ASSOCIATION OF WISCONSIN SCHOOL ADMINISTRATORS

SLATE CONFERENCE

SOCIAL MEDIA AND THE LAW

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Presented By:

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I. EMPLOYERS, EMPLOYEES, AND STUDENTS USE OF SOCIAL MEDIA

A. Definitions Of Social Media

Social media include various online technology tools that enable people to communicate easily via the internet to share information. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications.

1. Social Networking Sites.

   a. **Facebook** is a website that allows individuals to create and customize profiles about themselves, and provide information by posting photographs, lists of personal interests, contact information, and other personal information. Individuals may send private messages to others in a manner similar to e-mail. Individuals may also communicate with other users by posting messages via a feature known as a "wall," and can choose to limit access to their information through privacy settings.

   b. **MySpace** is an online, Internet community that allows users to create and customize personal profiles with information about themselves. Profiles contain "About Me" and "Who I'd Like to Meet" sections for users to complete with their personal information. MySpace also allows users to add photographs and images to their profiles. Additionally, it allows users to upload their own music and create their own blogs.

   c. **Twitter** is a "micro-blogging" site that allows users to send and receive updates known as "tweets." Tweets are limited to 140-character-long posts that are displayed on a user's page and delivered to that user's subscribers. Users may restrict access to their tweets to their friends, or allow anybody to access them.

   d. **LinkedIn** is a business-oriented social networking site. The purpose of the site is to allow registered users to maintain a list of contact details of people they know and trust in business. The people on the list are called Connections.

   e. **Google+** is Google's version of a social media site. With a Google profile, the user has access to five basic components: (1) Circles, (2) Sparks, (3) Hangouts, (4) Instant Uploads and (5) Huddle. *Circles* lets the user group his or her contacts, e.g. friends, work, family. Like Facebook,

this feature lets the user share information with groups of contacts instead of hitting everyone with the latest update at once. *Sparks* acts like an RSS reader or Facebook news feed, letting the user input things he or she is interested in and pushing relevant content to the user. *Hangouts* features live group video chats, aiming to foster spontaneous meetings with up to 10 people. A user can also alert certain groups of friends when he or she is hanging out. *Instant Uploads* takes care of the increasingly important mobile aspect of social networking, automatically posting users' phone pictures and videos to a private album. From there, users can decide if and with whom they want to share their media and whether they want to add location data to every Google + post. Finally, *Huddle* is a group texting feature that lets the user group chat through the phone.

2. **Blogs** (a contraction of the phrase "website log") are online journals where registered users are provided their own website on which to post writings, photographs, and video. A "blogger" may determine whether to make his or her blog available to the public or to limit access to approved users.

3. Image Sharing Sites.

   a. **YouTube** is a video-sharing website on which users can upload, share, and view videos. Unregistered users can watch the videos, while registered users are permitted to upload an unlimited number of videos.

   b. **Flickr** is a photo management and sharing application website. Unregistered users can view personal photographs and other images, while registered users are permitted to upload images. This service is widely used by bloggers to host images that they embed in blogs and social media.

B. Use Of Social Media

1. As of September 2009, 93% of American teens between the ages of 12 and 17 went online.

2. As of December 2009, 93% of adults ages 18 to 29 went online; 81% of adults ages 30 to 49 went online; 70% of adults ages 50 to 64 went online; and 35% of adults ages 65 and older went online.

3. As of 2009, 73% of wired American teens used social networking websites.

4. As of 2009, 47% of adults who went online used social networking sites. For online adults ages 18 to 29, 72% used social networking websites.

5. Facebook is currently the most commonly-used online social network among adults. Among adult profile owners, 92% have a profile on Facebook, 29% have a profile on MySpace, 18% have a LinkedIn profile, and 13% have a Twitter account.

6. Facebook and Twitter are used more frequently by their users than LinkedIn and MySpace. Some 52% of Facebook users and 33% of Twitter users engage with the platform daily, while only 7% of MySpace users and 6% of LinkedIn users do the same.

Pew Research Center, *Social Media & Mobile Internet Use Among Teens and Young Adults*, February 3, 2010, and *Social Networking and our Lives*, June 16, 2011.

II. SCHOOL DISTRICT USE OF SOCIAL MEDIA IN THE HIRING PROCESS

A. Employers Are Using Social Media To Screen Applicants

1. A 2009 survey from CareerBuilder.com found that nearly half of employers use social networking sites to screen job candidates.

2. The survey of more than 2,600 hiring managers revealed that 45 percent of employers used social networking sites to research candidates and 35 percent of employers rejected applicants based on what was uncovered on social networking sites. Of those 35 percent:

   a. 53 percent cited provocative/inappropriate photographs or information.

   b. 44 percent cited content about drinking or using drugs.

   c. 35 percent cited bad-mouthing of previous employers, co-workers or clients.

   d. 29 percent cited poor communication skills.

e. 26 percent cited discriminatory comments.

f. 24 percent cited misrepresentation of qualifications.

g. 20 percent cited sharing confidential information from a previous employer.

[http://thehiringsite.careerbuilder.com/2009/08/20/]

B. Risks Employers Face When Conducting Social Media Background Checks

1. Discrimination Claims

Employers who conduct background checks using social media may obtain information about applicants that they are prohibited from asking about on an application or in an interview. Employers need to be aware of the following federal and state laws when screening for and hiring new employees.

a. Federal Law

i. Title VII of the Civil Rights Act of 1964 (Title VII)

Title VII prohibits discrimination against individuals because of (1) race, (2) color, (3) religion, (4) sex, or (5) national origin.

ii. Fair Labor Standards Act (FLSA) and Equal Pay Act (EPA).

FLSA-Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting full-time and part-time workers in the private sector and in Federal, State and local governments.

EPA-Prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort and responsibility for the same employer.

iii. Age Discrimination in Employment Act of 1967 (ADEA).

Prohibits discrimination on the basis of age for anyone age 40 and over.

iv. Americans with Disabilities Act of 1990 (ADA).

Prohibits discrimination based on disability in employment practices.

b. State Law

Wisconsin Fair Employment Act (WFEA), prohibits discrimination on the following bases:

i. Age
ii. Ancestry
iii. Arrest/Conviction
iv. Color/Race
v. Creed
vi. Disability
vii. Marital Status
viii. Military Service
ix. National Origin
x. Sex
xi. Sexual Orientation
xii. Use or Nonuse of Lawful Products

2. Invasion of Privacy

Wisconsin recognizes an individual's right to privacy. *See* Wis. Stat. § 995.50. An invasion of privacy includes, "Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass." Wis. Stat. § 995.50(2)(a).

Employers who access applicants' information stored on social media sites should proceed with caution. Generally, if an applicant uses social media and his/her profile is open to the public, then he or she will not have a claim for invasion of privacy. However, under no circumstances should an employer ever access an applicant's information on a social media site through false pretenses.

3. Inaccurate information

Employers who use social media to obtain information about applicants risk accessing information about the wrong person, especially when an applicant has a common name. Further, social media profiles may be created and maintained by someone other

than the person named in the profile. Therefore, the information obtained through this imposter profile may be false.

C. Court Cases

1. *Gaskell v. University of Kentucky,* 2010 WL 4867630 (E.D. Ky., November 23, 2010).

   In July 2007, Dr. Gaskell saw the position of Observatory Director at the University of Kentucky advertised in the Job Register of the American Astronomical Society and applied for the position. In October 2007, Gaskell was invited to the University of Kentucky for a personal interview.

   One of the committee members conducted an internet search for information about Dr. Gaskell, and found his UNL website which linked to Gaskell's personal web site containing an article titled "Modern Astronomy, the Bible, and Creation."

   In part, due to his beliefs in creationism, which were revealed through his website, the University of Kentucky chose to hire someone other than Dr. Gaskell for the position.

   Dr. Gaskell filed suit against the University alleging discrimination on the basis of religion in violation of Title VII of the Civil Rights Act of 1964.

   The case settled for $125,000.

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

   From June 2002 until May 2006, Stacy Snyder attended Millersville University, where she majored in education. As part of the required education curriculum, Ms. Snyder completed various field assignments at area schools, where she observed teachers and taught two mini-lessons. During the Spring Semester of 2006, Ms. Snyder was enrolled in the University's Student Teaching Program, which entailed considerably greater responsibilities, including lesson and curriculum planning, teaching a full course load, and administering exams.

   During orientation, the University cautioned Ms. Snyder and the other student teachers not to refer to any students or teachers on their personal webpages. Contrary to the advice and directives she received, Ms. Snyder sought to communicate about personal matters with her students through the MySpace webpage that she

maintained throughout her placement. On several occasions, she informed the students during class that she had a MySpace webpage.

Ms. Snyder's posting on her MySpace webpage included a photograph that showed her wearing a pirate hat and holding a plastic cup with a caption that read "drunken pirate." Teachers responsible for supervising Ms. Snyder in the Student Teaching Program learned about Ms. Snyder's MySpace webpage and her interactions with students on the webpage. As a result of their complaints related to the webpage, Ms. Snyder was removed from her Student Teaching assignment.

Shortly thereafter, the University determined that Ms. Snyder had not successfully met the prerequisites for obtaining the degree of Bachelor of Science in Education. Ultimately, Ms. Snyder was issued her degree, but she was not issued a licensed to teach.

In 2008, Ms. Snyder filed suit against the University alleging that it violated her First Amendment rights. The federal judge ruled against Ms. Snyder, stating that the university is under no obligation to award the teaching degree without the required hours of student teaching. The judge also stated that a teacher's First Amendment rights pertain to public matters only, not personal.

3. *Fisher v. Department of Veterans Affairs*, 2009 WL 1885072 (E.D. Mich. 2009).

Deborah Fisher was employed by the Department of Veterans Affairs for 38 years when she was placed on a performance improvement plan, which she alleges was based on her age. Ms. Fisher retired shortly after being placed on the performance improvement plan.

As evidence supporting her claim of age discrimination, Ms. Fisher submitted an article wherein the Secretary of the Department was quoted as saying that he was happy to see young workers at the VA because "they understand computers. They know Facebook."

The court dismissed her claim because Ms. Fisher's retirement did not constitute a constructive discharge. The court concluded that her working conditions were not objectively intolerable such that a reasonable person would be compelled to resign.

D. Steps Employers May Take To Minimize Risks Associated With Conducting Social Media Background Checks

1. Obtain consent to conduct a criminal background check, as well as an internet-related background check after a conditional offer has been extended to an applicant.

2. Develop a clear internal policy and documented training regarding internet-related background checks not being conducted in violation of state and federal discrimination laws. This policy and training should make it clear that only factors relevant to job performance will be considered.

3. Designate person not involved in the hiring decision-making to conduct the internet-related background check. This person will then only transmit permissible information to the person making the hiring decision.

III. STUDENT MISUSE OF SOCIAL MEDIA

A. Introduction To School Discipline For Student Misuse Of Social Media

Student Rights: First Amendment

Students have a First Amendment right to create and express their views using various forums, including electronic forums, but that right is not absolute in the context of the special characteristics of the school setting. Student speech, including off-campus speech, may be regulated and disciplined by school officials under certain circumstances without violating students' free speech rights.

B. School Board Authority

1. Electronic Communication Devices (Wis. Stat. § 118.258).

   Each school board may adopt rules prohibiting students from using or possessing an electronic communication device while on premises owned or rented by or under the control of a public school. If the school board adopts such rules, it must provide a copy of the rules to each student annually.

2. Student Suspensions (Wis. Stat. § 120.13(1)(b)(2)(d)).

3. Student Expulsions (Wis. Stat. § 120.13(1)(c)1.).

   a. Repeated refusal or neglect to obey the rules established by the school district.

   b. Conduct while at school or while under the supervision of a school authority which has endangered the property, health and safety of others.

   c. Conduct while not at school or while not under the supervision of a school authority which has endangered the property, health and safety of any employee or school board member of the school district in which the pupil is enrolled.

   d. Knowingly conveying or causing to be conveyed any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives.

   e. Possession of a firearm, while at school or while under the supervision of a school authority.

   f. If the pupil is at least 16 years old and has repeatedly engaged in conduct while at school or while under the supervision of a school authority that disrupted the ability of school authorities to maintain order or an educational atmosphere at school or at an activity supervised by school authority and that such conduct does not otherwise constitute grounds for expulsion.

C. Wisconsin Expulsion Cases

1. **A.S. by the West Allis School District, Decision and Order No. 568 (DPI, March 13, 2006)** A pupil's expulsion was upheld where the student who, from his home computer, threatened to bring a gun to school and kill students.

2. **S.B. by the Gilmanton School District, Decision and Order No. 572 (DPI, May 1, 2006).** A pupil's expulsion was upheld where student used his home computer and threatened to bring a gun to school and kill students.

3. **D.J.S. by the Hartford Union High School District, Decision and Order No. 550 (DPI, July 8, 2005).** A pupil's expulsion was upheld where a student compromised the security of the school's computer network by illegally obtaining and using a staff member's password.

D. Court Cases

1. Student first amendment rights to use social media

a. ***T.V. v. Smith-Green Community Sch. Corp.,*** **--- F.Supp.2d ----, 2011 WL 3501698 (N.D. Ind. Aug. 10, 2011).**

Facts: T.V. and M.K. were students entering 10th grade at a public high school. T.V. and M.K. were both members of the high school's volleyball team, and M.K. was also a member of the cheerleading squad and show choir. A couple weeks prior to the volleyball try-outs for the coming year, T.V. and M.K., and a number of their friends had sleepovers at M.K.'s house. Prior to the first sleepover, the girls bought phallic-shaped rainbow colored lollipops. During the first sleepover, the girls took a number of photographs of themselves sucking on the lollipops. Another photograph involved a fully-clothed M.K. sucking on one lollipop while another lollipop was positioned between her legs and a fully-clothed T.V. pretended to suck on it. At another slumber party, more pictures were taken with M.K. wearing lingerie and the other girls in pajamas. One of these pictures shows M.K. standing while talking on the phone as another girl held one of her legs up in the air, with T.V. holding a toy trident as if protruding from her crotch and pointing between M.K.'s legs. In another, T.V. is shown bent over with M.K. poking the trident between her buttocks. A third picture showed T.V. positioned behind another kneeling girl as if engaging in anal sex. In another picture, M.K. posed with money stuck into her lingerie (stripper style).

T.V. posted most of the pictures on her MySpace or Facebook accounts, where they were accessible to persons she had granted "friend" status. Some of the photos were also posted on Photo Bucket, where a password was necessary for viewing. None of the images identified the girls as students at their high school. Neither T.V. nor M.K. ever brought the images to school either in digital or any other format. A few weeks after the pictures were posted; two separate parents contacted the principal concerned about the photos. The student handbook contained a provision that stated: "If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year."

Within a day of the principal's receipt of the photographs, he informed M.K. and T.V. that they had violated the athletic code and faced suspension from extracurricular and co-curricular activities. The conclusion that the photographs represented a violation of the student handbook coupled with the anticipation of potential school disruption from the situation served as the basis for the discipline imposed. The principal informed the girls that they were suspended from extracurricular and co-curricular activities for a calendar year, but that they could reduce their punishment by making three visits to a counselor and then meeting with the school's Athletic Board to apologize for their actions. The girls then brought an action alleging a violation of their First Amendment rights and that the school's policy was unconstitutionally vague and overbroad.

Holding: The court first concluded that as a matter of law, the conduct in which M.K. and T.V. engaged, and that they recorded in images, which led to their punishment by the school, had a particularized message of crude humor likely to be understood by those they expected to view the conduct, and therefore was sufficiently expressive as to be considered within the ambit of the First Amendment. Further, the court concluded that whether the punishment of T.V. and M.K. was based on the acts depicted in the photographs, the taking or existence of the images themselves, or the posting of the photographs to the internet, each possibility qualified as "speech" within the meaning of the First Amendment.

After concluding that the students' actions constituted speech within the meaning of the First Amendment, the court then explored whether the speech was unprotected by way of being obscene or child pornography. The court concluded that the photographs did not constitute obscenity or child pornography.

Next, the court determined that no reasonable jury could conclude that the photos of T.V. and M.K. posted on the internet caused a substantial disruption to school activities, or that there was a reasonably foreseeable chance of future substantial disruption. Therefore, the court granted summary judgment to T.V. and M.K. on the issue of whether they were punished in violation of their First Amendment Rights. Finally, the court held that the provision in the

student handbook on conduct "out of school that brings discredit or dishonor upon [the student] or [the] school" is impermissibly overbroad and vague under constitutional standards.

NOTE: On August 29, 2011, the parties agreed to leave the case open pending the result of a related case.

b. ***Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. July 27, 2011).**

Facts: Kara Kowalski, a 12th grade student at a public high school, created a discussion group webpage on MySpace.com using her home computer. This group's heading was titled "S.A.S.H." Under this title, she posted the statement, "No No No Herpes, We don't want no herpes." Kowalski claimed in her deposition that "S.A.S.H." was an acronym for "Students Against Sluts Herpes," but a classmate, Ray Parsons, stated that it was an acronym for "Students Against Shay's Herpes," referring to another student at the high school who was the subject of discussion on the webpage. After creating the group, Kowalski invited approximately 100 people on her MySpace "friends" list to join the group. Approximately two dozen students at the high school responded and joined the group. Parsons was the first to join the group. Parsons uploaded a photo of himself and a friend holding their noses while displaying a sign that read, "Shay has Herpes." The record of the webpage shows that Kowalski promptly responded, stating, "Ray you are soo funny!=)" It showed shortly thereafter, and she posted another response to the photograph, stating that it was "the best picture [I]'ve seen on myspace so far!!!" Several other students posted similar replies. Parsons also uploaded to the "S.A.S.H." webpage two additional photographs of Shay N., which he edited. In the first, he had drawn red dots on Shay N.'s face to simulate herpes and added a sign near her pelvic region, that read, "Warning: Enter at your own risk." In the second photograph, he captioned Shay's face with a sign that read, "portrait of a whore." The commentary on the "S.A.S.H." webpage mostly focused on Shay. A few hours after the photographs and comments had been posted to the MySpace.com page, Shay's father called Parsons and expressed his anger over the photographs. The next morning, Shay's parents, together with Shay, went to the high school and filed a harassment complaint with the vice principal of the school

and they provided her with a printout of the "S.A.S.H." webpage.

School administrators concluded that Kowalski had created a "hate website," in violation of the school policy against "harassment, bullying, and intimidation." For punishment, they suspended Kowalski from school for 10 days and issued her a 90-day "social suspension," which prevented her from attending school events in which she was not a direct participant. After Kowalski's father asked school administrators to reduce or revoke the suspension, her out-of-school suspension was reduced to 5 days, but the 90-day social suspension was retained. As a result of the discipline imposed on her, Kowalski brought suit against the school alleging that her First Amendment rights were violated by being punished for speech that occurred outside the school.

Holding: The court recognized that there is a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the school-house gate. However, the court did not define that limit because it was satisfied that the nexus of Kowalski's speech to the high school's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being. The court concluded that they did not need to resolve whether the speech was in-school speech and therefore whether *Fraser* could apply because the school district was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it "interfered with the school's work and collided with the rights of other students to be secure and to be let alone." The court also reasoned that it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the "S.A.S.H." group's members and the target of the group's harassment were the high school's students.

NOTE: The student filed a petition for certiorari with the U.S. Supreme Court on October 11, 2011.

c. ***Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. June 13, 2011).**

Facts: A high school senior created an online parody profile of his principal while off-campus and received a ten-day suspension. The district punished him for causing disruptions of the normal school process; harassing a school administrator; engaging in gross misbehavior; using obscene, vulgar, and profane language; violating the school's computer policy; and using school pictures without authorization. The student was also placed in an alternative curriculum program and was forbidden from attending school-sponsored events and graduation. The student challenged his punishment by asserting that the school violated his First Amendment right to free speech.

Holding: The Third Circuit held that the student's use of the district website did not constitute entering the school, and that the district was not empowered to punish his out of school expressive conduct under the circumstances in this case. The Third Circuit affirmed the district court's grant of summary judgment to the student on his First Amendment claim.

NOTE: The School District filed a petition for certiorari with the U.S. Supreme Court on October 18, 2011.

d. ***J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. June 13, 2011).**

Facts: Two eighth-grade girls created an off-campus myspace.com profile that appeared to be a fictitious, lewd, and vulgar self-portrayal of their middle school principal and each girl received a ten-day suspension. The school district concluded that the profile violated the district's acceptable use policy because it misappropriated the principal's photo from the school district's website without permission. District staff concluded that the profile qualified as a level-four infraction under the middle school discipline code by making false accusations about a school staff member. A number of staff members testified that the profile disrupted school because two teachers had to quiet their classes when students talked about the profile, a guidance counselor had to proctor a test so another administrator could attend a

meeting, and two students decorated the suspended students' lockers upon their return. One of the students challenged her punishment by asserting that the district violated her First Amendment right to free speech.

Holding: The Third Circuit assumed, without deciding, that *Tinker* applies to J.S.'s speech in this case. The court in *Tinker* held that "to justify prohibition of a particular expression of opinion," school officials must demonstrate that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance. The Supreme Court has carved out some narrow categories of speech that a school may restrict even without the threat of substantial disruption. The first exception is set out in *Fraser*, which the Third Circuit interpreted to permit school officials to regulate "'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school. The second exception is articulated in *Hazelwood Sch. Dist. v. Kuhlmeier*, which allows school officials to "regulate school-sponsored speech on the basis of any legitimate pedagogical concern. The third exception appears in *Morse*, where the Supreme Court held that "[t]he special characteristics of the school environment, and the governmental interest in stopping student drug abuse… allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."

The Third Circuit determined that the facts in this case did not support the conclusion that a forecast of substantial disruption was reasonable. The Third Circuit stated that they could not apply *Tinker's* holding to the actions in this case. The Third Circuit pointed out that if *Tinker's* black armbands (an ostentatious reminder of the highly emotional and controversial subject of the Vietnam War) could not "reasonably have led school authorities to forecast substantial disruption of or material interference with the school activities," neither could J.S.'s profile, despite the humiliation that it caused for the principal.

NOTE: The School District filed a petition for certiorari with the U.S. Supreme Court on October 18, 2011.

e. ***Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. April 25, 2011).**

Facts: After learning that a band event was going to be postponed, the student e-mailed members of the community regarding the rescheduling of a band contest. After receiving numerous responses, the principal requested that the student send a corrective e-mail. Instead, the student posted a blog while off-campus that contained vulgar language. The blog erroneously asserted that the contest had been cancelled, and urged readers to contact the school. Concluding that the student's conduct failed to display the civility and good citizenship expected of class officers, the principal prohibited the student from running for class office.

Holding: The Court of Appeals for the Second Circuit agreed with the district court in saying that the student's rights under the First Amendment were not violated. The Court recognized that off-campus conduct, such as the student's Internet post, can create a foreseeable risk of substantial disruption within a school; in such circumstances, its off-campus character does not necessarily insulate the student from school discipline. In this case, the student created this blog for the purpose of it coming on campus.

In a later appeal, decided on April 25, 2011, the Court of Appeals for the Second Circuit held that the individual district administrators were entitled to qualified immunity from suit with regard to their roles in disciplining the student for her blog post, and for prohibiting the student from wearing a disruptive t-shirt to a school assembly regarding the election of class officers.

NOTE: The student filed a petition for certiorari with the U.S. Supreme Court on July 25, 2011. The Court was scheduled to consider the petition on or about October 28, 2011.

f. ***J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).**

Facts: A group of students gathered at a restaurant one day after school. While at the restaurant, one student, J.C., recorded a four-minute and thirty-six second video of her friends talking in a mean-spirited way about a classmate of theirs, C.C. For example, C.C. was called a "slut" and

"spoiled." That evening, J.C. posted the video on "YouTube" from her home computer. J.C. then contacted five to ten students from the school and told them to look at the video on YouTube. J.C. also contacted C.C. and informed her of the video. The next day at school, J.C. overheard ten students discussing the video. C.C. came to school with her mother so that they could inform the school district about the video. The school district suspended J.C. from school for two days for posting the video about C.C. on the Internet. J.C. challenged her discipline by asserting that the school district violated her First Amendment right to free speech.

Holding: The district court held that J.C.'s First Amendment rights were violated when the school district disciplined her for her off-campus speech. The district court found that the school district was not able to discipline her for her off-campus speech because there was no substantial disruption to school activities, nor was there a foreseeable risk of substantial disruption as a result of the YouTube video.

g. ***Evans v. Bayer*, 684 F. Supp.2d 1365 (S.D. Fla. 2010).**

Facts: A student, Katherine Evans, created a group on Facebook entitled, "Ms. Sarah Phelps is the worst teacher I've ever met." This group was created to allow students to voice their dislike of Ms. Phelps. The posting was made after school hours and from the student's home computer. Ms. Phelps never saw the posting before it was removed. After its removal, the principal, Mr. Bayer, suspended the student for three days. The student brought suit for her right to free speech under the First and Fourteenth Amendments. The principal moved to dismiss the student's claims on procedural grounds.

Holding: The court dismissed the principal's motion, finding that additional proceedings were necessary to determine whether the student's rights were violated. In particular, the court noted that the existing facts suggested that the student's activities were off-campus and non-disruptive and, therefore, may be constitutionally protected. The court also concluded that the principal did not have qualified immunity. In making this determination, the court stated that it would be appropriate for a district court to grant the principal's defense of qualified immunity at the motion to dismiss stage if the complaint 'fails to allege the violation of a clearly established constitutional right.' The court concluded, however, that the

constitutional right in question was clearly established because the principal's action did not comport with the requirements for the regulation of on-campus speech, and, therefore, his action would fail a more lenient standard for off-campus speech. The court stated that Ms. Evans' actions could not be construed as remotely disruptive, nor was her speech in any way lewd, vulgar, defamatory, or promoting drug use or violence.

h. ***J.S. v. Bethlehem Area Sch. Dist.,*** **807 A.2d 847 (Pa. 2002).**

Facts: An eighth grade student created a website entitled "Teacher Sux" on his home computer, on his own time, and posted it on the Internet. The website was not sponsored by the school district. It consisted of web pages that made derogatory, profane, offensive, and threatening comments in the form of written words, pictures, animation, and sound clips. For example, it included a picture of his teacher with a severed head dripping with blood and a solicitation for funds to cover the cost of a hit man. One web page indicated that the principal engaged in sexual relations with a principal from another school. When the principal and teacher viewed the site at school, each took the threats seriously. The student was expelled from school and, subsequently, sued the school claiming First Amendment speech rights.

Holding: The Supreme Court of Pennsylvania affirmed the lower court ruling in favor of the school district. First, the court concluded that the student's speech was not a "true threat," which is an exception to the protection of the right of free speech, and cited the fact that the district allowed the student to attend class and extracurricular activities during an investigation of the incident. Second, however, the court concluded that although the website was created off-campus, it was accessed and viewed at school. In upholding the student's expulsion, the court reasoned that student free speech rights must be balanced with the school officials' need to maintain order and to discipline when necessary to assure a safe school environment that is conducive to learning.

2. Recently Filed Complaint.

a. **Doe v. West Baton Rouge Parish School Board, et al.,** (October 2011).

Facts: At approximately 10:00 p.m. on Wednesday, September 7, 2011, a Brusly High School student criticized one of his teachers on Facebook. The student posted the comment to his own Facebook page, from his own computer, in his own bedroom, at his parents' home. He formatted the comment so that it was visible only to 10 students with whom he had been working earlier that evening, all of whom had Facebook pages of their own. Unbeknownst to the student, one of those students took a cell phone picture of the posting and sent it via text message to the teacher at issue. Having intended the Facebook post as a joke, the student deleted it the following morning before school.

Unfortunately for the student, the teacher had already reported the Facebook post to the Principal, who called in the student and his parents for a meeting to discuss the post. During this meeting, the Principal informed the student that the Facebook post violated the school's 'Improper access of the Internet' policy, and that he would be suspended out of school for five days. Upon review, the discipline was reduced to a two-day in-school suspension. The student and his parents allege that the dispute with regard to the Facebook post and disciplinary action led to the student performing poorly on two important examinations in two separate classes, when he had never received grades lower than an 'A' in either class.

Complaint: The student and his parents have filed suit in federal court in Louisiana against the District, the Superintendent and the Principal alleging that the student has a fundamental First Amendment right to engage in public speech on his Facebook page, so long as that speech does not substantially disrupt the educational mission of his school. Because no substantial disruption occurred, the student alleges that the disciplinary action violated his First Amendment rights. The suit is seeking a restraining order to keep the suspension confidential. In addition, the student and his parents want the school district ordered to “refrain from sharing [his] disciplinary record as to the suspension

with any other person or entity, including any colleges to which [he] may be applying for admission." They want him to be able to retake two exams, and to be reinstated in the honors club.

E. State Criminal Offenses Related To Student Misuse Of Social Media

1. Computer Crimes Act (Wis. Stat. § 943.70(2)).

   Willful, knowing, and unauthorized offenses against computer data and programs, including copying, modifying, destroying, accessing, or disclosing restricted access codes to unauthorized persons, of data, computer programs or supporting documentation is a crime.

2. Unlawful use of computerized communication systems (Wis. Stat. § 947.0125).

   Intentional conduct consisting of frightening, intimidating, threatening, abusive, or harassing messages sent to a person on an electronic mail or other computerized communication system with the threat to inflict injury or physical harm to any person or property is a crime.

3. Harassment (Wis. Stat. § 947.013).

   Harassment means a pattern of conduct or repeatedly committing acts representing a credible threat which harass or intimidate another person.

   a. Harassment includes striking, shoving, kicking or otherwise subjecting another person to physical contact or attempting or threatening to do the same.

   b. The statute refers to actions against a "person," which has been interpreted by case law to include municipalities. A school district, therefore, is an entity entitled to obtain injunctions and may do so when there is a relationship between the harassing conduct and the school.

   c. Case law confirms that the statute does not violate protected speech; rather, it is directed at oppressing repetitive behavior which invades another's privacy interests in an intolerable manner.

VI. FEDERAL ELECTRONIC COMMUNICATIONS LAWS

A. Electronic Communications Privacy Act Of 2000 (ECPA) (Federal Wiretap Act) (18 U.S.C. § 2510-2521; Wis. Stat. § 968.31).

1. It is unlawful to *intercept* and disclose wire, oral, or electronic communication, including telephone conversations and e-mail, while it is in transit.

2. An electronic communication consists of the *transfer* of the signals, data, and other items, but does not include their electronic storage. Interception occurs when it is captured or re-directed in any way through the use of a mechanical or electronic device. This may include obtaining access to in-storage wire communications (e.g., obtaining access to someone's voice-mail mailbox and forwarding it to your own).

3. Ordinary course of business exception: the employer is allowed to monitor or record employee communications if it is done for a legitimate purpose and all employees have been informed about the monitoring device. It may be limited, however, to determining whether the nature of the communication is business related. The employee must be given prior notice.

4. Consent exception: It is not unlawful to intercept communications, such as e-mail and voicemail, while it is in transit if one party to the communication has given his or her consent to the interception. This may be inferred either through an employment contract or through a well disseminated e-mail policy.

B. Electronic Communications Privacy Act Of 2000 (ECPA) (Stored Communications Act) (18 U.S.C. § 2701-2711).

1. It is unlawful to access *stored* electronic communications, such as e-mail, pagers, and voicemail, while it is in electronic storage.

2. Whoever intentionally accesses without authorization a facility through which an electronic communication service is provided or intentionally exceeds an authorization to access that facility, and thereby obtains, alters, or prevents authorized access to an electronic communication while it is in electronic storage in such system shall be punished. Accessing e-mail from a stored database without authorization is prohibited, including read or sent e-mail that is saved on the user's server or hard drive.

3. Provider exception: the prohibitions against accessing stored electronic communications do not apply to conduct authorized by the person or entity providing an electronic communications service. The provider is the entity that provides the terminals, computers, software, pagers, etc. Therefore, if an employer provides access to e-mail through an in-house e-mail server, the employer is free to monitor an employee's stored e-mail. This may not apply if access to e-mail is provided through a commercial Internet service provided, such as America Online or charter.net.

4. User exception: the prohibition does not apply to users of the service with respect to a communication of or intended for that user. This exception includes individuals who have provided informed consent and authorized access to the user's stored e-mail.

5. Ordinary course of business exception: a person or entity may divulge the contents of a communication as authorized under § 2511(2)(a) (see previous section).

6. Because the law is unclear regarding the circumstances that establish an employer's right to access electronic messages stored on the employer's computer network and equipment it is best to provide employees with prior notice of the employer's intent to audit the use of its computer system and monitor employee use of its computer network and equipment, which may include accessing stored e-mails, and obtain the employees' consent to the rules under the employer's acceptable use policy.

C. Federal Communications Act Of 1934 (47 U.S.C. § 333).

A cell phone jammer operates by emitting a frequency that collides and then cancels the cell phone signal out, thus preventing cell phone communication. In 2005, the Federal Communications Commission issued a public notice declaring the sale and use of transmitters "designed to prevent, jam or interfere with the operation of cellular or personal communications service ... unlawful." (FCC Public Notice DA-05-1776); 47 U.S.C. § 302a(b); FCC Rules Sec. 2.803(a). According to the FCC, jammers fall under the Communications Act of 1934 prohibiting any person to "willfully or maliciously interfere with the radio communications of any station licensed or authorized under the Act or operated by the U.S. Government." 47 U.S.C. § 333. The stated penalties for parties in violation include monetary forfeitures up to $11,000.00 a day for each violation and the possibility of further criminal prosecution.

D. Children's Internet Protection Act (CIPA) (47 U.S.C. § 254).

CIPA imposes requirements on any school or library that receives funding for Internet access or internal connections from the E-rate program.

Schools and libraries subject to CIPA may not receive the discounts offered by the E-rate program unless they certify that they have an Internet safety policy that includes technology protection measures. The protection measures must block or filter Internet access to pictures that are: (a) obscene, (b) child pornography, or (c) harmful to minors (for computers that are accessed by minors). Before adopting this Internet safety policy, schools and libraries must provide reasonable notice and hold at least one public hearing or meeting to address the proposal.

Schools subject to CIPA are required to adopt and enforce a policy to monitor online activities of minors.

Schools and libraries subject to CIPA are required to adopt and implement an Internet safety policy addressing: (a) access by minors to inappropriate matter on the Internet; (b) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (c) unauthorized access, including so-called "hacking," and other unlawful activities by minors online; (d) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (e) measures restricting minors' access to materials harmful to them.

Schools and libraries are required to certify that they have their safety policies and technology in place before receiving E-rate funding.

Association of Wisconsin School Administrators: SLATE Conference

Social Media and the Law

December 6, 2011

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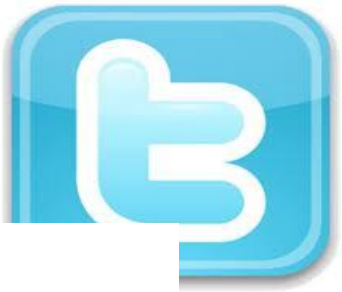
Social Media Websites



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Using Social Media to Screen Candidates for Employment

- Type of Information Available:
  - Personal Information.
  - Inappropriate photographs.
  - Alcohol and/or drug use.
  - Sexual activity.
  - Poor communication skills.
  - Discriminatory comments.
  - Misrepresentation of qualifications.
  - Sharing confidential information.
  - Weapons and other concerns about violence.
- Concerns:
  - Reliance on inaccurate or unreliable information.
  - Misunderstandings with regard to culture or content.
  - Mistaken identity.
  - Guilt by association.

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Legal Concerns About Using Social Media to Screen Candidates for Employment

- Discrimination claims. State and Federal Statutes.
  - Age.
  - Ancestry.
  - Arrest/Conviction record.
  - Color/race.
  - Creed.
  - Disability.
  - Marital status.
  - Military service.
  - National origin.
  - Sex or gender.
  - Sexual orientation.
  - Use or non-use of lawful products.
- Invasion of Privacy. State Statute.
  - Elements:
    - A public disclosure of facts;
    - The facts disclosed were private;
    - Highly offensive to a reasonable person of ordinary sensibilities; and
    - The party disclosing the facts acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter or with actual knowledge that none existed.
  - Damages:
    - Equitable relief.
    - Compensatory damages.
    - Attorney fees.

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Court Cases

- *Gaskell v. University of Kentucky* (2010).
- *Snyder v. Millersville University* (2008).
- *Fisher v. Department of Veterans Affairs* (2009).
- *Stay Tuned!* Developing area of law.

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Cyber Bullying

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Student Discipline in Wisconsin

- Expulsion Questions:
  - Any activity at school or during school activities?
  - Other students aware or circulating materials?
  - Images taken from school materials?
  - Gather information at school?
  - Threats to be carried out at school?

- State of Wisconsin
  - *A.M. by the Racine Unified School District* (2005).
  - *S.B. by the Gilmanton School District* (2006).
  - *D.J.S. by the Hartford Union (2005).*

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First Amendment Rights of Students

- Supreme Court Trilogy:
  - *Tinker v. Des Moines Independent Community School District* (1969).
  - *Bethel School District v. Fraser* (1986).
  - *Hazelwood School District v. Kuhlmeier* (1988).
- General Rules Resulting from the Trilogy:
  - Protections for symbolic expression, written and verbal speech.
  - No protection for true threats.
  - Balance the rights of students to express v. the right of the District to maintain order.
  - Substantial disruption – actual or reasonable expectation based on facts.

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First Amendment Cases Addressing Student Discipline for Misuse of Social Media

- *TV v. Smith-Green Community School* (2011).
- *Kowalski v. Berkeley County School* (2011).
- *Layshock v. Hermitage School District* (2011).
- *JS v. Blue Mountain School District* (2011).
- *Doninger v. Niehoff* (2011).
- *JC v. Beverly Hills Unified School District* (2010).
- *Evans v. Bayer* (2010).
- *JS v. Bethlehem Area School District* (2002).

- New Complaint
  - *Doe v. West Baton Rouge Parish School Board, et al., (October 2011).*

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US Department of Education Tips: Preventing Cyberbullying

- **Educate** students, teachers, and other staff members about cyberbullying, its dangers, and what to do if someone is cyberbullied.
- **Discuss cyberbullying with students.**
  - They may be knowledgeable about cyberbullying and they may have good ideas about how to prevent and address it.
- **Craft policies** to address cyberbullying.
- **Closely monitor students' use of computers at school.**
  - Use filtering and tracking software on all computers, but don't rely solely on this software to screen out cyberbullying and other problematic online behavior.

US Department of Education Tips: What To Do When it Starts

- **Investigate reports immediately.**
  - If cyberbullying occurs on-campus or through the school district's internet system, you must take action. If the cyberbullying occurs off-campus, you can still help.
  - Closely monitor the behavior of the students involved at school for all forms of bullying.
  - Investigate to see if those who are cyberbullied need support from a school counselor or school-based health professional.
  - Notify parents of students involved in cyberbullying.
  - Talk with all students about the negative effects of cyberbullying.
- **Contact law enforcement.** Notify the police if the aggressive behavior is criminal. The following may constitute a crime:
  - Threats of violence.
  - Child pornography and sexting.
  - Taking a photo image of someone in a place where he or she would expect privacy.
  - Harassment, stalking, or hate crimes.
  - Obscene or harassing phone calls or text messages.
  - Sexual exploitation.
  - Extortion.

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