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Legal and Practical Issues Associated with a Teacher's Use of Social Media In and Out of the Classroom

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These materials should serve as a guide and do not purport to cover every requirement of these laws. These materials should not be construed as legal advice or legal opinion on any specific facts or circumstances. These materials are intended for general informational purposes only, and you are urged to consult with your own legal counsel concerning your own situation and any legal questions you have.

I. WHAT IS SOCIAL MEDIA?

A. Social Media Venues

1. Facebook

   a) One obtains "friends," sends "messages" to friends, updates one's "status," and writes on friends' "walls," which essentially serves as a public bulletin board.

   b) Users also display other personal information about themselves, including marital status, sexual orientation, religious beliefs, political beliefs, and photos of themselves engaged in various activities.

   c) In 2010, Facebook passed Google as the United States' most visited website.

   d) In 2011, there were 800 million Facebook users worldwide.

2. Twitter

   a) Users "tweet" – create status updates – that are no more than 140 characters in length to describe locations, activities, or other thoughts. The previous sentence is 118 characters.

   b) As of August 2011, there were 200 million people on Twitter.

   c) On March 11, 2011 – 177 million tweets were sent in that one day.

3. LinkedIn

   a) Networking tool for employees and employers.

   b) Similar to Facebook, but more "professional."

4. MySpace

   a) Another social networking site geared toward younger individuals.

5. YouTube

   a) Video sharing site that broadcasts videos and permits comments about those videos.

   b) Each day, people watch 2 billion videos on YouTube.

c) As of January 2009, it would take 412 years to view all of the videos available on YouTube. (*See* Adam Singer, Social Media, Web 2.0 and Internet Stats).

6. Blogs

a) Explosion of Web Blogs or "Blogging" is an increasing problem for Employers: 175,680,249 blogs have been indexed by BlogPulse as of November 1, 2011.

b) A "blog" is a type of online personal journal and ranges from mere text to as complex as an interactive, multi-media website.

c) Frequently, a blogger's diary consists of critiques of, or comments on, their work environment. Specifically, their wages, benefits and working conditions. These comments may be seen by millions of people via the Internet.

7. Cell Phone Text Messaging

a) Messages or images sent through a cellular phone.

(1) Brett Favre and the New York Jets employee.

(2) District Attorney Ken Kratz in Calumet County accused of sending racy text messages to several females, one of whom was a domestic abuse victim.

(a) "I'm serious! I'm the atty. I have the $350,000 house. I have the 6-figure career. You may be the tall, young, hot nymph, but I am the prize!"

8. "Googling"

9. Google Plus

II. TEACHERS' POSITIVE USE OF SOCIAL MEDIA

A. General Information

1. Three Arenas – Each with Different Benefits and Risks
   a) Personal Use
   b) Use as a Teacher
   c) Use as an Employee of the District

2. Students can benefit from their teachers' effective use of social media since it can teach students to be effective collaborators in the world of social media, how to interact with people around them, and how to be engaged, informed 21st century citizens.

3. Students can also benefit from learning about the dangers associated with social media.

4. Important Consideration for Everyone: How do you present yourself electronically?

B. On Campus Use

1. Use of "Google Docs" application or "Google+" – to hold extra office hours for students

2. Use of chat rooms and Twitter
   a) Twitter – you can create a "class hashtag" which all students can use to tag their tweets about course-related content
   b) Example: Assignment was to explain in 140 characters or less the purpose of the lesson for the day
   c) Notify students of assignments and deadlines (sent via Twitter to phones and email accounts of students)

3. Use of blogs and websites

4. Restricted Use of Facebook – Maintain appropriate, clearly established boundaries at all times
   a) Class pages – Use to enhance instruction
      (1) Post links relevant to course work
      (2) Post podcasts, flashcards, etc. to assist with learning
      (3) Share goals and successes
      (4) Announce events and meetings
      (5) If teacher and student are both online at the same time, students can ask questions about homework, etc. via chatting on Facebook. Teachers should keep a record of this interaction.

b) Eliminate the "friend" requirement
   (1) Teachers should not "friend" the students.
   (2) Closed online groups can be set up so friending is not required so teachers will not see students' private profile or online posts.
   (3) Students can't see the teacher's profile.
c) Require students to request to join
d) Mandate that students accept the "acceptable use" policies of the District
e) Transparent communications
   (1) Consider equal access for parents as well as students

5. Concern: Students who have limited or no access to computers outside of the school day

6. Concern: How much monitoring of the sites is reasonable or practical?

C. **Off Duty Use**

1. Teacher-specific sites – such as classroom 2.0, The Apple, Education Interactive, NextGen Teachers, Educatorsconnect.com
2. Personal use to connect with friends and family
3. Forums to engage in topical discussions

III. RISKS ASSOCIATED WITH THE USE OF SOCIAL MEDIA BY TEACHERS

A. **KEY POINT:** Nothing you do is truly private on the internet, regardless of privacy settings. Especially if you do it on the District's server! Even if you use your personal computer at home, if you discuss District issues, students, etc., it could be subject to a public records request or result in discipline in some circumstances. Be aware of your electronic persona.

B. **"Friending" between Supervisors and Subordinates, Staff and Students**

1. Supervisors and Subordinates

a) In an attempt at camaraderie, supervisors will become "friends" with employees through social networking. A "friendship" between a supervisor and subordinate can create potential liabilities and problems for employers.

(1) Harassment

(a) Is a supervisor going to use the social network as a medium to engage in harassing behavior by either

sending inappropriate messages and pictures or "poking" someone?

(b) Intimidation can also play a role. If a subordinate receives a "friend" request from a supervisor, is there any obligation to "accept" the friendship?

(2) Improper consideration of protected classifications in evaluations

(a) Having an online connection between two employees can reveal personal information that might not otherwise be available between employees. One can obtain personal phone numbers, e-mail addresses, pictures and descriptions of off-duty activities, one's religion, sexual orientation, race, membership in groups, or other protected classifications. Unless a subordinate activates privacy settings, a supervisor has access to those items.

(b) Ideally, no supervisor would ever consider protected classifications in a job evaluation. Unfortunately, the plethora of information available through a social networking site could plant information in a supervisor that might later arise in an evaluation.

(c) How does a supervisor, and the supervisor's employer "unring the bell" once information about protected classifications has been viewed?

(3) Potentially negative impact on employee morale

b) Hypothetical

(1) A third-year probationary science teacher is a Facebook "friend" with the building principal. That principal is also responsible for conducting the teacher's annual evaluation. One month before the evaluation, the teacher posts information on her Facebook page that she is a "Christian." The principal accesses and views this information from his school's computer, using the school network.

The previous two years, her performance has been good to excellent, and she faithfully teaches evolution and instructs

the students in the proper scientific method. That has not changed since she became a "Christian," nor has she brought religion into the classroom. The principal, however, is an atheist, and believes no religious person can be a good science teacher.

The principal evaluates the teacher and does not expressly use the information gleaned from the teacher's Facebook page in the evaluation, but privately treats the teacher's religious affiliation with disgust. Nothing has changed in the teacher's noted effectiveness or style, but the teacher is rated as "average," and the principal recommends non-renewal, especially since she will obtain non-probationary status.

The Board non-renews the teacher, and the teacher grieves, arguing the non-renewal was arbitrary and capricious. Before arbitration, the teacher apprises the Union that she is "Facebook friends" with the principal and the Union makes a records request for the principal's history of Facebook use on school grounds. Eventually, the Union discovers the principal accessed the Facebook page after the teacher changed her status to "Christian." The Union raises that evidence in arbitration. How does the District demonstrate that impermissible consideration did not play a role in the teacher's non-renewal?

c) Pro and Cons of a Ban or "Strongly Discouraging" Supervisor-Subordinate "Friendships"

(1) Pros

(a) Avoids the aforementioned risks.

(b) Avoids the potentially awkward situation of a subordinate feeling "pressured" to friend a supervisor, or a subordinate or supervisor feeling "unwanted" if the other employee rejects the "friend" request.

(2) Cons

(a) Negative impact on employee morale.

(b) Attempting to enforce the policy.

(3) Conclusions

(a) The benefits of a policy prohibiting supervisor-subordinate friendships are apparent, but it depends district-by-district. However, generally speaking, a policy at least "strongly discouraging" such supervisor-subordinate "friendships" is advised.

(b) Check your District's policies or draft a new policy to address this issue.

2. "Friendship" between Staff and Students

a) According to a story in the *Chicago Tribune*, a Chicago-area teacher sees nothing wrong with the practice of being Facebook friends and "tweeting" on Twitter with students. The teacher stated, "I, personally, am not worried about sharing (online) space with students. The kids can talk to me, and I find it a useful avenue to communicate." The teacher further justifies his actions because he does not "follow" students on Twitter, nor does he initiate friend requests on Facebook.

(1) The above-mentioned teacher ignores the obvious risks, regardless of how you enter the online relationship. The privacy of online material is almost non-existent.

b) Regulation of Teacher-Student Contact in Wisconsin
(1) No statutes or regulations as of yet
(2) District specific policies are in effect

c) Regulation of Teacher-Student Contact Outside Wisconsin

(1) Missouri

(a) In July 2011, Missouri passed the Amy Hestir Student Protection Act which seeks to regulate electronic communications between teachers and students. It requires every district to promulgate a written policy on teacher-student and employee-student communications by January 1, 2012, which would include restrictions on teachers' use of work-related internet sites and nonwork-related internet sites. The law prohibited exclusive or private electronic communications between a student and teacher as well as students and teachers from being Facebook "friends."

(b) A judge recently issued an injunction to block the law.

(c) On October 21, 2011, the Governor signed a new law into effect that modifies the original broad legislation. The new law now requires every district to promulgate a written policy concerning employee-student communication by March 1, 2012. The policy must include, but not be limited to, the use of electronic media and other mechanisms to prevent improper communications between staff and students. The act repeals the prohibition on a teacher establishing, maintaining, or using a work-related internet site unless it is available to administrators and the child's legal custodian. The act also repeals the prohibition on a teacher establishing, maintaining, or using a non-work related internet site which allows exclusive access with a current or former student.

(2) Louisiana

(a) Louisiana passed a law requiring school districts to implement policies that require documentation of every electronic interaction between school employees and students through non-school-issued devices. That includes communication through "Internet-based social networks" and "text-based telecommunication devices."

(3) Ohio

(a) Several districts have prohibited teachers from becoming friends with students on social media sites. They also can't text or send students instant messages.

(b) The Union has not contested these new policies. Instead, the Union sees it as protection for the teachers

d) Additional Risks of Friending Students

(1) Too much information — private information now publicly available.

(a) Weekend activities of students, staff, and board members

(b) Do teachers accept a burden if they friend students? What if they see a posting about bullying, drinking, depression, abuse, drug use? What obligations, if any, do teachers have to report or take action? Depends on the circumstances.

(2) Unprofessional and improper communications.

(a) In 2010, at least three teachers in the New York City school system were terminated for inappropriate Facebook communications with students. One male teacher wrote "This is sexy," under a female student's photo on Facebook. Another male teacher told a female student that her "boyfriend [doesn't] deserve a beautiful girl like you." The third teacher made a remark regarding an OB/GYN examination.

(b) Even if you are "friends" with your mother or grandmother on Facebook, that only inhibits you from publicly posting embarrassing things. As a result, a user might be more prone to make Facebook communications privately through individual messages.

(c) In Texas, a teacher aide looked up former students on Facebook. The teacher found a 16-year-old male student and within one day, the Facebook conversations turned to a sexual nature. The teacher has been charged with online solicitation of a child. (*Houston Chronicle*, Dec. 12, 2008).

(3) Cell phone numbers of students available, which can lead to texting.

(a) Text messages or messages sent through social networking sites can trend into the unprofessional realm more quickly than other means of communication.

(4) Pressure to say yes.

(a) Does a student feel pressure from a teacher to accept a "friend" request?

e) Conclusions

(1) Strongly encourage staff not to "friend" students through social networking venues.

(2) If a teacher or other district employee is going to communicate with a student through electronic means, the best means to do that is through the school-provided e-mail account. This should remind the teacher to keep the exchange limited to homework or another proper educational purpose. Plus, the district can better monitor potential inappropriate staff-student exchanges.

(3) Practical Reality: In smaller communities it may be difficult to have bright line rules. For example, a parent may be friends with a teacher for 20 years before that teacher has a student in their class and that teacher may be pre-existing friends with various kids who later become their students.

3. Check your District's policies or draft a new policy.

C. **Disclosure of Proprietary Data or Other Sensitive Information**

1. In the public sector, what if a confidential employee "tweets" about an investigation or other information that is subject to privacy laws or posts material on Facebook regarding a discussion held in closed session?

2. Wisconsin Pupil Records in Wis. Stats. § 118.125 and FERPA

a) Don't name pupils publicly or state things that could identify students

b) Don't discuss specific pupils in online venues

D. **Genetic Information Nondiscrimination Act (GINA)**

1. GINA prohibits employers, unions, and employment agencies from gathering, using and disclosing genetic information about applicants and employees in most situations.

2. Final Federal Regulations addressing GINA were issued on February 9, 2010, and were effective as of January 10, 2011.

a) "Inadvertent Receipt" Exception Applied to Social Media.

(1) The Regulations provide a safe harbor for the inadvertent receipt of genetic information. It is also known as the "casual conversation" exception.

(2) If an employer accesses genetic information in the "virtual world" through social media, GINA is not violated, so long as the employer did not search the social media venues with the intent of finding genetic information and so long as the employer had been granted access to the social media profile.

E. **Copyright Infringement**

1. The Internet puts numerous copyrighted resources at the fingertips of employees, including streaming video, music files, power point presentations, articles, software, logos, artwork, and pictures.

2. If an employee infringes copyrights, the employer may be held liable under two theories: contributory and vicarious infringement.

a) One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005). Actual knowledge, however, is not always necessary. "Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant should have known of the direct infringement)." *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003). Thus, the fact that an employer was unaware of the illegal conduct of its employee does not fully preclude liability.

b) Vicarious infringement has no knowledge requirement, but only requires that the employer receive "a direct financial benefit" and have "a right and ability to supervise the infringers." *Id.* In the employment setting, the second element is virtually always found, leaving the question of financial benefit to control the inquiry.

3. Unauthorized use of any copyrighted material may give rise to employer liability, especially when: (i) the employer enjoys a benefit because of the employee's infringement, (ii) the copyrighted material is shared using employer time and equipment, or (iii) the employer has taken no steps to prevent such infringement and has turned a blind eye to the infringing activities.

4. When a third party brings charges for copyright infringement, which carries hefty fines of up to $150,000 per violation, the employer becomes a more profitable target than the employee because of the depth of employer pockets.

F. **Terms of Service and User Agreements**

1. Accessing social networking sites through deceptive means might violate the terms of service or user agreements on those sites.

2. Facebook terms of service provide, in part, "You will not provide false personal information on Facebook, or create an account for anyone other than yourself without permission."

G. **Stored Communications Act (18 U.S.C. § 2701)**

1. It is a crime for anyone who ". . . 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 a wire or electronic communication while it is in electronic storage in such system...." 18 U.S.C. § 2701(a).

2. A violation does not occur "with respect to conduct authorized by:

   (1) the person or entity providing a wire or electronic communications service; or

   (2) a user of that service with respect to a communication of or intended for that user. . . ." 18 U.S.C. § 2701(c)(1)-(2).

3. *Pietrylo and Marino v. Hillstone Restaurant Group d/b/a Houston's*, 2009 WL 3128420 (D.N.J.).

   The managers obtained "authorization" from an employee to use that employee's log-in information so the managers could access a protected chatroom in a MySpace.com page. The employee testified she felt she had to give her password to the manager because she worked for him and that she would not have provided her password to him if he had not been a manager. She felt that she "probably would have gotten in trouble" if she did not provide her password to the manager. The managers accessed the site repeatedly and their access was not accidental.

   The jury found a violation of the SCA and the Court affirmed on a motion that sufficient evidence existed to find that the employees' managers

violated the SCA when they knowingly accessed the chat group on the social networking website without authorization.

4. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002).

A company vice president had gained access to the site by using a co-employee's name and creating a password for that employee with the employee's consent. The sole question was whether the employer by its unauthorized access to the site was exempt from liability under §2701(c)(2) which allows intended recipients of wire and electronic communications to authorize third parties to access those communications. As there was no evidence the co-employee had been a "user" of the service (website) prior to giving consent, the employer's motion for summary judgment was denied.

IV. TEACHERS' MISUSE OF SOCIAL MEDIA – CONSEQUENCES AND CONCERNS

A. General

1. "Big Brother?"

a) Generally, districts do not want to monitor employees' private lives, acting as the "morals police," but districts need to intervene when technology is inappropriately used on campus or when off-duty technology misuse seeps into the school and adversely affects the educational environment.

2. Information is Public and Difficult to Confine

a) An arbitrator in Wisconsin recently raised the important issue regarding one's expectation of privacy when using Facebook and other social networking sites. Basically, the conclusion was that there can be no expectation that information will remain private.

> "Social networking sites such as Facebook are relatively new creations that blur the line between public and private communications. And, as this case has made abundantly clear, confidentiality of communications intended for private use cannot be guaranteed, even where the Internet user has his/her social networking site set at the highest privacy level." *City of West Allis,* WERC Case No. A/P M - 10-017, (McGilligan, 4/10).

b) An Indiana Deputy Attorney General used an "anonymous" Twitter account to provide some advice for police facing pro-labor protestors in Wisconsin: "Use live ammunition," and "You're damned right I advocate deadly force." He claimed the comments were intended to be satirical.

He was terminated.

c) In Pennsylvania, a district recently suspended a high school English teacher after the teacher's blog was discovered by the student. One blog entry from this teacher wished she could make the following comments on students' report cards: "I hate your kid," "Don't you know how to raise kids?" "Your child has no other redeeming qualities," "a sneaky jerk-off," "rat-like," "utterly loathsome," "dunderhead," and "frightfully dim." (Source Pennlive.com). Students were not named.

The teacher stated the blog had been up for over one year and that it was relatively anonymous, because it only listed the author as "Natalie M."

The district recently reinstated the teacher, but the district has received, and will honor, at least 60 parental requests to have a different teacher for their children.

d) The *USA Today* recently reported an East Stroudsburg University professor was placed on administrative leave after making two Facebook postings about her students. The first one stated:

> "Does anyone know where to find a very discreet hitman? Yes, it's been that kind of day . . ."

The second status update, posted one month later, stated:

> "[H]ad a good day today, DIDN'T want to kill even one student :-). Now Friday was a different story."

After the suspension, the professor responded, "I actually did see that page as something that was not a part of [the university], not a part of my professional life. I don't invite students into that part of my life."

e) A school district in Georgia recently pressured a teacher to resign after the district found pictures of the teacher holding alcoholic beverages (beer and wine) and posting a message about a "B**** BINGO" event on her Facebook profile.

f) According the *Herald-Review*, an eighth-grade science teacher in North Carolina was suspended after making critical remarks about students, the South, and religion. In response to a Bible being anonymously placed on her desk by students, she posted on her Facebook page that it was a "hate crime." The teacher stated the Bible incident would not "go unpunished." She further mentioned "ignorant Southern rednecks." One commenter on her page suggested the teacher should retaliate by bringing a poster of a NASCAR driver to class with a swastika drawn on the driver's forehead.

The President of the Wake County chapter of the North Carolina Association of Educators stated teachers "are public figures. . . We are held to a higher standard."

B. Discipline and Discharge for Technology Use

1. Heightened expectations for teachers and other educational staff

a) Wis. Stats. § 115.31(2) provides that "any license granted by the state superintendent may be revoked by the state superintendent for incompetency or *immoral conduct* on the part of the licensee." (emphasis added).

(1) "Immoral conduct" is defined as "conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil." Wis. Stats. § 115.31(1)(c).

(2) In Janesville, WI, the district recently terminated and demoted two employees for conduct involving "moral turpitude" for making sexually suggestive remarks to fellow staff members. (*The Janesville Gazette*, Aug. 23, 2010).

(3) *See Cedarburg School District*, discussed *infra*.

2. Monitoring and Disciplining for On-Duty Misuse

a) Generally speaking, a district has a right to monitor and prohibit certain uses of its network and equipment. Likewise, when an employee is "on the clock," the district can direct what activities are not appropriate.

b) Cases and Arbitrations involving On-Duty Misuse.

(1) *Chippewa Falls School District.*

Recently, the abuse of a school district's e-mail system was detailed in several articles in *The Chippewa Herald* and *The Eau Claire Leader Telegram.* The facts did not result in arbitration, but the story is useful to demonstrate that abuses of school-owned technology will not be tolerated.

A teacher sent 3,811 e-mails over 169 class days between January 2009 and January 2010. Assuming each e-mail sent took one minute, that would have come to 38 hours of class time and 19 hours of prep time. The e-mails inappropriately discussed drinking alcohol, taking and distributing prescription drugs, participating in sexual situations, and name calling of students, parents, fellow staff members and a principal.

She referred to co-workers as "cult members," a "nutjob," "crabbypants," "cuckoo woman" and "Nazi aides." She described the principal as a "lapdog." There were almost 50 uses of profanity.

Referring to a student she stated, "Do not allow him to SUCK THE LIFE OUT OF YOU!" and that "it's just such a waste of time with the dummies."

The investigation report concluded "A comparison of [the teacher's] e-mail activity to that of other district teachers indicates that [the teacher's] e-mail usage is considerably higher than other district teachers. As such, [the teacher's] e-mail usage is excessive and inappropriate."

The teacher resigned on August 26, 2010.

(2) *Menomonie Area School District*, MA-14305, (Morrison, 09/25/09).

The grievant, Head Custodian for the Middle School, was terminated for improper use of a computer, including accessing pornographic material and likely forwarding such material. The investigation revealed that the images were opened on the employee's school e-mail, on a school computer, and the images showed naked men and women, images of children with inappropriate comments next to the images, and racist and homophobic jokes. The Union

argued that termination was excessive and that the District's interests, if any, could have been easily served by a less drastic penalty.

The Arbitrator decided there was just cause to discharge the grievant and the grievance was dismissed. The Arbitrator found the Union's argument that the grievant never signed the Acceptable Use of Electronics Policy (and was therefore not responsible for its contents) to be without merit and found that:

> ". . .the Grievant engaged in immoral behavior consisting of receiving, opening, viewing, and retaining sexually explicit, pornographic, and other inappropriate photographs and material on a School District computer while on school property."

(3) *Cedarburg Educ. Ass'n v. Cedarburg Board of Educ.,* 313 Wis. 2d 831 (2008); *rev.* denied, 2009 WI 23 (2009); *see also Cedarburg School District*, FMCS Case. No. 06-2483 (Bielarczyk, 9/06).

The Arbitrator held that the district lacked cause to terminate a teacher who violated the district's computer policy by accessing pornographic images. The District was aware of 2 instances over the course of several years, one of 67 seconds and another of 18 minutes. The arbitrator determined that the district failed to investigate many other alleged computer use violations, including accessing pornographic images, by different district employees. The arbitrator stated that if the district had a zero tolerance policy as it claimed, the policy was clearly not communicated to its employees. Teacher was reinstated with full back pay.

The Board refused to rehire Zellner and appealed the arbitration award to Circuit Court. Judge McCormack reversed the arbitration, concluded it was necessary to take the rare step of overturning an arbitrator's decision because the decision failed to consider that Zellner's actions amounted to "immoral conduct." The judge wrote that "clearly the expression of the public policy in this state as set forth in (state law) should be sufficient notice to any person that there will be severe consequences when any rule violation crosses into such type of conduct." The Court

of Appeals affirmed the Circuit Court. *Cedarburg Educ. Ass'n. v. Cedarburg Board of Educ.*, 756 N.W.2d 809 (Wis. Ct. App. 2008).

In the post-*Zellner* world, a district is not doing its job correctly if it does not terminate a school employee for viewing pornography on district-owned equipment.

(4) *Pierce County*, MA-12963 (Millot, 1/06)

The County disciplined the Grievant (an 8 ½-year employee of the County) because she admittedly violated the Pierce County Policy on Computer Use and Information Systems when she repeatedly made changes to her payroll profile without permission. The County Coordinator immediately suspended the Grievant. Subsequently, the Grievant was told that instead of being terminated she could accept a transfer to a position in the Public Health Department. The Grievant accepted the transfer, but filed a grievance claiming that the transfer/termination was without just cause.

Although Arbitrator Millot stated that "the Grievant is an experienced computer professional and understands the risks associated with unauthorized individuals tampering with data and the computer system as a whole," she determined that the Grievant's actions created strictly "an auditing issue, a security issue."

Thus, Arbitrator Millot held that the County did not have just cause to terminate the Grievant. Instead the County only had just cause to issue the Grievant a written reprimand for "[o]btaining unauthorized access to any computer system."

(5) *Howard-Suamico School District*, (MA-13387, Millot, 5/31/2007).

The arbitrator reduced an employee's termination to a written warning, finding fault in the district's investigation procedures. The employee had been terminated for inaccurately reporting the length of his lunch break and engaging in excessive personal use of the Internet during work time. As to the latter, the arbitrator found the district failed to completely review other employees' utilization of the Internet. Further, as the district's policy forbids any use

of the Internet during the school day, the district could not impose a subjective "excessive" standard.

(6) In *County of Sacramento*, 118 LA 69 (2003), an arbitrator held that the County did not have just cause to suspend an employee who used the internal computer system to send sexually-related messages, even though the system was supposed to be limited to information system emergency use, where the County made exceptions to restricted use of the system to approve notifying employees that muffins were being delivered to office. The suspension was reduced to a letter of reprimand.

(7) In *Chevron Products Co.*, 116 LA 271 (2001), an arbitrator held that the employer violated a collective bargaining agreement when it discharged an employee who sent video e-mail that offended undisclosed person or persons, where employee sent it only to three friendly co-workers – none of whom complained – and employee had no reason to believe that e-mail would be spread across Internet to other employees. Even though employer had a policy regarding misuse of e-mail, past practice completely negated that policy. In fact, supervisors regularly sent numerous e-mails that contained sexually explicit jokes and management permitted personal use.

(8) In *Nord Center*, 121 LA 1158 (2005), an arbitrator held that an employer had just cause to discipline an employee who called co-workers over to look at obscene e-mail for unwelcome behavior, exhibiting immoral or indecent conduct, and violating policies defining "legal and ethical usage" of computer, where content of e-mail made co-workers uncomfortable and some complained to management and computer was used for purpose unrelated to employer's business, which distracted some employees.

(9) In *Department of Veterans Affairs*, 122 LA 106 (2006), an arbitrator held that the discharge of an employee for extensive use of his government computer during work time for personal reasons was for just cause, regardless of how productive he was when not using computer for personal reasons, where his work was adversely affected, and his actions also disrupted work efficiency of co-workers who he frequently called over to discuss matters his personal Internet browsing had unearthed.

(10) In *Farm Service Agency, U.S. Dept. of Agriculture*, 118 LA 1212 (2003), an arbitrator held that the agency did have just cause to suspend employee for accessing sexually explicit websites with his work computer, despite contention that he was doing so to determine if agency blocked access to the sites. Employee admitted that he was aware of agency's computer use policies and knew he was not supposed to access such sites.

(11) In *Vick v. Marshfield Door System*, (LIRC 1/31/2007), the complainant was unsuccessful in her age, sex, and retaliation claims. Among other claims, Vick asserted her discharge for forwarding an internal company e-mail to a customer was discriminatory. The hearing examiner concluded that Vick's failure to acknowledge a potential problem in her actions and to accept supervision, coupled with her earlier progressive discipline, provided ample and reasonable justification for her discharge.

3. Discipline for Off-Duty Conduct

a) When there is a connection ("nexus") between off-duty conduct and work, sometimes corrective action is required. Generally speaking, corrective action is warranted if an employee's off-duty conduct either:

(1) Harms the employer's business or mission;

(2) Adversely affects the employee's ability to perform his or her job; or

(3) Leads other employees to refuse to work with the offender. DISCIPLINE AND DISCHARGE IN ARBITRATION 393 (Brand & Birens eds., 2d Ed. 2008).

b) Hypotheticals

(1) Track Coach and the 18-Year-Old Student. A 25-year-old high school teacher, who also serves as the varsity track coach, has recently had his eye on one of the team's top talents, a 18-year-old female student who runs quite well. Her running ability is not the only thing the coach noticed. The coach has the student's cell phone number and he recently started sending the student text messages after practices. He did not send the messages while coaching or engaging in any other official school duties.

After a couple weeks of sending relatively innocuous texts like "good practice"; "see you tomorrow at the track. keep up the good work," the texts turn more salacious. The student reports the texts to her mother, who in turn contacts the principal. What now for the teacher? Is there any problem with using technology to contact an "adult" student?

(a) Immoral conduct when a student is involved, regardless of age.

(2) Track Coach and the 18-Year-Old Former Student. This time, the texting does not occur until *after* the female student turns 18-years-old and graduates from high school. She is no longer a student. The mother lodges a complaint against the teacher. What now?

(a) Where is the common sense?

(b) Just because it is a former student does not mean the off-duty conduct is not going to seep into the school the following school year.

(i) Disruption of the educational environment by his students in the classroom

(ii) Coaching ability adversely affected

(iii) Co-workers — several teachers have teenage daughters who are on the track team

(c) Subpoena of text messages to further investigate if your messages were limited to an 18-year-old student or if the texting with that student was one in a series of many. "This was my first time, honest," is probably untrue.

c) Arbitrations Involving Off-Duty Technology Misuse

(1) *Milwaukee County (Sheriff's Department)*, MA-14561 (Bauman, 7/10).

A sheriff deputy's off-duty Facebook rant against his department resulted in a five-day suspension. The Deputy posted comments to his Facebook account stating, in part,

that "I just HATE my department and the people helping run it into the ground . . . You can't just do your job anymore . . . you must jump on the propaganda bandwagon and drink the kool-aid . . . It's a cult mentality. . . punishing and segregating those that are non compliant and rewarding those who follow the party line . . ." (emphasis in original). There was also a picture of the Deputy in uniform.

The County and Department had the following rules:

> Members [of the Department] shall not engage in any conduct or activity, on- or off- duty, which discredits or impairs the efficient and effective operation of the Milwaukee County Sheriff's Office or its members.

There were also grounds for discipline if the employee:

> Refus[ed] or fail[ed] to comply with departmental work rules, policies or procedures.

Or if the employee engaged in:

> Offensive conduct or language toward the public or toward county officers or employees.

The County argued the Grievant's posting discredited the Department, and the combination of the picture and comments impaired his effectiveness as an officer through his ability to make arrests, present cases, and appear before a jury. If a potential juror saw the picture and comments, that would have been detrimental to the County's position at trial.

The arbitrator ruled the Department did not have just cause to suspend the Grievant because there was insufficient evidence to show a violation of those work rules. While a Facebook photo showed the Grievant in uniform, the arbitrator held that the Grievant was not clearly identifiable as a Department employee, and therefore his conduct could not be connected to the Department. The fact that his "Facebook friends" knew where he worked was deemed immaterial. Further, the arbitrator found the comments were not "offensive" because no member of the Department testified the comments were offensive. The

arbitrator ordered the Grievant made whole and directed all reference to the discipline be expunged from his file.

(2) *City of West Allis,* WERC Case No. A/P M - 10-017, (McGilligan, 4/10).

The City terminated the Grievant, a Police and Fire Dispatcher, after the Grievant made the following posting on her Facebook account: "5 things I'm addicted to by Dana, Vicodin, adderall, quality marijuana, MD 20/20 Grape and [absinthe]." The City also took into consideration the Grievant's previous disciplinary actions and unacceptable conduct which placed her at the termination step of progressive discipline.

The Grievant passed all drug tests and the City did not allege that she was addicted to the substances listed on Facebook. The Facebook posting was entered while off-duty and viewed by both employees and members of the public. The posting did not mention or identify the Grievant as a member of the Department.

In entering a decision termed "a close call," the arbitrator reached the following conclusions:

(a) The Grievant was warned of consequences in the Department Rules of Conduct and Code of Ethics and inappropriate jokes about drugs and alcohol could potentially discredit the Department;

(b) Department rules were reasonably related to the orderly and efficient operation of the Department and performance expectations of the Grievant (but the City had not adopted specific rules regarding social networking and that failure mitigated the penalty imposed);

(c) The City properly and fairly investigated before administering discipline;

(d) The Grievant's off-duty conduct harmed the employer, adversely affected the Grievant's ability to perform her job, and had a damaging effect on her working relationship with co-workers, and as such she engaged in off-duty conduct for which she could be disciplined;

and, finally, the arbitrator ruled:

(e) Discharge was too severe a penalty for off-duty conduct consisting of a "stupid joke."

The discharge was reduced to a 30-day unpaid suspension; the City was ordered to reinstate the Grievant and make the Grievant whole for all lost wages and benefits.
The City has appealed the arbitrator's decision to circuit court, contending "The Arbitrator ignored the contract, fashioned his own contract and implemented his own brand of 'industrial justice.'"

(3) *Green Bay Area Public School District*, MA-10948 (Hahn, 9/00)

The School District terminated the Grievant, a teacher in the Green Bay School District, due to his relationship with a seventeen year old student in a neighboring district. The termination was based primarily on a long-standing sexually explicit e-mail relationship between the Grievant and the student, as well as other allegations of improper physical contact. During the arbitration hearing, over 160 separate e-mails between the two individuals were introduced into evidence.

The Grievant contested the termination, relying primarily on language in the parties' collective bargaining agreement which states the following: "The private life of a teacher is not within the appropriate concern or attention of the Board except as it may directly prevent the teacher from properly performing his/her assigned functions during the workday."

(a) The Union contended that the e-mails were private, off-duty conduct, not preventing Grievant from performing his job.

(b) Conversely, the District argued that the e-mails – their content – was reason enough for discharge.

Arbitrator Hahn held that the District did <u>not</u> have just cause to terminate the Grievant. He stated that he was bound to apply the "privacy" language of the parties' collective bargaining agreement to this situation. Given this language, the Arbitrator determined that the

relationship between the student and the Grievant "had no effect on Grievant's assigned teaching duties and did not adversely affect anything Grievant did for the District . . ." Arbitrator Hahn did note that "[i]f this e-mail exchange had been between Grievant and a student within the District, I believe it would be clear that this off-duty conduct would be a concern of the District Board."

Ironically, despite the Arbitrator's decision to not uphold the discharge, he acknowledged that this decision put the District in a difficult position when he stated the following: "[B]y the District proceeding through its own hearing and an arbitration hearing in an attempt to discharge Grievant, the District cannot be accused of failing to prosecute sex abuse cases . . . The District should suffer no loss of credibility in its responsibility for protecting the welfare of its students."

C. **Municipal Employment Relations Act. Wis. Stats. § 111.70 (Public Sector)**

1. If an employee starts a blog or posts material on Facebook about their workplace, their actions may be protected. A public employee is protected if he/she "engage[s] in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." Wis. Stats. § 111.70(2). Historically, activities would be "for the purpose of . . . mutual aid or protection" if they relate to the employees' wages, hours, or other terms and conditions of employment.

   a) A public sector employer is not allowed to retaliate against employees for engaging in protected activities.

   b) For example, a public sector employer probably cannot discipline an employee for blogging about the public sector employer's inadequate pay scale with other employees, or for using a blog to urge other employees to challenge the public sector employer's vacation policy. *See Timekeeping Sys., Inc.,* 323 NLRB 244, 247-49 (1997).

2. To find an employee's activity "concerted," the action must be engaged in, with, or on the authority of, other employees, and not solely by and behalf of the employee alone. If the blogger is promoting the blog to other workers or other workers are visiting the site, it may fall under the Act because "two or more employees are engaged acting together." Also, even if no other employee is viewing the blog, if the employee can show that the content is aimed at initiating, inducing, or preparing for group activity, then it may be protected.

3. *University of Wisconsin Hospitals and Clinics Authority*, Dec. No. 30202-C (WERC, 4/04). At issue was whether the employer unlawfully interfered with the employees' rights to engage in lawful concerted activity when it blocked the Union's access to the employees through the Hospital's e-mail system.

   After weighing the employees' rights against the employer's needs, the WERC found the employees' rights prevailed. Blocking the e-mail access eliminated an efficient, effective method of communication with the Union, which was sufficient to conclude that it inhibited the employees' ability to engage in lawful, concerted activity. The Commission ignored the Hospital's property interest argument. "Rather, by generally permitting personal use of the e-mail system by employees without imposing routine controls or monitoring outside access, and by using the system with some frequency to send its own broadcast e-mails, the Hospital has evinced little bona fide concern that the Union's e-mail would disrupt the system or interfere with work." *Id.* at 17.

4. Florida's Public Sector Decision Regarding Website Postings

   a) *Steven J Dickey and Hillsborough PBA v. David Gee, Sheriff of Hillsborough County, Florida*, 35 FPER P191 1 (2009).

      A police officer who was the bargaining unit president made off-duty posts to a PBA union website about the Chief Deputy, who was the officer's supervisor. The posts referred to the Chief Deputy by his nickname, "ICE MAN," and questioned his comprehension of the collective bargaining process. The posts also discussed more general contractual matters.

      The Sheriff suspended the officer for five days because the articles contained statements that were deemed to be insubordinate. The Union filed an unfair labor practice in response to the discipline, stating the articles were protected concerted activity.

      The Florida Public Employees Relations Commission ruled the officer's writing of the articles was protected activity and that the protected activity did not lose its protection because of the statements within the articles. The statements were not threatening, libelous, language which constituted extortion or bribery, nor did the statements create a real threat of immediate disruption in the workplace.

D. **National Labor Relations Act (Private Sector) – But Interesting and Comparable Analysis**

1. Protected Concerted Activity

   a) Regardless of employees' union statuses, avoid retaliating against employees if they discuss wages, hours, and other terms and conditions of employment through social media or other forms of technology. Engaging in such discussions can constitute protected concerted activity.

   b) Section 7 of the National Labor Relations Act provides:

   "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. Increased Enforcement

   a) On April 12, 2011, the General Counsel for the NLRB issued a memorandum to the NLRB's regional offices, requiring that social media issues be submitted to the NLRB's Division of Advice before any action is taken by regional staff members. Specifically, the regional officers are required to submit cases "involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter."

3. NLRB Complaint Filed Against American Medical Response

   a) On November 2, 2010, the NLRB announced a Complaint that it brought against a private sector Connecticut employer when the employer discharged the employee after the employee posted negative comments about her supervisor on the employee's Facebook page, on her own time, from her home computer.

   Apparently, the employee mocked the supervisor on Facebook, using several vulgarities. The employee also had posted that she "love[s] how the company allows a 17 to become a supervisor." A "17" is the company's lingo for a psych patient.

   b) NLRB Complaint Settled

(1) Overbroad policies. The NLRB announced that as part of the settlement with the Connecticut employer, the employer agreed to revise the overly-broad rules involving social media so employees are not restricted from discussing their wages, hours and working conditions with co-workers and others while off-duty.

In this case, the company had a blogging and internet posting policy which stated, in part, that:

> Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

If you have a social media policy, review it to ensure it is not overbroad in its restrictions involving employees' rights to communicate about wages, hours, and conditions of employment ("protected concerted activity").

(2) Do not apply policies in a discriminatory manner. The parties' settlement in this case also required the employer not to discipline or discharge employees for engaging in discussions about wages, hours, or conditions of employment on social media.

If an employer is going to discipline for off-duty social media use, ensure it is not in response to protected concerted activity. For example, if several employees use Facebook to complain together about wages or a single employee is authorized by other employees to discuss wages, the employer should not discipline employee(s) for those Facebook posts.

E. Anti-Discrimination Statutes Apply (Retaliation and Sexual Harassment)

1. Retaliation

a) If an employee is "opposing" an unlawful employment practice under one of the anti-discrimination statutes through a social media profile, the employer should not take adverse action in response to that posting.

2. Sexual Harassment – Civil Rights Act of 1964 (Title VII)

a) Types of Sexual Harassment

(1) "Quid Pro Quo" Harassment: When submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or when tangible job benefits are granted or denied depending on an employee's submission to unwelcome sexual requests or conduct.

(2) "Hostile Work Environment" Harassment: When the harassment unreasonably interferes with an individual's job performance or creates an intimidating, hostile or offensive working environment.

(a) The standard is whether the conduct is "sufficiently severe or pervasive" so as to alter the conditions of the victim's employment and create an abusive working environment.

b) Remedying Social Media Harassment

(1) Take prompt and effective remedial action

(2) Revise current policies

(3) Educate all employees

F. **First Amendment (Public Sector)**

1. General Rule: An employer's right to terminate an employee is limited by the First Amendment. The free speech rights of a public employee are more limited than they are for the general public.

2. The First Amendment to the U.S. Constitution entitles public employees to voice their concerns about matters of **public interest.** Public employers may, however, regulate employees' communications about more **personal matters**. Where a public sector employee raises both public and private interests, the administration must show that any right to speak of public concerns is offset by other considerations, such as undermining a legitimate goal of the institution, creating disharmony among colleagues or impairing discipline.

3. Some courts find such communications unprotected even where only a potential for disruptiveness has been shown.

   a) Examples of subjects likely protected include corruption, wastefulness, or inefficiency.

   b) Examples of subjects likely **not** protected include bickering with department heads, individual assignments, responses to the public's complaints or poor teaching evaluations.

4. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

   a) Facts: Richard Ceballos, a supervising prosecutor, wrote a memo to his superior arguing that a case should be dropped due to inaccuracies in an affidavit. Ceballos was subsequently reassigned as a trial attorney, transferred to a new courthouse, and denied a promotion. He argued that these actions were retaliation for his writing the memo, in violation of his First Amendment rights.

   b) The Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The intent of the holding is to draw a "bright line" around job-related speech, declaring it not protected by the First Amendment. In theory, this holding allows a government employer to sanction job-related speech without having to fear judicial intervention or second-guessing.

   c) In so holding, the Court carefully distinguished its prior employee-speech cases, leaving fundamentally intact the doctrine established by *Pickering v. Board of Education of Township High School District*, 391 US 563 (1968) and *Connick v. Myers*, 461 US 138 (1983), cases that establish limited circumstances in which employee speech is protected.

      (1) The *Pickering/Connick* inquiry asks first whether the employee spoke as a citizen on a matter of public concern, and if so, whether the government employer has an adequate justification—i.e., efficiency and efficacy—for treating the employee differently from any other citizen.

      (2) If the government does not have adequate justification, the speech is protected. The test has been applied to protect, for example, the speech of a teacher who wrote a letter to the newspaper about school funding issues (*Pickering*), a

teacher who complained to her principal about racist hiring policies (*Givhan v. Western Line Consol. School Dist.*, 439 US 410 (1979)), and a police dispatcher who expressed a negative opinion about the president to co-workers while on the job (*Rankin v. McPherson*, 483 US 378 (1987)).

(3) In *Connick*, the test did not protect an attorney who was fired for circulating a questionnaire about personnel matters, which either posed questions not of public concern (e.g., the department's transfer policy), or was sufficiently disruptive to office morale to justify a disciplinary response.

d) The critical fact in this case, the Court emphasized, was that Ceballos admittedly wrote the memorandum pursuant to his duties as a calendar deputy, and not as a citizen—as in *Pickering*, when a teacher wrote a letter to the newspaper—nor as an employee concerned about an issue not expressly within the scope of her job—as in *Givhan*, when a teacher spoke to her principal about racist hiring practices at the school, or in *Rankin*, when a police dispatcher voiced her opinion of the president.

e) *Garcetti*'s progeny has spawned additional dangers for public employers dealing with union members–especially union representatives.

f) In *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006), Milwaukee County passed over the union president for a promotion after the union president voiced complaints over a staffing matter. The Court of Appeals found the County was entitled to show there was an interference with the efficient operation of the sheriff's department under *Connick*, but that removing the case based on *Garcetti* was inapposite because the union president's criticisms that precipitated the adverse promotional action were made in his capacity as a union representative, rather than in the course of his employment as a deputy sheriff. One can envision how this type of speech could leak into the social media sphere with Facebook and blogging.

g) *But see Bivens v. Trent*, 591 F.3d 555 (7th Cir. 2010).

An Illinois state police officer brought a claim alleging retaliation for exercising First Amendment rights after he filed a grievance. The officer worked at a firing range, and after experiencing illnesses, he complained regarding potential unsafe levels of lead exposure at the facility. He filed an internal grievance that alleged

a violation of the safe working conditions provision in the collective bargaining agreement.

The Seventh Circuit Court of Appeals held the grievance was speech made pursuant to his official duties under *Garcetti* because it was "undisputed [the officer] was responsible for the safe operation of the firing range and consequently that he had a responsibility, as part of his job duties, to report his concerns about environmental lead contamination."

The Court further held, that even if the officer was speaking as a citizen under the First Amendment, he was not speaking on a matter of a "public concern," as his grievance "was filed for the sole purposes of securing his own medical treatment and ensuring he had a safe work environment."

5. School District Employee Cases

a) *Richerson v. Beckon*, 337 Fed. Appx. 637 (9th Cir. 2009).

A school district employee posted critical and highly personal comments in her blog about her employer, union representatives, and fellow teachers. Though not individually named, those individuals referenced were readily identifiable in the blog. The District's Director of Human Resources received several complaints from teachers and other District employees, including someone to whom the employee was assigned to as an "instructional coach." Other individuals refused to work with the employee in the future. The HR Director transferred the employee. The employee filed suit, claiming the transfer of positions was unconstitutional, as it retaliated against her for her exercise of her First Amendment rights through her personal internet blog.

The Ninth Circuit held that the statements made by the school district employee in her blog fatally undermined her ability to enter into trusting relationships as an instructional coach, and thus the decision to transfer the employee from her position as curriculum specialist and instructional coach into classroom teaching position did not violate employee's First Amendment free speech rights, even if employee's speech touched on matters of public concern, where employee's positions required that she enter into trusting mentor relationships with less experienced teachers in order for her to give honest, critical, and private feedback.

b) *Spanierman v. Hughes,* 576 F. Supp. 2d 292 (D. Conn. 2008).

A male teacher claimed his employer school district retaliated against him for exercising his First Amendment rights after he communicated with students through his MySpace page. The teacher claimed he communicated to the students about homework, to learn more about the students so he could "relate" to them better, and to conduct casual, non-school related discussions.

Students complained about the site and a guidance counselor reviewed the MySpace page. The counselor found a profile picture of the teacher when he was 10 years younger. Under the profile picture, there were pictures of students. Near the pictures of the students were pictures of naked men, with "inappropriate comments" underneath them. Further, the guidance counselor viewed the MySpace page conversations between the teacher and students as "very peer-to-peer like." The students conversed with the teacher about what they did over the weekend at a party or their personal problems. One of the exchanges (in its unaltered state) between the teacher and students was as follows:

> *Teacher*: "Repko and Ashley sittin in a tree. K I S S I N G. 1st comes love then comes marriage. HA HA HA HA HA HA HA !!!!!!!!!!!!!!!!!!!!!! LOL"
>
> *repko [student's username]*: "don't be jealous cuase you cant get any :)"
>
> *Teacher*: "What makes you think I want any? I'm not jealous. I just like to have fun and goof on you guys. If you don't like it. Kiss my brass! LMAO"

The guidance counselor confronted the teacher and suggested that he use the school e-mail system for communicating with students about educational topics like homework. The teacher deactivated that MySpace page.

Subsequently, a teacher viewed another very similar MySpace page with a different username. It was nearly identical to the male teacher's previous MySpace page that he had deactivated. The profile had the same people as "friends" and included the same types of communications. The school district non-renewed the teacher's contract.

The Court dismissed his First Amendment claim, finding the MySpace communications did not address a matter of public concern. Further, "it was not unreasonable for the [school] to find that the [teacher's] conduct on MySpace was disruptive to school

activities." The exchanges showed a "potentially unprofessional rapport with students, and the court can see how a school's administration would disapprove of, and find disruptive, a teacher's discussion with a student about 'getting any.'"

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

A student teacher enrolled in a public university teaching program did not have her First Amendment free speech rights violated when the teaching program failed to certify her allegedly due to web pages about her found on the Internet. Because of her status as a teacher, the student teacher was subject to freedom of speech that touched on public concern. The student teacher's website posting (a picture of her wearing a pirate hat and holding a plastic cup with a caption that read "drunken pirate"), was not speech that touched on matters of public concern, but rather the posting was only related to personal matters.

d) *Shaver v. Davie County Public Schools,* 2008 WL 943035 (M.D.N.C. 2008).

The employee claimed he was wrongfully terminated as a public high school bus driver because he practiced the Wicca religion (Title VII) and engaged in unspecified protected speech (First Amendment). The District obtained the information about his religion from his MySpace page.

The Court dismissed the Title VII claim on procedural grounds, precluding the employee from bringing another claim under Title VII for the discharge. However, the Court dismissed the First Amendment claim without prejudice, meaning the employee could bring a First Amendment claim against the school at a later date.

G. Fourth Amendment

1. General Rule: Public employees are protected by the Fourth Amendment of the US Constitution, although whether or not an employer is permitted to monitor employee's communications still depends on whether a court determines that the employee had a "reasonable expectation of privacy" with respect to the act.

2. "Operational realities of the workplace" make some employees' expectations of privacy unreasonable.

3. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the U.S. Supreme Court stated a public sector employer may conduct a warrantless search of an

employee's office if the search is "reasonable"– or "justified at its inception" and "permissible in its scope."

4. In *Muick v. Glenayre Elecs.*, 280 F.3d 741 (7th Cir. 2002), a private sector employee had no expectation of privacy in a computer provided by the employer for his work use that the employer had seized at the encouragement of federal agents to investigate whether the employee possessed child pornography.

5. In *United States v. Simons*, 2006 F.3d 392, 398 (4th Cir. 2000), a government employee's privacy expectations in offices, desks, and file cabinets may be reduced by office practices, procedures, or regulations.

6. New Guidance for the Public Sector.

   a) *City of Ontario v. Quon,* 130 S.Ct. 2619 (June 17, 2010).

      Primary Issue before the U.S. Supreme Court: Whether a SWAT team member (public sector employee) has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.

      Facts: The City of Ontario, California provided wireless text-messaging services to its employees through Arch Wireless. The City did not have an official policy directed to text messaging through pagers, but there was a general computer usage, Internet and E-mail Policy applicable to all City employees. The employee at issue was told the e-mail policy applied to pagers and that the messages were not private. However, the police lieutenant in charge of the pagers had established an informal policy that an officer's messages would not be audited if he or she paid for usage overages.

      After several times where the employee exceeded the normal monthly pager usage amounts and that employee still paid for the overages, the City obtained a transcript of the employee's pager and discovered sexually explicit messages sent between the employee and his wife, and the employee and his mistress.

      9th Circuit's Holding/Analysis: The Court of Appeals held the Department's informal policy that the text messages would not be audited created a reasonable expectation of privacy by the users of the text messaging service. The Court noted that if the informal policy was not in place, there would not be a reasonable

expectation of privacy. However, when the employee followed the informal policy that overages would not result in an audit so long as the employee paid for the overages, there was a reasonable expectation of privacy in the text messages archived on Arch Wireless's server. The Court dismissed any influence of California's Public Records Act might have on diminishing the employee's reasonable expectation of privacy.

The Court also held the search was unreasonable. The search was initially reasonable in its inception because its purpose was to determine the efficacy of existing character limits placed on the pagers. However, the scope of the search was unreasonable because the Court of Appeals determined there were simpler, less intrusive ways to determine the efficacy of the 25,000 character limit without intruding that far into the employee's privacy. The Court suggested the Department could have warned the employee ahead of time that for a certain month, the messages would be audited.

U.S. Supreme Court Reverses: On June 17, 2010, the U.S. Supreme Court reversed the lower court and held the search of the electronic device's message was reasonable under the circumstances. The Court did not issue a broad rule whether a public-sector employee has a reasonable expectation of privacy in electronic communications because "the judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. . . . Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices."

The Court assumed, for the sake of argument, that the employee *had* a reasonable expectation of privacy, but determined that the search of the messages was reasonable. Relying on precedent that held a search conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," is reasonable if "justified at its inception" and if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search," the Court held the City's search was reasonable because it was motivated by a legitimate work-related purpose and it was not excessive in scope.

This case was closely watched, as it had the potential to adversely impact the ability of public sector employers to monitor

employees' electronic communications. This decision provides public sector employers with the opportunity to review their electronic use policies to determine whether employees are clearly told of their reduced expectation of privacy when using employer-provided electronic devices.

H. **Blogging or Promoting Services for an Employer Using "New Media"**

1. New Federal Trade Commission Guidelines

a) In the Fall of 2009, the FTC updated its *Guides Concerning the Use of Endorsements and Testimonials in Advertising.*

b) Bloggers/Facebook posters/Twitterers must disclose any material connection (commissions, free products received, or cash payment) they have with the product or services being described in a post. This is known as any "material connection" that the poster has to the product or service.

(1) A blog poster "should clearly disclose [the blogger's] relationship to the manufacturer to members and readers of the message board." A "poster's employment likely would affect the weight or credibility of [the blogger's] endorsement."

c) Both the advertiser of the product and the blogger "are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement."

d) The FTC can levy fines of up to $11,000 per post.

e) For example, non-compliance with these guidelines might arise where a district desires greater promotion of an aspect of its services (charter school). If an employee is paid to "blog" about those services, the employee should disclose his or her material connection to the company.

2. Enforcement Action – Reverb Communications (8/26/2010)

a) In 2010, the FTC brought a complaint against Reverb Communications, Inc., a public relations firm that provides PR, marketing, and sales services to developers of video game applications, including mobile gaming applications.

b) Between November 2008 and May 2009, Reverb posted reviews about clients' games at the iTunes store using account names that

gave readers the impression the reviews were written by disinterested consumers. The reviews did not disclose the posts came from paid employees. The posts included:

(1) "4 out of 5 game"

(2) "Amazing new game"

(3) "Really cool game"

(4) "One of the best apps just got better"

(5) "GREAT, family-friendly board game app"

c) The Final Order required Reverb to "take reasonable steps" to remove previous endorsements that misrepresent the authors as independent users or ordinary consumers. The Order also prohibits the company from misrepresenting that the user or endorser is an independent, ordinary consumer unless they disclose "clearly and prominently, a material connection."

3. Solutions

a) Employers should update their policies to reflect the new legal considerations with promoting the employer through "new media" and prohibit employees from posting about an employer's product or service unless the material connection to the product or service is disclosed.

I. Invasion of Privacy

1. Outside of one's place of employment, one's use of the Internet in public forums is also being viewed with less of an expectation of privacy.

2. Wisconsin recognizes a statutory right of privacy for individuals. Wis. Stat § 995.50. An "invasion of privacy" includes an "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 . . ." Wis. Stat. § 995.50(2)(a).

a) Courts, however, have repeatedly held that there is no reasonable expectation of privacy with respect to e-mail communications. By extension, the same can apply to social networking.

Moreno v. Hanford Sentinel, Inc., 172 Cal. App. 4th 1125 (Cal. App. 5th Dist. 2009). This is not an employment case, but it sheds

light into the privacy expectations of a social media user. A UC-Berkeley student published an "extremely negative" missive on MySpace about her hometown, which was republished in the hometown's newspaper. In response, the community "reacted violently," and the author's family received death threats and a shot was fired at the family home, forcing the family to move out of city. The father's 20-year-old business was forced to close. The author and other members of her family brought action against the author's sister's high school principal, who had submitted the MySpace entry for republication in the local newspaper, and against the school district, for invasion of privacy.

The court rejected the invasion of privacy claim and opined, the author's "affirmative act made her article available to any person with a computer and thus opened it to the public eye. Under these circumstances, no reasonable person would have had an expectation of privacy regarding the published material."

b) Public vs. Password-Protected Social Media Sites

(1) Generally, if the applicant's or employee's blog, website, or social networking profile is open to the public, an employer is free to review it without worrying about an invasion of privacy claim.

(2) However, if the site is password-protected, employers have the following options:

(a) Obtain a copy of the materials from someone with access to the protected site (caution strongly advised).

(b) If the computer being used is the employer's property, the employer may be able to review the communications on the employer's server.

(c) Do <u>not</u> ask the applicant or employee for his or her username and password. Also, accessing social media sites through false pretenses would likely invade a right to privacy.

(d) Do <u>not</u> access the employee's personal social media account to post on the employee's behalf.

(i) *Maremont v. Susan Fredman Design Group* 2011 WL 902444 (N.D. Ill. 3/15/11). The

Court ruled the company could be liable under Illinois' Right to Publicity Act (using her likeness without her authorization) and the Lanham Act for false endorsement. After Ms. Maremont was in a serious accident, several employees accessed Ms. Maremont's Facebook and Twitter pages while Ms. Maremont was injured. The employees posted from her social media pages, as if she were posting the messages herself, indicating her injuries were not severe and that she had returned to work. Ms. Maremont's relations with the company deteriorated, and she left the company.

J. **Identity Theft**

1. *State of Wisconsin v. Baron,* 318 Wis 2d 60 (Wis. 2009) Christopher Baron worked as an EMT for the City of Jefferson under the direction of Mark Fisher, Jefferson's EMS Director. Baron accessed Fisher's e-mail account and found several e-mails allegedly showing that Fisher was having an affair and discussing his sexual activity and sexual preferences. Baron forwarded the e-mails to people in the Jefferson community in a manner that made the e-mails appear to come from Fisher himself. The next day, Fisher committed suicide. Among other things, Baron was charged with identity theft in violation of Sec. 943.201(2)(c), Wis. Stat., for intentionally using personally identifying information (Fisher's name) to harm Fisher's reputation by representing that he was Fisher when sending the e-mails. Violation of the statute is a Class H felony.

   The circuit court granted Baron's motion to dismiss by reasoning that Sec. 943.201(2)(c) contains a defamation element which interferes with Baron's First Amendment right to free speech, (i.e., his First Amendment right to defame a public official with true information). The circuit court noted that the statute could have a chilling effect if applied to Baron's conduct. The Court of Appeals reversed the circuit court, holding that "Wisconsin statutes are replete with provisions that criminalize conduct that may otherwise be constitutionally protected, if that conduct is carried out in an unlawful manner." The Supreme Court affirmed, stating that the statute does not prevent Baron from revealing the reputation-harming information so long as the method chosen to reveal the information does not involve Baron pretending to be Fisher. In other words, there would have been no violation if Baron had disseminated the information using his own e-mail account or stood on the street corner and distributed flyers. The Court stated: "[I]t is not the case that this statute punishes Baron for criticizing a public official. Rather, the statute punishes Baron for

intentionally using an individual's personal identifying information with the intent to harm the individual's reputation."

K. Protected Whistleblowing Activity

1. E-mails or blogs that are critical of a municipality might constitute legally protected whistleblowing. However, the protected status of these activities is limited by the U.S. Supreme Court's *Garcetti* decision (discussed above).

L. PUBLIC RECORDS ISSUES

1. Wisconsin's Public Records Law

a) Wisconsin Public Records Statute: When board members, administrators, or district employees use electronic communications, such as e-mail systems or other social media between themselves and/or other employees, they may also be creating exposure for the governmental unit as it relates to public records issues.

b) *Schill v. Wisconsin Rapids School District*, 2010 WL 2791918 (Wis.).

In this case, a citizen requested e-mails for the period from March 1, 2007 through April 13, 2007 "from the computers [the Teachers] use during their school work day." The requester wanted to determine if the teachers were following the district's computer use policy that permitted "occasional" personal use. The teachers sought to prevent the release of personal e-mails sent over the district's computers.

On July 16, 2010, the Wisconsin Supreme Court issued its decision and ruled purely personal e-mails sent by public sector employees over a government network, using government equipment, are not subject to release under Wisconsin's Public Records Law.

A clear majority of the court concluded that purely personal e-mails are not subject to disclosure under Wisconsin Public Records Law, but the Court split 4-3 on the issue of whether personal e-mails are "records."

The Court's lead opinion, drafted by Justice Abrahamson and joined by Justice Crooks and Justice Prosser, rejected the argument that personal e-mails were "records." To constitute a "record" under the Public Records Law, "the content of the document must

have a connection to a government function." In this case, the personal e-mails had no connection to a government function and were therefore not records. (Both parties conceded the e-mails at issue were personal.) The opinion noted that "personal e-mails could, however, be public records under the Public Records Law . . . if the e-mails were used as evidence in a disciplinary investigation or to investigate the misuse of government resources."

However, a majority of the Court, including Justices Bradley, Gableman, Ziegler, and Roggensack concluded that personal e-mails are "records." After applying the balancing test, Justice Bradley and Justice Gableman, in separate concurring opinions, concluded that the public interest in the non-disclosure of personal e-mails outweighed the public interest in disclosure. Justice Roggensack, in a dissent joined by Justice Ziegler, concluded that Wisconsin's strong public policy in favor of disclosure requires that such e-mails be disclosed.

c) Wisconsin Attorney General's Initial Analysis of Schill

(1) Responding to *Schill*, Wisconsin Attorney General J.B. Van Hollen issued a memorandum on July 28, 2010 to address the practical impact of the decision on records custodians.

Parts of the Attorney General's initial analysis are unsurprising. The memorandum states that *Schill*'s "purely personal e-mail" exception "should be narrowly applied." Further, "If there is *any* aspect of the e-mail that may shed light on governmental functions and responsibilities, the relevant content must be released as any other record would be released under the Public Records Law." (emphasis in original). Also, the memorandum addressed partial redaction of e-mails and stated, "If a document contains both personal and non-personal content, a records custodian may redact portions of the document so that the purely personal information is not released."

If you hoped there would be fewer public records requests for e-mails in response to *Schill* that hope is probably misplaced. The memorandum encourages individuals who are concerned about misuse of public resources to make public records requests regarding personal use of government e-mail. Specifically, the memorandum noted, "an individual may request existing records containing statistical information, including the number of e-mails

(personal and business) and the time and dates of the personal e-mails over a specified period."

2. "Personal" Websites

a) Wis. Atty. Gen. Informal Opinion I — 06 — 09 (Dec. 23, 2009).

The Salem Town Chair maintained a Google group website called "Making Salem Better," where only certain individuals had access. A member of the press requested to join the group, but was denied access. Eventually, documents were provided to a press member, where it was discovered the Town Chair used the website to discuss town business, including the community library and representation on its board, the high school addition project, and potential construction of a round-about.

Attorney General Van Hollen opined that the material on the website was "more likely than not a public record," despite the Town Chair's argument that the website was maintained as a private individual, not in her capacity as the Town Chair. The Attorney General reaffirmed that it is the content, not the location of the record, that determines whether it is a public record. The Town Chair used the website as a vehicle to communicate with constituents about town governance and operations. As such, those items that were connected to the Town Chair's official duties were "more likely than not" a public record.

3. Records Retention Issues

a) How does one retain electronic communications (e-mails, text messages, Facebook messages) when they are records?

V. COMMON SENSE GUIDANCE TO USING TECHNOLOGY AS A DISTRICT EMPLOYEE, OFFICER, OR BOARD MEMBER

A. Some Steps to Take to Reduce your Risk of Harm from Employee Use of Social Media

1. Expand current policies regarding use of all electronic and social media, including the fact that the employer has the right to monitor all use of such media.

2. Adopt a "social media" policy to address issues that arise with on and off-duty use of Facebook and other social media.

a) Communication with staff

b) Confidentiality

c) Harassment

d) Protected concerted activity

(1) Avoid a social media policy that violates the Wis. Stat. §111.70 and the First Amendment.

(2) Structuring and enforcing a better social media policy

3. Educate employees about the risks involved with technology use.

4. Put employees on notice that certain forms of off-duty misconduct, including Internet or other electronic media misconduct, could subject them to discipline, up to and including discharge.

5. Monitor employee use.

6. Expect administrators and supervisors to help enforce your rules consistently, including notifying you immediately of possible violations.

7. When you receive a report of a possible violation, investigate it promptly.

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