

Communications in the Era of Social Media



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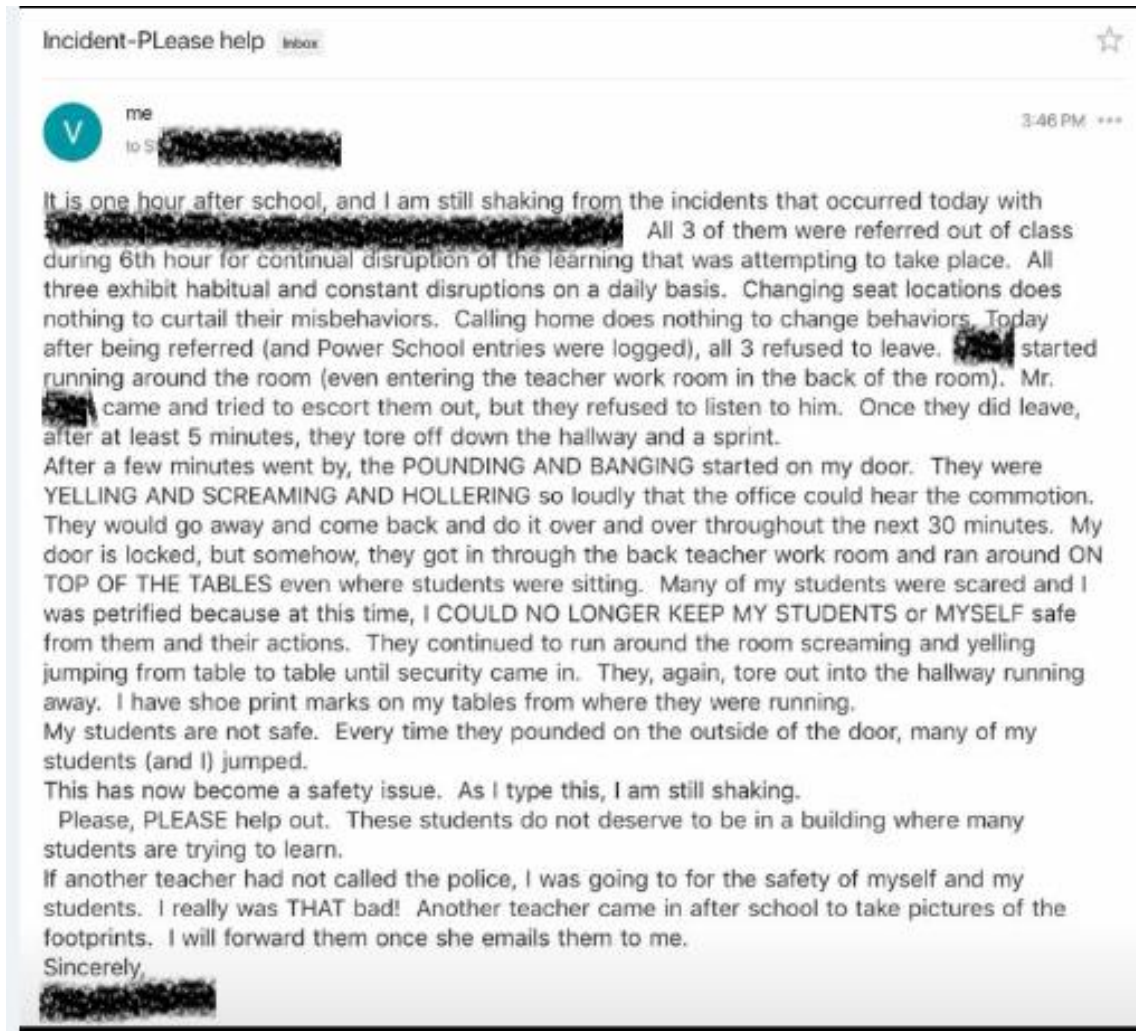
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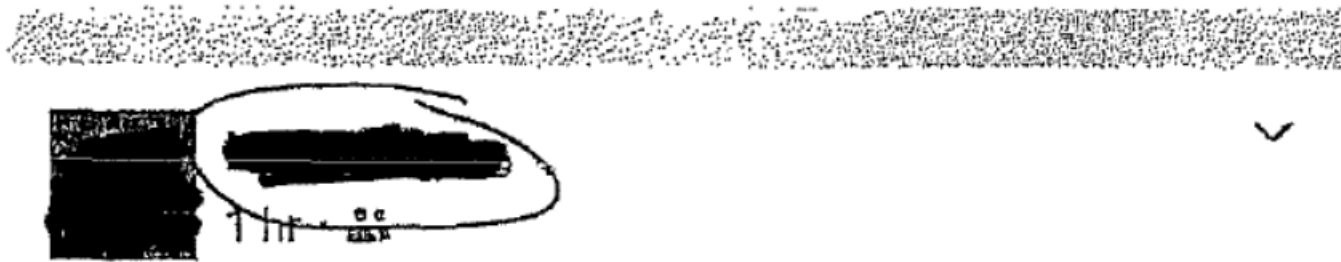
- **Social Media Concerns in the Workplace**
 - “I Have Rights!” vs. Conduct subject to Discipline
 - First Amendment
 - Concerted Protected Activity
- **Controlling Social Media**
 - Is a BOE Policy Proactive or a Pitfall?
- **Bargaining and Social Media**
 - Recipe for Success or Disaster?
 - Union Tactics v. District Best Practices



SOCIAL MEDIA CONCERNS IN THE WORKPLACE



SOCIAL MEDIA CONCERNS IN THE WORKPLACE



When you promise you will hire the most qualified..... And then you ask if you can help the "most qualified" that makes you a liar! I will never be a liar! Rot in HELL!

  [redacted] and 1 other



Like



Comment

SOCIAL MEDIA CONCERNS IN THE WORKPLACE

- **“Mr. Teacher” wrote on his Twitter feed about pictures of two students and their mother:**
 - Not my typical girl, but attractive in their own way. That youngin’ knows how to pose lol. I’ll take 3 #hot #sexy #teen #jailbait #bikini
- **“Mr. Teacher” also has posted a library of photographs of children he calls “creepshots”**



SOCIAL MEDIA CONCERNS IN THE WORKPLACE

- **Middle School Teacher had a “Tinder” profile, which specifically identified he was a teacher at District’s Middle School and further stated:**
 - *“They let me be the adult supervision at a school even though I look like a student. I think it is a clerical error, but nobody has stopped me yet.”*
- **Teacher further sent obscene and vulgar message to female “match.”**
- **Female reported to District and sent screen shots to Title IX Coordinator**

A red, rectangular stamp with the words "X-RATED" in a bold, sans-serif font. The stamp has a slightly distressed or ink-like texture.

SOCIAL MEDIA CONCERNS IN THE WORKPLACE

- **Protected vs. Unprotected communication**
- **First Amendment Protections**
 - Is topic a matter of *personal* or *public* concern?
 - Is speech a part of employee's *duties and responsibilities*?
 - Does school have a *need* to regulate speech to maintain order or accomplish its mission?
- **Possible Concerted Activity**
 - NLRB vs. MERC



SOCIAL MEDIA CONCERNS IN THE WORKPLACE

- “I HAVE RIGHTS!”
- Two approaches to analyzing employee speech in the workplace under the 1st Amendment:
 - The multi-part *Connick, Garcetti* and *Pickering* Standard
 - The *Tinker* and *Hazelwood* Standard may be applied by some courts if the speech was made within the classroom or during “curricular” activities.



SOCIAL MEDIA CONCERNS IN THE WORKPLACE

- ***Connick v. Myers***
- **Is the employee speaking as a citizen on a matter of “public concern”?**
 - *Speech involves a matter of public concern if it can be “fairly considered as relating to any matter of political, social, or other concern to the community.”*
- **Whether the employee’s speech meets this test will be determined by:**
 - Content
 - Form
 - Context



SOCIAL MEDIA CONCERNS IN THE WORKPLACE

- **Even if the speech is on a matter of public concern, the court will analyze whether the speech was made pursuant to the employee's official duties.**
- ***Garcetti v. Ceballos***
 - “. . . 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.”
- **However, the *Garcetti* analysis probably will not apply to an employee's out of school speech if the speech is regarding non-academic or non-curricular content.**

SOCIAL MEDIA CONCERNS IN THE WORKPLACE

- If an employee's speech is made as a citizen and on a matter of public concern, the court will nonetheless analyze whether the speech was substantially impeding on the efficiency of the public employer's operations.
- "The problem...is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." - The U.S. Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)
- **Pickering balancing test:**
 - The Court will balance the interests of the school administration with the employee's opportunities to contribute to public debate.
 - The Court will analyze
 - 1) whether the speech impeded the employee's proper performance of his/her daily duties; or
 - 2) whether the speech substantially interfered with the regular operation of the school generally.

CAN WE DISCIPLINE?

- **Generally, to be able to discipline, we want to look for:**
 - Personal expressions or “gripes”
 - Issues not concerning the “greater good” of students/staff
 - Employee is acting pursuant to his/her official job duties and responsibilities when utilizing social media
 - Speech is disruptive to school activities or the learning/work environment
 - Substantial disruption”
 - Any other options for discipline?
 - *i.e.*, Discrimination, Harassment, FERPA, IDEA



WHAT ABOUT CONCERTED PROTECTED ACTIVITY?

- **Employers who are contemplating the discipline of employees for their activity on social networking websites should review the speech to determine if it is protected concerted activity under Michigan labor law.**
- **PERA, Section 9:**
 - “Public employees may organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection”



WHAT ABOUT CONCERTED PROTECTED ACTIVITY?

- Although there are a very limited number, if any, of state labor law cases in this area, the National Labor Relations Board (NLRB) has decided several private sector decisions regarding employee Facebook activity.
- The NLRB seems to have taken a strong stance of protecting employees' rights regarding protected activity on social networking websites and state agencies charged with enforcing public sector collective bargaining laws may look to NLRB decisions for guidance in this area.



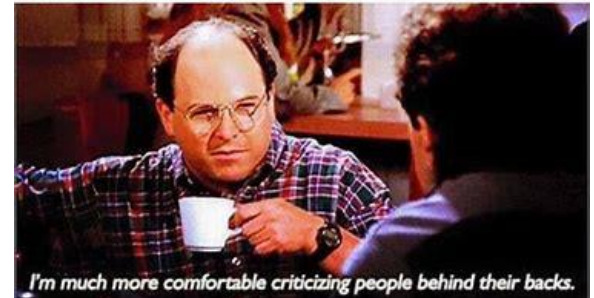
WHAT ABOUT CONCERTED PROTECTED ACTIVITY?

- **Employees who engage in internet speech regarding terms and conditions of employment may be participating in protected concerted activity.**
- **Factors to evaluate:**
 - Was the employee engaging in this speech during work hours?
 - Was the employee engaging in this speech using the employer's computer or network?
 - Does the employer have a policy prohibiting non-educational use of its computers or network?
 - Was the employee speaking with or on the authority of other employees?
 - Was the employee inviting other employees to discuss issues or was this an individual "gripe"?

SOCIAL MEDIA POLICY: PROACTIVE OR PITFALL?

- No MERC guidance; however NLRB (MERC's federal counterpart) guidance. NLRB Office of General Counsel – May 30, 2012 Memorandum
- Language found **LAWFUL** by the NLRB:
 - No harassing, bullying or discriminating of co-workers
 - Requiring employees to receive permission to post a message on behalf of the employer
 - Requiring employees to “be respectful” while using social media if examples of acceptable and unacceptable behaviors are included

People are always getting in fights on social media and I'm just over here like



I'm much more comfortable criticizing people behind their backs.

SOCIAL MEDIA POLICY: PROACTIVE OR PITFALL?

- **Language found *UNLAWFUL*:**
 - A policy that encourages employees to resolve concerns about work by speaking with co-workers, supervisors or managers
 - Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
 - Employee's social media posts should be completely accurate and not misleading and should not reveal non-public information.
- **Uncertain to the extent NLRB guidance applies. Best to be cautious of broad or over-reaching social media policies as may be viewed as infringing on 1st Amendment rights.**

GENERAL (AND SAFE) GUIDELINES

- Maintain Confidentiality – Federal Educational Rights & Privacy Act (FERPA)
- Maintain Privacy – seek permission before mentioning others by name
- Respect School Time and Property – work posts v personal posts
- Do No Harm – to the school or to yourself
- Understand Your Personal Responsibility – for the posts you make
- Be Aware of Liability – *copyright infringement, defamation, obscenity, etc.*
- Maintain Transparency – posting as individual or school representative?
- Correct Mistakes
- Respect Others
- Be a Valued Member – contribute valuable insights to discussions
- Think Before You Post
- Explicit rights to monitor and search when using District technology

SOCIAL MEDIA POLICY EXAMPLES



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BARGAINING AND SOCIAL MEDIA



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BARGAINING AND SOCIAL MEDIA: UNION TACTICS

- **UNION TACTICS –**

- Facebook posting
- Twitter postings regarding “crisis”
- Email blasts
- Employee email blasts



BARGAINING AND SOCIAL MEDIA: DISTRICT BEST PRACTICES

- **DISTRICT BEST PRACTICES –**
 - Consistency in communication
 - Judicious use of district website



DO YOU NEED A COMMUNICATION PLAN?

- **Communications plan necessary to have community see and think about issues in the same way as the Board**
- **Key to maintaining the support/trust/confidence of the public**
 - Addresses and offsets pressure of union tactics
 - Creates pressure on union and its positions
 - Key: Preempts Board recall efforts, and reduces chances of displacing Board members in elections
- **Establishes and communicates goals (directly) and competency (indirectly) of Board and administration.**

DO YOU NEED A COMMUNICATION PLAN?

- A **PROACTIVE** communications strategy
 - Key: District frames issues (financial realities and spiraling cost of teacher insurance and pensions; collaboration/conflict necessary and ultimately beneficial)
- A **REACTIVE** communications strategy
 - Key: Lets Union frame issues (“respect” and failure to value teachers; conflict an indication that the Board/Administration is doing something wrong)





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FUNDING THE UNFUNDED: CROWDFUNDING

- **Popularity Increasing – Stephen Colbert/Bill Gates**

- **Examples: GoFundMe.com, DonorsChoose.org, ClassWish.org**



- **Policy: To Have or Not to Have?**

- Legal Liability? Unregulated use can lead to legal pitfalls

(1) FERPA

(2) IDEA

- Examples

(3) Supplement not Supplant (FAPE!)



FUNDING THE UNFUNDED: CROWDFUNDING

- **Template NEOLA Policies**

- BOE/Superintendent designation of approved Crowdfunding sites
 - Education-specific is best; procedural safeguards in place

- **Administrative approval**

- Require sample posting for review
- Other approval required? (ex: IT)

- **Funds raised are property of the District**

- Allow for requested items in lieu of direct funds

- **Provisions for protection re: FERPA, IDEA and Title IX**

- Photos of students, identifying information, disparaging comments, etc.

- **Student Crowdfunding?**



FUNDING THE UNFUNDED: CROWDFUNDING

- **All other BOE policies and administrative guidelines**
 - Non-discrimination, Anti-Harassment
- **Crowdfunding Policies extended to affiliated groups: Booster Clubs, PTO, etc.**
- **No use of District logo or images for personal benefit**
- **District retains control and can terminate if policy is violated**
- **Discipline for violations**



FUNDING THE UNFUNDED: CROWDFUNDING

- **Resources**

- <https://www.donorschoose.org/> (Commonly used education crowdfunding site)
- <http://www.revtrak.com/> (Another site used by schools)
- NEOLA Crowdfunding Policies – Tailored to District



PARTING THOUGHTS

- **Carefully review and analyze social media posts by employees prior to discipline – involve legal!**
 - Slippery Slope and Fact-intensive analysis!
- **If you have a social media BOE policy, or are thinking about one, review it carefully to avoid pitfalls.**
- **Frame your focus before and during negotiations and create a communication plan before you get to the table. Take advantage of the millennials on your team and social media to help spread your communication plan.**
- **Establish a *consistent* message through the entire District from the BOE – Administration – Negotiation Team. Inconsistency only raises questions of competency and integrity.**
- **Use repetition to get the message to key stakeholders through multiple channels of social media, literature, and at school events.**
- **KEEP EMOTIONS OFF SOCIAL MEDIA.**

QUESTIONS?



PLEASE NOTE

This presentation does not constitute specific legal advice for any particular situation. It contains general recommendations and information and should not be relied upon for any specific purpose without consultation with legal counsel and in the context of specific facts and circumstances.

THANK YOU!



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