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# County Commissioners Association of Ohio

# *Social Media*

## *Harassment, Workplace Conduct and Social Media Policies and Issues*

***May 13, 2015***

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**About Jonathan Downes:**

Jonathan Downes brings more than thirty years of experience and expertise in representing public and private employers in all aspects of labor and employment law and human resource management. In addition to negotiating over 500 labor contracts, Jonathan has represented employers in arbitrations, organizing campaigns, and administrative hearings including the State Employment Relations Board. Jonathan has also defended employers in state trial and appellate courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.

When not in negotiations, at court, or teaching a seminar, Jonathan edits Westlaw's Ohio Civil Service and Collective Bargaining Laws Annotated publication. He also edits annually Civil Service Law in Ohio (Westlaw) and contributes to numerous association and trade group publications.

Jonathan is certified by the Ohio State Bar Association as a Specialist in Labor and Employment Law, is AV-Preeminent rated by Martindale Hubbell and selected by peers for "Best Lawyers in America" in the practice areas of "Employment Law – Management" and "Labor Law – Management." ® While recognized many times over as a subject-matter expert, Jonathan was selected as one of the Top 50 Central Ohio Lawyers of 2015 and every year since 2004 has been named an Ohio "Super Lawyer."

**About Zashin and Rich:**

Zashin & Rich Co., L.P.A. ("Z&R") specializes in labor and employment law with offices in Cleveland and Columbus, representing both private and public employers. Members of Z&R have diverse backgrounds and experience which provides depth and understanding of the needs of its clients.

Z&R represents its clients with broad experience in labor negotiations, human resources matters, and civil service. Attorneys of Z&R have collectively negotiated over 1000 contracts and have represented private and public employers in numerous arbitrations, impasse proceedings and in litigation. Attorneys have extensive experience representing private employers, universities and colleges, state agencies, special districts, cities, counties, townships, housing authorities, hospitals and others. Attorneys handle matters at arbitrations, the National Labor Relations Board, the State Employment Relations Board as well as the State Personnel Board of Review, and local civil service commissions.

Z&R representation includes all federal and state discrimination laws, administrative and court proceedings, employee handbooks and manuals, contract administration, strike situations, grievances and arbitration, discipline matters, public pension systems and workers' compensation. Attorneys in the firm have extensive knowledge and experience, both in litigation and providing advice, with various federal laws including FMLA, FLSA, ADA and Title VII Civil Rights. The firm has an extensive insurance defense practice representing several national insurance companies including Chubb, Travelers, and AIG among others. The firm represents clients before the EEOC, OCRC and in state and federal courts in all parts of Ohio.

The firm's Labor & Employment Group has received First Tier ranking in Employment Law-Management in the Cleveland Region and Labor Law-Management in both the Cleveland and Columbus Regions by U.S. News Best Lawyers® "Best Law Firms" in 2014 and 2015.



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# I. INTRODUCTION

## Social Media – Policies, Use, and Employee Issues

The use of social media has become a valuable tool for communications by government agencies. Communicating with the public for general information through social media has become increasingly important and useful. Administration of the social media sites has special considerations for public employers such as access, public records, and use by employees on mobile devices.

Use of social media by public employees, both the public social media and private social on-duty and off-duty has raised concerns and lawsuits against public employers.

The most common areas of conflict and dispute have been the use of social media, such as Facebook, by employees to express their concerns or which demonstrates improper conduct of employees.

Discipline can be issued for conduct by employees' off-duty conduct on social media. This means of "communication" has been held to be similar to other means of communication for which they may be held accountable, balancing the freedom of speech issues.

This outline will provide examples for the issues arising out of social media, including:

1. Social Media Policy
2. Employee conduct standards on and off-duty
3. Electronic devices on duty
4. Discipline of employees
5. Freedom of Speech
6. Public records and social media
7. Union activities and social media
8. Social media use in the hiring process

# II. SOCIAL MEDIA CONSIDERATIONS – HOSTING SITES

A. Exposure to claims limited if employers that host social media sites do not open the sites up to posts from employees or third-parties.

B. Employers who host social media sites and allow third-parties to post on the site:

   i. Can only censor posts pursuant to a content-neutral policy which is narrowly-tailored.

ii. The censoring serves a compelling governmental interest (i.e. preserving the public peace).

C. Determine what your reasons and goals for using social media.

D. Checklist for policy to post on the social media site for the general public.

1. Inform the public that the site is routinely monitored (and actually routinely monitor the site).

2. Inform the public of a timeframe for which all posts will be deleted.

3. If the public is allowed to post, identify the subject matters/posts that may be deleted.

a. Spam or posts which include links to other sites.
b. Posts which are clearly off topic.
c. Posts which advocate illegal activity.
d. Posts which infringe on copyrights or trademarks.
e. Posts which contain obscene language or content.
f. Posts which contain confidential or non-public information.
g. Posts which solicit services or products.
h. Threats or harassing comments
i. Any material trademark or copyrighted
j. Any trade secrets or confident information

4. Emphasize that there is no privacy to posts on the site.

5. Inform the public that their posts become public.

6. "Opinions and comments expressed on social media sites do not reflect the opinions or positions of the name, its officers or employees."

E. Checklist for policy for employees who post on their employer's website.

1. Clear statement as to what is and what is not permissible to post.

2. Do not include a blanket statement prohibiting employees from posting.

3. Explicitly prohibit the disclosure of confidential information, trade secrets, public records, etc.

4. Violation of the policy may result in discipline, up to and including termination, subject to any relevant collective bargaining agreement or other applicable policies.

## III. POLICIES - FOR SOCIAL MEDIA FOR EMPLOYEES

A. Checklist for what should be included in developing social media polices and related policies including computer use, cell phones, and electronic devices.

1. The purpose of the use of the social media tool(s)…..Policy Statements

2. Identify sites where conduct will affect employment and why

3. Standard of Conduct expected:

   a. On-duty
   b. Off-duty

4. Prohibited Conduct - Posting or Use.

   a. Employer logo
   b. Employer uniforms or equipment
   c. Unlawful, inappropriate behavior
   d. Obscene, violent, sexual, offensive, harassing or pornographic materials
   e. Material, comments, etc. which impairs morale or public image
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## IV. SOCIAL MEDIA IN THE HIRING PROCESS

Pre-employment use of social media. How can a jurisdiction use social media in the hiring process?

A. Posting job openings on social media sites.

B. An increasing number of employers are recognizing the benefits of using the internet for vetting out applicants in the pre-employment process. Do not require applicants to disclose sites used or to allow access to the employer to the personal sites. Before doing Google searches on potential new hires, consider the following:

1. Do not use fraudulent or improper techniques in order to obtain information. Accessing "invitation only" internet discussion pages to make employment decisions may constitute an invitation of a privacy claim if accessed without permission. Pietrylo v. Hillstone Rest. Group, 2008 U.S. Dist. LEXIS 108834 (D.N.J. 2008).

2. Accessing information about a potential employee on the internet may bring about information that an employer cannot consider in the individual's employment. E.g.: race, sex, national origin, age, etc. protected class

   Avoid this by having someone outside the hiring process perform the internet searches on the potential employees. Have that person report to the hiring individual(s) only relevant, legal information that can be considered for employment.

3. Be careful about disqualifying applicants based on perception versus actual, objective criteria. Perceptions are harder to defend. E.g.: disability.

4. Remember that the quality and truthfulness of information on the internet may not be up to the standard you would prefer to rely on in making important hiring decisions. False profiles are prevalent. Employers may want to consider giving applicants the opportunity to explain information on the internet before disregarding an otherwise qualified candidate. Not everything on the Internet is as it appears.

5. Check for inconsistent information.

6. Consider creating very specific criteria to be used in determining what you are looking for in using the internet for pre-employment research. This will provide consistency in how individuals are evaluated. The more consistent the internet searches are the better. For example, outline specific information that you are looking for (i.e. pornography on personal sites, indications of illegal drug use, any evidence that the applicant lied on his or her application).

C. What about the applicants that have been critical or negative about their previous employers?

First Amendment: Protections apply only to local governments from silencing individuals. Are employers silencing individuals by not hiring them on the basis of them exercising their First Amendment right?

## V. SOCIAL MEDIA - SPECIAL ISSUES FOR PUBLIC EMPLOYEES

A. First Amendment of the Constitution – Government Employees.

The First Amendment prohibits governmental entities from infringing on the employee's or general public's right to freedom of speech.

1. Traditional public forum—places by which long tradition, have been devoted to public assembly and debate (i.e. streets, sidewalks, and parks). Must show that there is a content-neutral prohibition which serves a compelling state interest and is narrowly tailored.

2. Designated public forum—government opens a traditionally non-public forum for public discourse (i.e. public board meetings). Government restrictions must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication.

3. Non-public forum—places which are traditionally not held open to the public (i.e. jails, public schools, military bases). Government may impose content-based restrictions if those restrictions are reasonable.

B. Ohio Public Records Act – Revised Code § 149.43

1. The Law: Requires public entities to make records kept by a public office available. Records are defined as "any documents, device, or item, regardless of physical form or characteristic […] created or received by or coming under the jurisdiction of any public

office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the office." O.R.C. §§ 149.011; 149.43 (Emphasis supplied).

Ohio Historical Society, Electronic Records Commission Link to Social Media Outline: http://ohsweb.ohiohistory.org/ohioerc/images/e/e7/OhioERC-TS-social-media.pdf

2. Ramifications for inappropriate disclosure of confidential information:

   a. Local governments risk public records act violations, which can become very expensive.

   b. Even if social media sites are not a public record, local governments involved in litigation may need to have access to social media sites.

3. How to avoid the ramifications:

   a. Clearly identify who is authorized to release public records.

   b. Amend the records retention policy to reflect the transient nature of social media sites.

   c. Archive websites as they change.

   d. Identify on the website that posts may be removed.

4. Remember: posts which are legally and properly deleted if retained are still public records.

C. Ohio Open Meetings Act – Are public officials conducting business through social media including emails.

1. The Law: all meetings of a public body must be open to the public. "Meeting" is defined as any pre-arranged discussion of public business of a public body by a majority of its members. O.R.C. § 121.22.

2. The Issue: A majority of a public body's members post on a local government's social media site.

3. Ramifications:

    a. Avoid any act that the public body takes regarding a matter that was improperly discussed.

    b. Bad publicity.

4. Ways to avoid the ramifications:

    a. Only have a minority of public body members (or better yet, have no members) post on the sites.

    b. Don't have any members post on sites on matters which may come before the public body.

D. Discrimination and retaliation law

1. Employers cannot use information obtained via an employee or job candidate's social networking page to deny a job promotion or take other adverse action solely because they have learned that the person belongs to a protected class.

    a. Protected class: Race, sex, gender, pregnancy or religion) or has a disability, age, national origin, for example

    b. Protections can also extend to pictures or information that may identify or suggest the person's sexual orientation.

2. Allegations of discrimination can also arise if an employer selectively targets employees in a protected class for investigation or for more severe treatment as a result of information discovered.

    a. Employers should be wary of using information learned from someone's social networking page to terminate or discipline if the party recently filed a charge (formally or informally) of discrimination.

    b. To withstand a retaliation charge, the employer will have to show that the protected activity did not cause the investigation and did not result in more heavy disciplinary action.

    c. Document rationale for employment decisions.

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## VII. SOCIAL MEDIA AND EMPLOYEE CONDUCT - CASES

**Social Worker Terminated for Facebook postings**

***Debord v. Mercy Hospital 120 FEP Cases 1429 10th Cir. 11/26/13***

Facts:

- Employee terminated for disruptive behavior, being untruthful.
- Employee claimed sexual harassment and retaliation.
- Internet postings negative of supervisor.
- Posting occurred while at work.
- Inflammatory material that supervisory was a "snake" who "needs to keep his creepy hands to himself."
- Termination affirmed.

Holding:

- Employer's reporting system, for harassment claims, not followed by employee therefore procedural defense.
- Company investigation policy provided for confidentiality and employee's text messages not seeking information.
- Employee terminated for inappropriate and disruptive behavior and dishonesty.

**Social Worker Fired for Facebook Posts Has No First Amendment Claim**

***Sheperd v. McGee, 37 IER Cases 148, Oregon U.S. Dist. Ct., 11/7/13***

Facts:

- Children's Services Worker.
- Facebook postings.
- Negative comments about people on public assistance.
- Assertion that clients on public assistance buy luxury items.
- Comment that people on public assistance should not have more children.
- Employee terminated for unbecoming conduct.

Holding:

- State's administrative interest outweigh 1st Amendment rights.
- Negative comments would impair worker's ability to do her job.
- Negative comments potential adverse impact in testimony of social worker in a trial.
- Termination affirmed.

**Facebook Postings, "Liking" a Candidate For Sheriff**

***Bland v. Roberts, 730 P.3d 368 (4th Cir. 2013)***

Sheriff's Department employees - Political affiliation and speech - Qualified immunity on *Branti-Elrod* question (whether political affiliation required for the job).

Six "jailers" alleged that the sheriff retaliated against them in violation of the First Amendment by failing to reappoint them due to their support for his electoral opponent, and two of the plaintiff alleged that another basis for the failure to reappoint them was their Facebook postings in support of his opponent.

The 4th Circuit held that the sheriff failed to demonstrate that political allegiance was a job requirement for some of the plaintiffs, and as to others, there were disputed issues of material fact concerning whether a lack of political allegiance was a substantial basis for the failure to reappoint them. In addition, the 4th Circuit held that the sheriff was not entitled to summary judgment on the First Amendment because the employees' Facebook postings in support of the sheriffs opponent constituted protected political speech, and the sheriff had threatened employees with termination for such actions. However, the 4th Circuit concluded that the sheriff was entitled to qualified immunity because a reasonable sheriff at the time could reasonably have believed that he was authorized to terminate his deputies for political reasons.

**Facebook Comments Critical of Supervisor**

***Gresham v. City of Atlanta, 2013 WL 5645316 (11th Cir. 2013).***

Maria Gresham was employed by the City of Atlanta as a police officer. She maintained a Facebook page, set to "private," that was available for viewing by a number of her "friends," who could share her posts more widely. Gresham made critical comments on her Facebook page about a fellow Atlanta officer for allegedly unethically interfering with Gresham's investigation of a person she had arrested for fraud and financial identity theft. When alerted to the Facebook comment, the Department's Office of Professional Standards opened an investigation, alleging that Gresham had violated the Department's work rule requiring that any criticism of a fellow officer "be directed only through official Department channels, to correct any deficiency, and…not be used to the disadvantage of the reputation or operation of the Department or any employees."

During the investigation, Gresham was passed over for promotion. In response, she sued the Department in federal court, alleging that she was denied a promotion in retaliation for her critical Facebook posts, in violation of the First Amendment. The Department countered that Gresham was not eligible for promotion because of its policy not to consider candidates for promotion if they had disciplinary investigations pending against them.

The Eleventh Circuit Court of Appeals agreed with the Department, holding that the Department had not violated Gresham's free speech rights. In analyzing whether Gresham's Facebook post was protected First Amendment speech, the Court applied a 45-year-old Supreme Court test: (1) whether Gresham's speech involved a matter of public concern; (2) whether Gresham's interest in speaking outweighed the Department's legitimate interest in efficient public service; (3) whether the speech played a substantial part in the Department's challenged employment decision; and (4) whether Defendant would have made the same employment decision even in the absence of the protected speech.

The Court assumed that Gresham's speech implicated a matter of public concern, and focused on the second prong of the analysis, in which it balanced Gresham's interest in speaking against the Department's legitimate interest in efficient operations. The Court determined that as a quasi-military operation, the Department's operational interest in directing criticism of a fellow officer through official channels far outweighed Gresham's interest in speaking on a private Facebook page.

It is "undisputed that Gresham violated the work rule requiring criticism of the Department or fellow officers to be directed only through Department channels. If the Department's investigation thereof were deemed First Amendment retaliation, that would have a tendency to

render such a rule unenforceable and would encourage employees to circumvent the Department's investigation processes, thus impeding the Department's investigations and ability to correct problems. In addition, common experience teaches that public accusations of unethical conduct against fellow officers would have a natural tendency to endanger the esprit de corps and good working relationships amongst the officers. Thus, we conclude that there is actual evidence in this record of a reasonable possibility of disruption of the legitimate interests of the Department.

"In this regard, we note that the context of Gresham's speech is not one calculated to bring an issue of public concern to the attention of persons with authority to make corrections, nor was its context one of bringing the matter to the attention of the public to prompt public discussion to generate pressure for such changes. Rather…the context was more nearly one of Gresham's venting her frustration with her superiors. Thus, we conclude that Gresham's speech interest is not a strong one, a factor which the Supreme Court has indicated is appropriate to consider in the balancing process. Moreover, even if Gresham's speech interests were somewhat stronger, we conclude that the Department's interest is considerable, and that the balance clearly tilts in favor of the Department."

**Facebook Posting With Race Overtones - Police Department Reputation and Morale**

***Duke v Hamil, February 4, 2014.***

A deputy police chief demoted after posting on Facebook a Confederate flag image may not proceed with his First Amendment retaliation claims, a federal district court in Georgia ruled. His employer, the Clayton State University (CSU) police department, had an interest in maintaining its reputation, and good working relationships outweighed the officer's First Amendment interest. Even if that were not the case, the individually named chief of police was entitled to qualified immunity because the officer's right to speak as he did was not clearly established. The defendants' motions to dismiss were granted

**Post-election Facebook post**. Days after the 2012 presidential election, the plaintiff, an eight-year veteran of the university police department, posted on Facebook an image of the Confederate flag with an accompanying phrase, "It's time for the second revolution." He intended the image only to be shared with those people with direct access to his Facebook page, which included close friends and family. He was not on duty at the time and his Facebook profile did not reference his place of employment. Although he removed the post within one hour, the damage was already done: Someone provided an image to a local television station, which ran the story on the evening news. The story identified his position as a deputy chief with the university police department.

Thereafter, the police department received anonymous complaints about the employee and the university started an investigation. In the final report, the chief of police recommended the employee's demotion and noted that officers should not publicly espouse their political beliefs. As a result of the demotion, the officer's pay was cut by $15,000 and he was put on a less desirable morning shift. Later, he voluntarily resigned, then filed suit against the chief of police, both officially and individually, and the board of regents of the University System of Georgia, which operates CSU.

**Pickering Test.** Claims for First Amendment retaliation are governed by the four-part *Pickering* test. The first two prongs of that test — whether the speech involved a matter of public concern and whether the plaintiff's interest outweighed the government's legitimate interest in efficient public service — were questions of law and, in this case, were the only two that the court needed to consider. With regards to the first prong, the employee was speaking as a citizen, the court found, and not as an employee pursuant to his official duties or in fulfillment of his responsibilities to his employer. He posted the image and statement on his personal Facebook page, which did not identify his employer. Also, the statement did not make reference to any of the police department's policies, practices, or employees.

Whether his speech was a matter of public concern was a closer question. The officer claimed he was expressing his dissatisfaction with Washington politicians. Although the employer argued that the phrase he posted was not related to a legitimate concern, the court determined that it could be "fairly considered to relate to matters of political concern in the community." The Confederate flag could relay a variety of messages, the court noted, including "political or historical points of view." Even if the message had been more radical, it would still be related to political and social concerns, albeit with a controversial point of view.

**Employer's reputational interest.** Important to the *Pickering* analysis, the court noted, was the understanding that employers deserved wide latitude in management and needed to be able to take action against employees who disrupted the efficient operation of government. This interest in efficient public service was particularly strong in the context of police departments, which have a particular need to maintain a favorable public reputation. The court needed to assess whether the specific speech impeded this ability. It also had to consider the time, place, and manner of the speech, as well as the context within which it was made. Having done so, the court found the officer's interest in speaking did not outweigh the employer's interests.

Although the officer alleged that his speech did not actually cause disruption, the court noted that the police chief nevertheless had an interest in preventing the speech from impeding the department's functions. Facially, the officer's speech could convey a message far different from what was claimed by the officer. Those messages were divisive, prejudicial, and controversial, and they came from the officer who was second in command in the department. The chief of police did not have to wait to see what happened as a result of that controversy before addressing

it. Given the officer's supervisory role, the speech could undermine working relationships within the department if it were not addressed.

Moreover, his speech received public attention and implicated the public trust, which could justify preemptive action. Indeed, the court noted, this potential for harm was "more than conjecture." As deputy chief, his actions reflected on the department's reputation more significantly, and many in the community would take offense at his speech because it raised concerns of prejudice. And it appeared to advocate revolution, which could undermine confidence in the department because the officer was supposed to uphold law and order.

**Internet posts a "gamble**." Although the officer was off-duty and off-campus, and he posted the picture and comment in a private Facebook account intended to be viewed only by close friends and family, this case illustrated the "very gamble individuals take in posting content on the Internet," the court noted. While the officer contended his speech was not violent, threatening, or directed at the police department, the court noted that his chosen manner of speech — the use of a symbol that was vulnerable to many meanings — left "ample room for interpretation." Taken in the politically charged context in which it was posted, the post had heightened potential to damage the department's interests. It appeared to advocate a revolution during a presidential election, an idea it associated with a Confederate flag. In so doing, the officer "likely sent a partisan, if not prejudicial, message to many" in the department and the community it served. After weighing all of these factors against the officer's interest, the court found no First Amendment violation.

**Immunity**. Even if the employee's rights had been violated, the chief of police would have been entitled to qualified immunity because the right in question was not clearly established. The Eleventh Circuit addressed the issue of qualified immunity in a case involving a police officer and determined that unless the *Pickering* analysis led to an "inevitable conclusion" that the action was unlawful, qualified immunity would apply. Here, obviously, the outcome did not so evidently favor the officer that the chief would have been expected to know that his action would result in a constitutional violation. Moreover, with regards to the claims against the board of regents, the court determined that it was entitled to Eleventh Amendment immunity.

### Employee Reinstated With 14 Month Suspension Following Termination for Comments About Governor on Facebook

### *In re Arbitration between State of Ohio, Dep't of Rehab. and Corr. & OCSEA, Local 11, AFSCME, # 27-11-20111201-0010-01-03 (Pincus, 2013).*

An arbitrator modified to a 14 month suspension the discharge of a state corrections officer for an inappropriate Facebook post. The Grievant made a Facebook post about Governor John Kasich following the death of Osama bin Laden that included the phrase, "OK, we got Bin Laden

... let's go get Kasich next. ..who's with me?'' Seventeen people viewed the post and "liked" it. Four of these individuals were employed by the same correctional facility as the grievant. The grievant's Facebook page was open to the public, identified him as a State employee and mentioned his job location. The State fired grievant for engaging in harassing conduct after the Governor's Office received an anonymous letter complaining of the grievant's behavior and containing a copy of the Facebook comments. The grievant's union appealed.

An arbitrator placed the grievant back on the job without back pay approximately fourteen months following his discharge. In his reasoning, the arbitrator noted "the record failed to establish the comment was anything more than empty words. Nothing in the record supports the view that the grievant's alleged threat was perceived as potentially dangerous to the physical well-being of the Governor. Union and Employer witnesses did not consider the comment as a serious threat." The arbitrator also mentioned that the grievant lacked past discipline and possessed no history of violence. Despite finding a job-related nexus regarding the posts, which is necessary in order to discipline employees for off-duty conduct, the arbitrator still determined grievant's discharge lacked sufficient cause for termination and instead issued the equivalent of a fourteen (14) month suspension.

The decision did not discuss issues of morale and Department reputation.

**Telling police chief on Facebook to "get the hell out of the way" not protected speech**

***Graziosi v. City of Greenville Mississippi January 9, 2015***

A police officer's "hot-headed" Facebook posts criticizing chief's leadership ability not protected speech because the department's interests in maintaining discipline and close working relationships and preventing insubordination within the department outweighed the officer's minimal interest in speaking on a matter of public concern.

The Facebook post appeared days after the officer, a 25 year veteran, returned from a suspension for multiple policy violations. The officer criticized the chief's decision not to send a police cruiser to the funeral of an officer killed in the line of duty in another city. The officer posted on her Facebook: "Dear Mayor, can we please get a leader that understands that a department sends officers to the funeral of an officer killed in the line of duty?" In response to several comments she again criticized the chief's decision and stated that she would no longer use restraint in voicing her opinion.

Later that night she posted her initial statement to the mayor's Facebook page and also state "If you don't want to lead, can you just get the hell out of the way, " and "seriously, if you don't want to lead, just go."

She alleged, after her removal, that the comments were matters of public concern. The court disagreed finding that the speech did not address public safety or a breach of the public trust and was only a matter internal to the department. The officer identified herself as a police officer regarding maters that were within her scope of duties. The court noted that the "speech" in the Facebook posts dissolved into a rant attaching the chief's leadership and culminated with the demand he "get the hell out of the way" thus this was an internal grievance, not a matter of public concern.

The court also found that the statements smacked of insubordination. The officer's statements, public criticism, were sufficient for the court to sustain the discharge of the officer. Even though the city was not required to prove the conduct and comments to be disruptive, the court found that the officer's posts were inherently disruptive to, or actually disruptive of, the efficient operations of the department due to the "buzz around the department."

The Court concluded that the city's substantial interests in maintaining discipline and close working relationships and preventing insubordination within the department outweighed the officer's minimal inters in speaking on a matter of public concern.

**Facebook post of employee's medical condition after suit filed supports ADA claim**

***Shoun v. Best Formed Plastics 6-23-2014, Indiana***

An employee filed a lawsuit against an employer that the comments made by a coworker about his recovery from surgery violated the ADA confidentiality provision. The coworker's comments were critical of the injured employee and the information commented by the coworker were drawn from knowledge she had with handling the worker's claim. The Facebook post remained for 76 days and the coworker's Facebook page was linked to her business email address and was available to a large number of business communities.

The ADA claim was that future employers could view the comments and claims posted by the coworker.

The court decision does not discuss what action was taken by the employer regarding the disclosure of information by the coworker and critical comments on the Facebook. However, this fact pattern is an example of the need for clarity for policies holding employees accountable for the off-duty conduct which is directly related to their work. And, the potential liability to the employer for the errant conduct of an employee.

**Arbitrator Rules Social Media Policy Valid**

***City of Bay City and IAFF Local 116, Arb. William Daniel, 9-22-2014, 134 LA 276***

The City's rules regarding employee use of social media was challenged by the union. The city promulgated rules based on the IACP model policy on social media drafted in 2011. The arbitrator ruled in favor of the city finding that the interests of the city to protect the public perception of the department outweighed the union's challenge to the rule. The arbitrator found valid the following rules:

The rule limiting the employee's right to express themselves on social media "to the degree that their speech does not impair working relationships of the Department for which loyalty and confidentiality are important" is reasonable on its face, since it is generally appropriate for purposes intended and whether it is violated depends entirely upon particular facts and circumstances.

Rule barring employees from disseminating "any information to which they have access as a result of their employment…on social medial is generally permitted, with the proviso that it not apply to information that is already publicly known or has been published by any other organization under right of FOIA."

Rule barring employees from using objectionable language on social media is reasonable on its face, with proviso that whether in a particular case such matter would be found to be "reckless and irresponsible" would depend upon facts and circumstances and subject of separate proceeding before an arbitrator.

**Private E-Mail Access May Violate Public Employee's Privacy Rights**

***Murphy v. Spring, 36 IER Cases 1163, N.D. Okla., No. 13-CV-96-TCK-PJC, 9/12/13***

An administrative assistant for Tulsa Public Schools may proceed with her claims for intentional infliction of emotional distress, wrongful discharge, constitutional violations, and a claim under the Electronic Communications Privacy Act, all arising from her supervisors' access and use of her private e-mail account against her in administrative proceedings, the U.S. District Court for the Northern District of Oklahoma (Murphy v. Spring, 36 IER Cases 1163, N.D. Okla., No. 13-CV-96-TCK-PJC, 9/12/13).

Cheryl Murphy alleged that school superintendent Keith Ballard had knowledge of the conduct of her supervisors, Stephanie Spring, Jon Wheeler, and Latricia Pruitt, when he demoted and terminated her because she reported that her supervisors "endangered the health and safety" of students and "misappropriated school funds," the court said. These allegations "go beyond a typical termination or harassment scenario and could more plausibly be deemed outrageous in

nature," the court said.

Murphy's allegations were also sufficient to state claims for invasion of privacy and IIED against her supervisors. "Her allegations of expecting privacy in her personal, private e-mail account are sufficient at this juncture," and accessing another's private account for the specific reason of garnering support for a wrongful termination could be deemed "highly offensive to a reasonable person," to support her invasion of privacy claim and the "outrageous" element of her IIED claim, the court said.

Murphy's allegations that she had a reasonable expectation of privacy in her personal e-mail account, that the police considered her a "cyber-crime victim," and that her supervisors worked together to illegally access her e-mail are sufficient to state a Fourth Amendment violation at this stage, the court also found.

Rejecting defendants' argument that she failed to plead the inapplicability of an exception under the Electronic Communications Privacy Act when a party has given prior consent, the court said that the defendants bear the burden of proving the exception, and even if such a pleading were required, Murphy met the requirements by alleging that her supervisors accessed her e-mail in the scope of their employment for the purpose of committing a criminal or tortious act, and they used her e-mails to retaliate against her.

While the court additionally allowed her to proceed on her First Amendment and wrongful discharge claim against the defendants, and on her claim for punitive damages under 42 U.S. Code §1983 against Ballard in his official capacity, the court rejected her claims for IIED and punitive damages against the school district.

**Deputy Sheriff Facebook Postings Private Matters, Office Drama, Not Protected**

***Gillman v Schlagetter, et al. (2010), 2010 WL 3447807 (S.D. Ohio).***

A discharged deputy sheriff brought a claim against the county sheriff's office and the sheriff, among others, alleging under 42 U.S.C. 5 1983 that he was terminated from his position as deputy in violation of speech protections afforded by the First and Fourteenth Amendments. He also asserted state-law claims for abuse of process and international infliction of emotional distress.

In the months leading up to the November 2008 Shelby County Sheriffs Election, Deputy Gillman made many posts on the Sidney Daily News website discussing the suitability of each candidate for sheriff. Subsequently, Deputy Gillman posted allegations about his supervisor and an allegation regarding the personal life of another Sheriffs Office employee with whom he was intimately involved. The employee accused of engaging in intimate relations with the deputy requested the identity of the username which appeared on the comments.

The Sheriffs Office had a policy that required employees to direct all inquiries by the news media to the Sheriff or his designee. The Shelby County Sheriffs Office also had a policy that forbid deputies from gossiping about any employee, failing to cooperate with an investigation, or publicly criticizing or ridiculing the Sheriffs Office, its policies, personnel, or supervisors. The Sheriff also distributed an internal memo reminding all employees that dissemination of information to the news required prior approval . In addition, the Sidney Daily News forum's terms of service allowed the forum administrators to reveals users' identities in the event of a formal complaint or legal action arising from any situation caused by the use of its forum.

The Sheriffs Office conducted an internal investigation and eventually terminated Deputy Gillman for using an online forum to demean, verbally abuse, and humiliate employees of the Sheriffs Office. Deputy Gillman grieved his termination, which was upheld by an Arbitrator as being terminated for just cause. Deputy Gillman then filed a claim in District Court, alleging, amongst other things, infringement of his First Amendment rights.

The court concluded that in the present matter, the posts taken as a whole and in full context were not a matter of public concern. Instead, the statements made could not only reasonably be construed to lead to a disruption within the Sheriffs Office, but they actually did lead to a disruption within the office. The court further stated that when petty office drama distracts those who are responsible for protecting the community, actions taken to remove the distraction are not forbidden by the protections afforded to free speech under the First Amendment. The comments made by Deputy Gillman created disharmony in the sheriffs office and destroyed trust between the rest of the office and Gillman. Additionally, although Gillman made comments in the forum postings that were political in context, the sheriff was permitted to discharge him because the full content of the posts had a negative effect on intra-office relations.

**Lack of Computer Use Policy Defeats Discipline**

***Bowman v. Butler Twp. Bd. of Trustees (2009), 185 Ohio App. 3d 180.***

Plaintiff worked for Butler Township as a part-time firefighter and emergency medical technician. Routine maintenance of the township computer system revealed that members of the fire department had been downloading violent and pornographic files from the internet on work time using Township computers. The Township initiated an investigation of the Plaintiff and several other firefighters. The computer records indicated that Plaintiff had watched several videos while at work. Plaintiff admitted watching only one of the videos, which he claimed had some training value. Based on the investigation, the Township Administrator recommended that Plaintiff and other firefighters be terminated. The Board of Trustees terminated Plaintiff. The Plaintiff appealed, and the lower court affirmed his termination. The Plaintiff appealed.

The Plaintiff argued that employees were not provided with adequate notice of what kinds of

conduct, and particularly what kinds of computer use, would be grounds for disciplinary action. However, computer data records showed that Plaintiffs username and password were used to access eight videos, all of which were either violent or sexual in nature. The parties agreed that firefighters were permitted to use Township computers at the firehouse for personal use during their downtime due to the nature of their work, namely long shifts. The Township conceded that some violent content was permissible, such as football coverage, but the violence in the videos watched by Plaintiff was inappropriate. The Second District Court of Appeals of Ohio agreed with Plaintiff that there was no notice of the conduct that was prohibited.

Prior to Plaintiffs disciplinary proceedings, the Township had provided no meaningful guidance as to where it drew the line between appropriate and inappropriate content along the spectrum of behaviors that can be accessed by television or computer. The Township provided no guidance as to what types of content, violent or otherwise, made internet or other media materials inappropriate or violated "the highest standards of morality." Thus, the Court found that Plaintiffs termination was improper.

**Facebook Postings - Reckless Disregard For Truth**

***Fairfield County Sheriff and FOP Ohio Labor Council, Inc., Mary Jo Schiavoni, March 20, 2009.***

The case involved inappropriate statements made by the deputy on a blog that was operated by the local newspaper. The deputy used a nickname but it was obvious that he was an employee of the Sheriffs Office. While the deputy offered some opinions, he also made false and derogatory statements about employees of the Sheriffs Office, including the Sheriff.

The Employer investigated the matter and interviewed the deputy. During the multiple interviews, the deputy lied on numerous occasions, including explicit denials that he made these blog entries. Eventually, the deputy admitted to making the entries. It is important to note that the deputy was represented by the Union throughout the process. The Employer terminated the deputy for making false and defamatory statements and lying during the investigation.

At the hearing, the Union argued that discipline was improper because the deputy's statements were protected by the First Amendment. The Union also claimed that the Employer had no right to investigate the blog entries since they were protected by the First Amendment. Therefore, the false statements were irrelevant.

The Arbitrator analyzed the statements made by the deputy along with relevant case law concerning the First Amendment. The Arbitrator concluded that the deputy made postings that were made with reckless disregard for the truth, detrimental to the effective operation of the Sheriffs Office, and potentially libelous. The Arbitrator concluded that many statements made

by him were of a personal nature and did not address matters of public concern. Under these circumstances, public employers have significant discretion and control over the management of its personnel and the First Amendment does not prevent discipline. In addition, the Employer properly terminated the deputy based on the inappropriate statements, his untruthfulness during the internal investigation and his prior discipline.

**Pagers - "Appropriate" Standard to Determine Use or Abuse**

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

The U.S. Supreme Court addressed the issue of how much privacy public employees have when sending text messages from workplace-issued pagers using their employers' accounts. A city police department issued pagers to its employees with the capability of sending text messages. The City's contract with the service provider limited the number of messages that may be sent per month, without incurring an additional charge. When a number of employees exceeded the allotted texts per month, the City allowed the employees to simply pay the overage charge. After incurring significant overage charges for a number of months in a row, the City investigated the overages to determine whether the City needed to increase its monthly allotted texts for its employees.

In its investigation, the City obtained transcripts from the service provider, requesting specifically only those messages which were sent during the employees' on-duty hours over a two month span. The City learned that the messages sent from one employee were not work-related, and some were sexually explicit. This employee was disciplined. He sued the City for a Fourth Amendment violation, alleging an unlawful search, among other allegations.

Although the City had previously announced a "Computer Usage, Internet and E-Mail Policy," which specified that the City reserved the right to monitor all network activity, the policy did not, on its face, extend to text messaging. The Supreme Court rejected the employee's Fourth Amendment challenge. The Court emphasized that there are certain established exceptions to the Fourth Amendment's ban on warrantless searches, and that the special needs of the workplace justify one exception. The Court reached its conclusion through a two-step analysis: (1) whether the employee had a reasonable expectation of privacy, and (2) whether the employer's intrusion was reasonable under the circumstances.

The Court declined to provide a definitive answer to the first part of the analysis, citing a reluctance to establish a broad conclusion about employee privacy rights before the role of emerging technology in society has become clear. Nevertheless, the Court addressed the second part of the analysis in holding that the search was motivated by a legitimate work-related purpose-to determine whether the text message limit was sufficient to meet the City's needs. The search was not excessive in scope because the City reviewed the transcripts from two months

only and any message sent off-duty was redacted. Thus, even if the employee did have a reasonable expectation of privacy in the messages, the review of the transcripts was reasonable under the circumstances and did not violate the Fourth Amendment right to privacy.

The Supreme Court's holding in Quon is consistent with its approach in other Fourth Amendment decisions. Government employers should make sure to craft monitoring policies that specifically identify the devices to which they apply. The policy should also be clear and definitive regarding what time of use, personal or professional, is permitted for the device. As with any other policy, once the employer has established a rule, the rule must be followed, or it will be of little effect.

When can employers discipline for violations of a policy that prohibits any access or limited access to social media sites during work hours?

Employees must have a clear understanding of what is and is not permitted.