient prosecution, and maintaining orderly internal operations.
- (2) The court found that the Policy was not vague. The plaintiffs all used ethnic slurs, profanity, personal insults, material wat was harassing, defamatory, fraudulent, or discriminatory, or would otherwise not be acceptable in a City workplace.

The Appellant's appealed, claiming the reprimanding constituted First Amendment Retaliation.

Holding: The court **reversed** the dismissal of the Appellant officers' claims and **remanded.**

Legal Analysis: The record provided by the lower court was underdeveloped to such a degree as to find that dismissal of the Officers' action was improper without a more developed record. The court explained that the twelve individual speakers created 250 discrete statements which covered a broad range of topics. It was too complex of a situation to resolve *Pickering* balancing without a more detailed inquiry. Furthermore, the court explained that:

- (1) just because the speech was uttered by a police officer does not affect the extent to which it might touch on matters of public concern. It is undiminished by the fact a state employee was the speaker.
- (2) under *Pickering,* an actual disturbance is not necessary, just the reasonable likelihood of a disruption will satisfy *Pickering*.

Due to the underdeveloped record, the court explains that many of the legal questions do not have sufficient information to make a determinative decision on, further providing reasoning for the decision to reverse dismissal and remand for further record development.

I. *Mahanoy Area School District v. B. L. by and through Levy,* 141 S.Ct. 2038 (2021)

Facts: Mahanoy High School student failed to make the school's varsity cheerleading squad. Over the weekend while off campus at a convenience store, the student made postings to snapchat consisting of temporary images shared with select friends of vulgar language and gestures expressing frustration with the school and its cheerleading team. Upon learning of these posts, the school suspended the student from the junior varsity cheerleading squad for the upcoming year.

Procedural History: The students' parents filed suit in federal court, arguing *inter alia* that the punishment violated the students' First Amendment rights. The District Court granted an injunction ordering the school to reinstate the student based on *Tinker*. The Third Circuit affirmed.

However, reasoned that *Tinker* did not apply because schools had no special license to regulate student speech occurring off campus.

Holding: While public schools may have a special interest in regulating some off-campus speech, the special interests offered by the school are not sufficient to overcome the student's interest in free expression. **Affirmed** Third Circuit court ruling, noting its reasoning is more in line with the concurrence which found *Tinker* did control.

Legal Analysis: Circumstances that implement a school's regulatory interests include:

- (1) serious or severe bullying, harassment, and targeting of students
- (2) threats aimed at teaches, failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activity
- (3) Breaches of school security devises

The court went on to explain that there of three features of off-campus speech that often times distinguish schools' efforts to regulate off-campus speech:

- (1) a school rarely stands *in loco parentis* when a student speaks off campus
- (2) from the student's perspective, regulations of off-campus speech, when coupled with regulation of on-campus speech, include all the speech a student utters during the full 24-hour day
- (3) the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy

The court explained that the school did not stand *in loco parentis* and that there was no reason to believe that the student's parents delegated control of the student's behavior at the convenience store. Additionally, the court rejected the school's argument that it was trying to prevent disruption since the speech was not within the classroom nor was it school sponsored. The court then rejected the school's argument concerning team morale and the negative impact that the post could have on the team. The court explained that "undifferentiated fear or apprehension … is not enough to overcome the right to freedom of expression." Citing *Tinker*.

J. *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407 (2022)

Facts: Appellant worked as a football coach for the high school. After games, he would pray at midfield. He would do this alone until players wanted to join him in prayer. Appellant never instructed anyone to join in. This practice went on for years without incident until the District's Superintendent heard about it. Upon learning about this practice, the superintendent sent Appellant a letter explaining that this practice was no longer permitted. The appellant, at first cooperating but after feeling guilty for not praying, asked the district for permission to continue his practice alone at midfield after games. Appellant and the School District ("Appellee") would continue to go back and forth attempting to find a balance. After kneeling after a game and bowing his head,

however, the appellant was placed on administrative leave and prohibited from participating in any capacity in the football program. A report recommended not rehiring the appellant.

Procedural History: District court judge granted summary judgment for the school district. Appellant appealed to the 9th Circuit who then affirmed the district judge. Appellant then appealed to the Supreme Court who granted cert.

Holding: The Court ruled that the lower courts erred when they affirmed the school district's decision to terminate appellant's employment. The court found that appellant was not speaking on behalf of the school, nor was he engaged in an activity that was the responsibility of a public employee.

Legal Analysis: In balancing the rights of the employee and the interests of government, the Court explained there is a two-step process. The first step is a threshold inquiry into the nature of the speech at issue. When the employee is speaking as a citizen on a matter of public concern, the courts should proceed to step two. At step two, courts should engage in a balancing of the competing interests and its consequences.

When appellant was engaged in prayer, he was not engaged in speech "'ordinarily within the scope' of his duties as a coach. *Kennedy*, at 2411 (Syllabus). Nor was he conveying a government message or policy. Put simply by the Court: "[Appellant's] prayers did not owe their existence to [his] responsibilities as a public employee."

K. *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016)

Facts: Police officers brought action against city and police chief under Section 1983, alleging that department's social networking policy violated their First Amendment rights and that they were retaliated against for seeking to exercise those rights. Two veteran officers engaged in a Facebook conversation about the pitfalls of "rookie copes becoming instructors." The court considered the police department's social media policy that prohibited "[n]egative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department" – and, even more broadly, the dissemination of any information "that would tend to discredit or reflect unfavorably upon" the department.

Analysis: The Fourth Circuit invalidated that policy as "unconstitutionally overbroad." In particular, the court concluded that there could be "no doubt" that the policy prohibited protected speech, inasmuch as it "prevent[ed] plaintiffs and any other officer from making unfavorable comments on the operations and policies of the Department, arguably the 'paradigmatic' matter of public concern." And the Fourth Circuit emphasized the "astonishing breadth" of the policy, be just about anything – or on the 'specific conduct of supervisors or peers' – which, again, could be just about anything." The court stated that "if the Department wishes to pursue a narrower social media policy, then it can craft a regulation that does not have the chilling effects on speech that the Supreme Court deplored."

L. *Hernandez v City of Phoenix*, 432 F. Supp. 1039, 1068-69 (D. Ariz. 2020)

Facts: Sergeant with city police department and group dedicated to fair representation of law enforcement officers sought preliminary in junction based on prospective discipline of sergeant for his previous social media posts and to enjoin enforcement of department's social media policy. On or about June 1, 2029, a group known as the Plain View Project publicized several Facebook social media posts made by various law enforcement officers. The posts of a number of officers in the Department, including Plaintiff Hernandez, were publicized.

Analysis: Plaintiff Hernandez is not likely to succeed on the merits of his claim nor are there serious questions about the merits because Plaintiff Hernandez did not speak on a matter of public concern. Alternatively, under Pickering, Defendants had an adequate justification for treating Plaintiff Hernandez's speech differently from a member of the general public.

M. *Fenico v. City of Philadelphia* – F.Supp.3d – 2022WL 226069 (E.D. Pen., Jan. 26, 2022)

Facts: This case is about public employees' social media use and a government entity's decision to discipline their employees based on past Facebook posts. The Plaintiffs are a group of current and former members of the Philadelphia Police Department ("the PPD") who were reprimanded because of content they posted on their personal Facebook accounts. The posts in question spanned a multitude of topics such as a protestor and their treatment, the use of violence against child molesters, Islam and its followers, refugees, police brutality, and much more. Because of the PPD's discipline, Plaintiffs alleged Defendant violated their First and Fourteenth amendment rights as well as rights under the Pennsylvania Constitution.

Argument: Plaintiffs alleged that the City violated their Fourteenth Amendment rights because: (1) the PPD's social media policy is vague and overbroad, as applied to them; and (2) the PPD discriminatorily enforces the policy. They argue that the Defendant "arbitrarily and capriciously applied a double standard as to what speech is acceptable and what is not.": Plaintiffs assert that while other could post and face no consequences, each of the Plaintiffs were charged with violating the Policies. Id. At 34.

Holding & Analysis: The Court found that the Policy was not vague. Here, Plaintiffs lack standing because the PPD's social media Policy is not unconstitutionally vague as applied to them. The PPD's policy prohibited the use of ethnic slurs, profanity, personal insults, material that is harassing, defamatory, fraudulent or discriminatory, or content and communications that would not be acceptable in a City workplace or under city agency, policy or practice on social media. The directive also warned employees that the "personal use of social media has the potential to impact the department as a whole, as well as individual members serving in their official capacity." Directive 6.10, Section 2(A). It further informed the employees that "[t]here is no reasonable expectation of privacy when engaging" in social media use and that anything posted "may be obtained for use in criminal trials, civil proceedings, and departmental investigations." Id. At Section 4(H). The Plaintiffs all used ethnic slurs, profanity, personal insults, material that is harassing defamatory, fraudulent, or discriminatory, or content and communications that would

not be acceptable in a City workplace. Because the policy is not vague as applied to their conduct, the Plaintiffs lack standing.

N. *Carney v City of Dothan*, 158 F.Supp.3d 1263, 1285-86 (M.D. Ala. 2016).

Facts: Carney, a former police officer, alleged that the Department engaged in racial discrimination when it suspended her without pay and placed her on probation for violations of its social media policy. According to Carney's allegations the Department failed to discipline officers who committed similar or worse offenses. Because Carney cannot make out a prima facie case of discrimination, and because the Department has offered an unrebutted legitimate, nondiscriminatory reason for disciplining Carney, the City of Dothan is entitled to summary judgment on this aspect of Carney's claims.

Analysis: Carney failed to make out a prima facie case of discrimination. Specifically, she has not shown that the Department treated similarly situated white officers more favorably. The Department suspended Carney because it determined that her Facebook comments, which it determined to be supportive of Donner's murderous actions, violated its social media policies. Carney complained that other officers posted on social media in violation of the policy, but the Department investigated those other comments and determined that they were not violative of city policy. These officers cannot be considered similarly situated because their posts were not objectional in the way Carney's posts were. The undisputed evidence establishes that the Department did in fact discipline other officers, both black and white, for posts that did violate its policies. Even assuming arguendo that Carney established a prima facie case, the City of Dothan is entitled to summary judgment based on its legitimate, nondiscriminatory reason for disciplining Carney. The Department determined after a full investigation that Carney's Facebook commentary ran afoul of its established policies which is sufficient to constitute a legitimate, nondiscriminatory reason. Carney has offered no evidence that this reason was pretextual.

V. PRIOR QUESTIONS – Answers Are Still the Same.

1. Is the regulation of off-duty use of Social Media a violation of 1st amendment?

It depends. First, public employees have First Amendment rights, but private employees do not have those same protections. In *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.*, 391 U.S. 563 (1968), the Supreme Court established a framework to balance public employee's free speech rights with the government's interest in efficient operations. Under the *Pickering* framework, one element that the plaintiff has to establish is that they spoke as a private citizen rather than a public employee. Courts determine that you are speaking as a private citizen or "off-duty," when the statements are made in the speaker's capacity as a citizen with no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform. *See Eng v. Cooley*, 552 F.3d 1062, 1071–72 (9th Cir. 2009).

In a recent decision, the Supreme Court explained that speech is not the product of an official duty when the speech does not owe its existence to the responsibilities of a public employee. *Kennedy v. Bremerton Sch. Dist.*, 132 S.Ct. 2407 (2022).

2. Are all Social Media Posts considered public?

Privacy settings on an employee's social media account control who are allowed to view the individual's posts. Facebook, for example, allows restrictions permitting only "Friends" to view the account holders post. There is also a "Friends of friends" setting which permits far more people to see that individual's posts. More often than not, these settings have little impact on determining the protections of the employee. It is important that social media policies inform their employees that while privacy settings are important, they do not shield an employee from discipline for posting content that may violate their employer's policy.

3. What are the risks and responsibilities of a Social Media policy?

Social media platforms allow individuals to interact and share their viewpoints on topics – both mundane and meaningful. In turn, such open platforms can entice some to make impulsive comments that can have lasting implications. For employers, it is their prerogative to take action against a post or comment that could ruin its reputation or become disruptive. Thus, it is the employer's responsibility to clearly articulate the appropriate use of social media for employees. Failure to clearly articulate social media usage can render the social media policy invalid. *Sargraves v. Ohio Dep. Of Rehab. and Corr.*, No. CVF-07-4559. Specifically, it is the employer's responsibility to detail the dos and don'ts, regulatory or compliance obligations, and to explain workplace expectations. However, employers need to be careful that the policy does not place an

undue limitation on an employee's constitutional rights by limiting the forum or content where employees can engage in discussion. It is also important for employers to be aware of the

4. I have a Social Media policy; do I need to update it?

Yes, it is important that a social media policy is updated to reflect the continuously evolving nature of social media and platforms. Reviewing a policy on a quarterly or semi-annually basis allows the policy to remain up to date. An employer should review decisions by the National Labor Relations Board and relevant cases to revise the policy accordingly.

5. What is the purpose of having a social media policy? Do I need one?

a. Broad policy vs. narrow policy?

The purpose of a social media policy is to set expectations for appropriate behavior for the employees' use of social media platforms. Outlining acceptable behavior is encouraged due to the fact that social media is everywhere, and the majority of people use some type of platform. These policies are going to differ from one company to another, so it is important for a company to have a policy that aligns with their company culture. Ideally, a policy would be broad enough to cover a variety of scenarios and encompass all platforms. However, courts have held that policies are unconstitutionally overbroad if the policy is blanket restriction curtailing employees' speech. *See O'Laughlin v. Palm Beach County*, --F.4th ---, 2022 WL 982870 (11th Dist. Apr. 1, 2022); *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016).

6. Does an organization need a different policy by section/agency? Or one size fits all?

There is no one-size-fits-all social media policy. An organization's policy should be tailored to their own business objectives and culture. The policy must reflect the company's values – just like any other policy and procedure. Additionally, a social media policy must take into account the structure of the company and consider the specific rules and regulations the organization is subject to. Lastly, it is important to find a balance between providing clear guidance on acceptable behavior without infringing on individual's rights.

7. If an organization's computer use policy mentions social media. Do I need a separate policy?

Similar to question 5, an organization's policy should be unique to its objectives and structure. An organization's computer use policy may encompass employee's social media use; however, it may be more beneficial to have a separate policy that clearly delineates acceptable social media behavior.

8. Should an organization have a Social Media online post Retention Policy for agency posts?

Organizations are encouraged to have a retention policy for agency posts – for reasons including compliance with public record laws and litigation purposes. Some states require that social media content be archived as part of public record, thus are subject to public record requests. Additionally, agency's social media use must be in compliance with federal and state laws, i.e., the First Amendment, therefore retaining records makes it easier and quicker to locate and produce records related to potential litigation purposes.

9. If an organization has a discipline grid in the employee policy manual, is that sufficient if the grid addresses intern/external social media posts? If it is in the grid, do you need a policy?

If the employee policy manual already implements a discipline grid that pertains to social media posts, then a separate policy may not be required. However, a separate policy for social media use should be considered. This policy can provide clear and explicit guidelines in regard to what constitutes appropriate use of social media in the work context. The employee should be able to clearly know whether their actions are in violation of a policy that warrants discipline.

10. Use of agency HR to monitor/review social media for the hiring process?

It has become common in the hiring process for an employer to check a candidate's social media profile as a way to vet them. Browsing a candidate's social media can provide a sense of who that person is and what their interests are. It also gives employers a chance to discover any immediate red flags such as illegal activity or violent behavior.

11. Can an employee be disciplined for off-duty posts without a social media policy? If not, what recourse does the agency have?

An employer does not necessarily need a social media policy to discipline an employee for a social media post. An employee's post may violate other company policies based on the impact of the post. However, a tailored and comprehensive social media policy is recommended to clarify the types of activities that are prohibited while acknowledging that certain speech is permitted.

12. Should the policy address on-duty and off-duty conduct?

The policy can address both types of conduct. A social media policy should facilitate a clear understanding of the company's expectation about on-duty use of social media. Additionally, the policy should address the potential impact that off-duty conduct may have in the workplace. However, an employer should be careful not to overregulate off-duty conduct that chills employees' speech. It is also important to ensure that the distinction between on-duty and off-duty is clear to the employees so that they can reasonably understand when they are speaking as an employee.

13. Recording and sharing video as a live event (Board Meeting/Public event) on-duty vs. off-duty?

Whether an employee can record and share a video should be described in the social media policy. The National Labor Relations Board has said it is unlawful to implement a blanket ban on video recording in the workplace since that could deter employees from exercising their rights. However, an employer may want to put in place a policy that prohibits secretive recording or sharing events that may disclose confidential or propriety information. Moreover, employers should be mindful that many states prohibit any kind of video or audio recording where all participants do not consent to being recorded.

14. Where is the line in off-work conduct in a Social Media policy?

In determining the line of off-work conduct on social media, courts look at the *Pickering* framework outlined by the Supreme Court. As mentioned in question 1, one element that courts determine is whether the post was made by an individual as a private citizen or in their employment capacity. Another element courts analyze is whether the employee spoke on a matter of public concern. The Supreme Court held that an issue is of public concern if it relates to any matter of political, social, or other concern to the community, or is a subject of legitimate news interest. *City of San Diego v. Roe*, 543 U.S. 77 (2004). Finally, under *Pickering*, the court will weigh the interests of the employee as a citizen in commenting upon matters of public concerns against the government as an employer in promoting the efficiency of the public services it performs. The Supreme Court has cautioned, however, that "[t]he inappropriate or controversial character of a

statement is irrelevant to the question of what it whether it deals with a matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

15. What are the different levels of discipline for the various types of offenses?

Disciplinary action should depend upon the severity of the posts impact upon the company's operation and reputation. If a social media post violates a company's policy, then disciplinary action would be appropriate. However, such action could range from warnings and consulting to termination. It is recommended to speak with the employee about the impact of the post, why it was not appropriate, and provide further education to minimize future occurrences. Additionally, ensure that the social media policy clearly articulates that the post is of the type that warrants disciplinary action and to what degree. Ambiguous and broad rules may be held invalid and lead to the inability to effectively enforce the interests of the organization.

16. Are employee's discussions of terms and conditions of employment on social media platforms protected speech under 4117?

According to the National Labor Relations Board, using social media can be a form of protected concerted activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on social media platforms. Such activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer's products or services without relating your complaints to any labor controversy. Additionally, federal laws provide individuals the right to join together with coworkers to improve lives at work – this includes joining together via social media.

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