â??They Posted WHAT!?â?•: Policing the Police on Social Media

Description

In a previous article, *â??They Said WHAT!?â?•: A Primer on Public Employee Freedom of Speech*, discussed the basics of public employee free speech under the First Amendment. This article will address the issue of how agencies may restrict employees from posting certain content on social media consistent with the First Amendment.

The Test

As a reminder, in the previous article mentioned above, we discussed the following four-step analysis has emerged in dealing with claims that an employer has unlawfully retaliated against an employee for the exercise of the employeeâ??s First Amendment right to freedom of speech:

1. **Was the employee speaking pursuant to his/her ordinary job duties?**
    - If yes, then there is no First Amendment protection for employment purposes.
    - If no, proceed to Step 2.
2. **Was the employee speaking on a matter of public concern?**
    - If yes, proceed to Step 3.
    - If no, then there is no First Amendment protection for employment purposes.
3. **On balance, does the employerâ??s or employeeâ??s interests prevail?**
    - If the employerâ??s interests prevail, then there is no First Amendment protection for employment purposes.
    - If the employeeâ??s interests prevail, proceed to Step 4.
4. **If the employeeâ??s interests prevail, was the protected speech a substantial or motivating factor in the adverse employment action?**
    - If yes, then the adverse employment action constitutes unlawful retaliation.
    - If no, then the adverse employment action does not constitute unlawful retaliation.

For a more in-depth look at this test, please refer to the previous article: *â??They Said WHAT!?â?•: A Primer on Public Employee Freedom of Speech*.

Social Media & the First Amendment

The First Amendment of the U.S. Constitution provides that â??Congress shall make no lawâ?¦abridging the freedom of speechâ?¦.â?• Although the framers of the Constitution likely did not contemplate the existence of the internet and social media, such applications fall within the ambit of the First Amendment. In fact, the U.S. Supreme Court held in Packingham v. North Carolina, that a state statute making it a felony for registered sex offenders to access social media sites impermissibly restricts lawful speech in violation of the First Amendment. Packingham v. North Carolina, 582 U.S. ___, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017). In that case, the Supreme Court recognized that a fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once moreâ?¦. While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspaceâ??the â??vast democratic forums of the Internetâ?• in general, and social media in particular.

Packingham, 137 S.Ct. at 1735. So, the result is that when public employees police their employeesâ?? speech on social media, it necessarily implicates the First Amendment. This is not all that surprising, and in fact, several courts have already dealt with these issues. Below are a couple of examples of how courts have considered the application of the First Amendment to employeesâ?? online posts:

- Kevin Buker was the battalion chief of the Howard County Fire Department, responsible for managing the day-to-day operations of the field and ensuring compliance with the policies and procedures. While watching news coverage of a gun control debate in his office on January 20, 2013, Buker posted the following statement on Facebook while on-duty:
  - My aide had an outstanding idea . . lets all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberalâ?¦its almost poeticâ?¦
- Twenty minutes later, Grutzmacher, a county volunteer paramedic, replied to the post with the following statement:
  - Butâ?¦.was it an â??assult liberalâ?•? Gotta pick a fat one, those are the â??high capacityâ?• ones. Ohâ?¦pick a black one, those are more â??scaryâ?•. Sorry had to perfect on a cool idea!
- Six minutes later, Buker â??likedâ?• Grutzmacherâ??s comment. Buker removed the posts pursuant to an order from his superiors. A few hours thereafter, Buker made the following post:
  - To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirley in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. Iâ??m not scared or ashamed of my opinions or political leaning, or religion. Iâ??m happy to discuss any of them with you. If youâ??re not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.
- One of Bukerâ??s Facebook friends then replied, â??As long as it isnâ??t about the [Department], shouldnâ??t you be able to express your opinions?â?• Buker responded:
  - Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Governement recently published a Social media policy, which the Department then published itâ??s own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complainâ?¦sad day. To lose the First Ammendment rights I fought to ensure, unlike the WIDE majority of the Government I serve.
- Soon thereafter, Buker was transferred to an administrative position pending the outcome of an investigation. Approximately three weeks later, a member of a department-affiliated volunteer company posted a picture of an elderly woman with her middle finger raised in his Facebook page. The picture bore the following caption: â??THIS PAGE, YEAH THE ONE YOUâ??RE LOOKING AT ITS MINE[.] Iâ??LL POST WHATEVER THE F[*]CK I WANT[.]â?• The member also wrote the following above the picture: â??for you Chief.â?• Buker â??likedâ?• the picture. Buker was subsequently terminated. The Fourth Circuit determined that at least a portion of Bukerâ??s speech touched upon a matter of public concern. In particular, this included the comments about â??liberalsâ?• and post describing the departmentâ??s social media

guidelines. In applying the balancing test, the Fourth Circuit determined that the departmentâ??s interests were outweighed by Bukerâ??s since the Facebook activity: (1) interfered with and impaired department operations and discipline as well as working relationships within the department; (2) significantly conflicted with Bukerâ??s responsibilities as battalion chief; (3) frustrated the departmentâ??s public safety mission and threatened â??community trustâ?• in the department which is â??vitally importantâ?• to its function; and (4) expressly disrespected his superiors. Grutzmacher v. Howard County, No. 15-2066 (4th Cir. 3/20/17).

- A Mississippi sergeant posted a message to the mayorâ??s Facebook page, saying it was â??totally unacceptableâ?• the chief had not sent a representative to the funeral of a nearby department officer who was killed in the line of duty. She asked the mayor for â??a leader that understands.â?• In later posts, she complained the department no longer had â??leadersâ?• and commented, â??if you donâ??t want to lead, can you just get the hell out of the way?â?• After an internal affairs investigation, she was fired. She sued, alleging retaliation in violation of the First Amendment. The court found she had spoken pursuant to her official duties, and her comments were not constitutionally protected. On appeal, the Fifth Circuit found she had spoken as a citizen but agreed her comments were not protected. Even if the court had found her speech a matter of public concern, it would have found the cityâ??s â??substantial interests in maintaining discipline and close working relationships and preventing insubordinationâ?• outweighed her â??minimal interestâ?• in speaking on a matter of public concern. It added this was â??in light of the wide latitude afforded police departments as paramilitary operations to discipline and otherwise regulate its employees.â?• Graziosi v. City of Greenville, Mississippi, 775 F.3d 731 (5th Cir. 2015).

Another interesting point to consider is the degree to which â??likingâ?• something on social media constitutes â??speechâ?• under the First Amendment. Most notably, the Fourth Circuit Court of Appeals ruled that the act of â??likingâ?• or clicking the â??Likeâ?• button on a Facebook post amounts to â??speechâ?• for First Amendment purposes. Bland v. Roberts, No. 12-1671 (4th Cir. 2013). The Fourth Circuitâ??s discussion relative to this issue is very interesting, and while not binding on other circuits, is highly probative on this issue.

Policy Considerations

Probably the number 1 case on point in the realm of crafting a constitutionally-sound social media policy is Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016). In Liverman, the 4th Circuit held that the City of Petersburg Police Departmentâ??s social networking policy violated the First Amendment. Two provisions in the policy were the primary focus of the Courtâ??s scrutiny: the â??Negative Comments Provisionâ?•[1] and another which â??strongly discourages employees from posting information regarding off-duty activities.â?• Citing to these two provisions, the Court denied qualified immunity for the Chief of Police on the grounds of the â??patent overbreadth of the policy.â?•

Most important for agencies to consider in light of the Liverman case is that: (i) the decision does nothing with respect to the analysis that is used to determine what statements made by public employees are protected by the First Amendment; (ii) the analysis used to determine the constitutionality of social media policies remains unchanged; and (iii) the doctrine of qualified immunity remains the same. The key takeaway is simply: the contours of the First Amendment are sufficiently clear as to put public employers on notice as to what employee conduct on social media may be prohibited.

That being said, agencies should consider policing the online speech of their employees utilizing the test previously discussed. Agencies should also work closely with their respective legal advisors to implement a social media policy which will withstand constitutional scrutiny. Agencies may also consider using the charge of â??conduct unbecomingâ?• to resolve incidents involving employee speech on social media.

The social media policy should be crafted to only prohibit that conduct which is not protected by the First Amendment. For example, social media policies may prohibit employees from displaying department logos, uniforms, photographs which cause the individual to be identified as a police officer of the department; or from accessing social media while on-duty. The policy should also contain guidelines as to when disciplinary action may be taken for employee content on social media. Policies may advise that personnel are free to express themselves as private citizens speaking on matters of public concern, but that employees should be careful not to conduct themselves in a manner that impairs the maintenance of discipline by supervisors, impairs working relationships of the department, impedes the performance of duties, impairs discipline and harmony among coworkers, interferes department operations, undermines the departmentâ??s mission, conflicts with personnel responsibilities, amounts to an abuse of authority, or undermines public accountability. The policy should make it clear that the decision and degree to which discipline is imposed will be dependent upon a case-by-case basis.

Closing

Public agencies and employees should be aware of the contours of what the First Amendment protects and does not protect with respect to employee speech on social media. It is important for agencies to review applicable policies with their legal advisors to ensure that they can withstand constitutional muster, particularly as such challenges appear to be on the rise. Again, when agencies seek to take action against employees based upon their â??speechâ?• or â??expressionâ?• on social media, agencies are best advised to utilize the four-prong test mentioned herein.

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[1] This provision stated that: â??Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the publicâ??s perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.â?•

Article by Eric Atstupenas. This article originally appeared on https://firstamendmentsummit.com/they-posted-what-policing-the-police-on-social-media/

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