Social Media - The Need to Adopt a Policy
The Importance Of Educating Fire, EMS, Police And Other Township Employees About Their Limited First Amendment Rights Under the “Balancing Test.”

Recently an Ohio Township made national news because of a very inappropriate social media post by a volunteer firefighter:

- **Ohio firefighter: ‘One dog is more important than a million’ African Americans**
  
  “Until last week, Tyler Roysdon suited up as a volunteer firefighter in Franklin Township, a small town in southwestern Ohio, about 40 miles north of Cincinnati.”

Unfortunately, this is not an isolated incident. There have been several other recent press stories about posts by emergency responders:

- **Chief resigns after labeling Steelers’ Tomlin with slur**

- **Firefighter relieved of duty, apologizes, after saying NFL, NBA athletes should be shot in head if they protest**

- **First responders in three states under investigation for allegedly mocking Charlottesville violence**

- **Philly firefighter calls himself an 'idiot' for tiki torch, Confederate flag Facebook post**

The concern facing townships and other public employers is that an employee’s social media posts can be inadvertently linked back to the employer, regardless if they mention their employer in a post. It is imperative that employees engaging in social media be mindful that their words and actions could be seen as a representation of the township.

**Headlines Test**

Townships and other public employers should have a social media policy, and conduct refresher training that cautions all employees about the U.S. Supreme Court’s “balancing test” as set forth in Pickering v. Board of Education, 391 U.S. 563 (1967), and Garcetti v. Ceballo, 547 U.S. 410 (2006). In the latter case, Mr. Ceballo was a California county prosecutor who learned the hard way that public comment about internal office decisions can lead to discipline.

“We hold 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.”

Fire, EMS and police personnel, likewise, hold “positions of trust in society.” Therefore, fire, EMS and police departments should also consider issuing their own social media policy that can address operational issues. For example, the Phoenix Fire Department has such a policy that states:

“Personal social media postings that relate to co-workers, other City employees, supervisors, or management, or activities that occur at work, can be considered as

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a deputy district attorney for the Los Angeles County District Attorney's Office...and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant.

*** Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

*** Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.  8

The U.S. Supreme Court held that under the "balancing test," the LA County Prosecutor has the authority to take corrective action when Mr. Ceballos went public with a memo about an internal office decision to prosecute a case. When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. *** Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

*** We hold 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 U.S. Supreme Court explained in its decision that employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.

Litigation

While public employees have limited First Amendment rights, townships and other public employers must also be cautious in imposing discipline on matters of public interest, particularly if the employee has previously made internal complaints as a "whistle blower." Many State and federal statutes protect whistle blowers.

- The city didn't like her Ferguson post, so they fired her. Now it must pay $1.5M

"In an embarrassing verdict for the city of Charlotte, a jury Thursday found the Fire Department retaliated against former fire investigator Crystal Eschert for raising questions about the safety of construction work at a new office building, awarding her $1.5 million.

The jury rejected Charlotte's claims that Eschert's firing wasn't retaliation. It also cast aside the city's defense that the firing was necessary because Eschert had made what the city said was an offensive and inflammatory Facebook post. On Aug. 20, 2014, about 10 days after the shooting of Michael Brown set off riots in Ferguson, Mo., Eschert wrote this post on her Facebook page, which was restricted to her Facebook friends:"

"White guy shot by police yesterday near Ferguson ...  Where is Obama? Where is Holder? Where is Al Sharpton? Where are Trayvon Martin's parents? Where are all the white guys supporters? So is everyone MAKING it a racial issue? So tired it's a racial thing. If you are a thug and worthless to society, it's not race - Y'ou're just a waste no matter what religion, race or sex you are." 9

On May 11, 2016, a federal jury returned a verdict against the City of Charlotte, NC for $1.5 million on behalf of a fire inspector who was fired. The fire inspector, prior to a post on her Facebook page, had complained to her father-in-law and to a City Councilwoman about the safety of construction work at a city building where she and others in the fire inspection bureau would be moving. The jury hammered the city, and so did the press.

During the trial, U.S. District Court Judge Frank D. Whitney applied the Pickering/Garcetti "balancing test" and dismissed the fire inspector's First Amendment Facebook claim, but he allowed retaliation claims to go to the jury. Judge Whitney wrote:

"Plaintiff, on the other hand, claimed Defendant actually fired her because she complained to her father-in-law and City Councilwoman Claire Fallon about health and safety issues in a new CFD building and about Defendant's mismanagement of money related to that building (Building Complaints)." 10 The Court ruled the Facebook Posts were not protected by the First Amendment because Plaintiff failed to establish that her interest in that speech outweighed Defendant's interest in providing effective and efficient services to the public. (Doc. No. 91-1, pp. 28-31). The Court submitted the six remaining [retaliation] issues to the jury."

On Aug. 23, 2017, Judge Whitney issued an order denying the City's motion to grant judgment for the City.

"In sum, the jury found Defendant wrongfully terminated Plaintiff because of her Building Complaints, in violation of the First Amendment, public policy under the North Carolina Constitution, REDA [whistle blower retaliation statute], and North Carolina's public policy expressed in REDA. 11 But the Court reduced the $1.5 million verdict to $464,538, plus attorney fees and costs, since all the claims that went to the jury concerned retaliation for the Building
Complaints, not the Facebook post. “The Court, therefore, must conclude that allowing Plaintiff to receive the damages awarded for all four claims would constitute a double recovery.”

**Conclusion**

In conclusion, all townships should adopt a social media policy and educate their employees about the “balancing test.” Provide employees training annually and remind them that they “occupy trusted positions in society.”

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**References**