

Employee Use, Misuse, and Abuse of Social Network Sites

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In January 2007, John Bush, a Florida middle school teacher, was fired after his superintendent discovered "inappropriate" material on Bush's personal MySpace web-page.¹ While the content posted to his social networking webpage was not pornographic, school district officials determined that the webpage contained personal information about Bush that "parents would not want their children to know about their teacher." The school district did not restrict its teachers from maintaining personal webpages, but it did inform all district staff not to post inappropriate material on the Internet.

Who's Blogging Now?

In today's technological climate, John Bush is not alone. In 2006, the Employment Law Alliance surveyed over 1,000 American employees and found that up to five percent maintained personal blogs. Of them, 16 percent admitted to posting unfavorable comments about their employers, co-workers, supervisors, or customers. Technocrati.com, a blog tracking website, listed nearly 850 blogs written by teachers in 2006, many of which receive thousands of hits each week.

At the touch of a button, Internet users can publicly chronicle personal details concerning their lives through an array of Internet blogs or social networking websites. As the popularity of blogs and social networking sites continues to rise, so does the risk that teachers and other school employees will post inappropriate information online. Many school districts have begun to discipline and even terminate teachers for uncensored images depicting bad behavior and caustic comments concerning the workplace, colleagues, and school administrators. While some blog content may be protected speech, at some point, such content may cross the line. When it does, school districts may want to discipline the teacher.

Should a school district concern itself with what a teacher is posting to his or her blog or to a social networking site on a Saturday night? Perhaps, if these postings affect the district. For instance, a teacher's posting may: disclose confidential student records or confidential personnel records; be defamatory; result in a disruption to the school environment; or impair the teacher's ability to perform his or her duties. How much freedom does a school district have to discipline teachers for their off-duty, online conduct? How much freedom does a public school teacher have in his or her speech on the Internet? School districts will need to confront these questions and others in order to identify potential liability when disciplining teachers for their off-duty, online behavior. Below are some of the issues and practical solutions for school attorneys to discuss with districts in an effort to reduce exposure to such liability.

Social Networking Sites, Blogs, and Bloggers

Currently, tens of millions of Americans maintain blogs, or online diaries, with thousands of new journals being created everyday.² These Internet-based journals cover a wide variety of topics and are used as a forum to express personal views on everything from politics, to the entertainment industry, to local crime reporting, to the allure of tasty blue crayons.³ Blogs generally are formatted to allow readers to post comments, which are then also available for other readers to view. Because of online journaling's popularity, many bloggers utilize different websites to post, update, and publicly circulate their entries.

Internet users frequently compose their journals on social networking websites. Social networking sites allow individuals to: (1) construct a public or semi-public profile or web-page within a bounded system; (2) articulate and maintain a list of other users with whom they share a connection; and (3) view their list of connections and connections made by others within the system.⁴ Users can easily build online profiles, communicate with other site subscribers via e-mail and comment sections, and share personal information, including photographs, text entries, or music and video clips. MySpace.com, Xanga.com, Friendster.com, Blogger.com, and Facebook.com are all examples of social networking websites that are immensely popular with teenagers and young adults.⁵ More than 8 million people use Facebook.com every month, and MySpace.com boasts 55 million current members.⁶

Teachers as Bloggers

Teachers utilize blogs and social networking sites for varying purposes. Some educators have embraced blogs as a way to engage colleagues, administrators, students, and parents in thoughtful educational discourse. Others have used their blogs as a forum to rant about colleagues, administrators, students, and parents. Still others use social networking sites to interact with others on topics of mutual interest that are wholly unrelated to their employment as teachers.

Authority to Discipline for Blogging

Clearly, public school teachers have some freedom to express themselves on blogs and social networking sites. But, unlike private sector employees, teachers are role models for the children they educate. Parents entrust educators with the duty to impart basic societal values and qualities of good citizenship to their children.⁷ The ability and authority of a school district to discipline a teacher for his or her off-duty, online conduct depends upon: (1) whether the teacher has tenure; (2) the nature of the offending conduct, which in many cases is statutorily defined; (3) the nexus between the conduct and job performance; (4) the terms and conditions of a collective bargaining agreement; and (5) first amendment considerations.

Probationary teachers are generally employed "at-will" and are not protected by statutory tenure or just cause pursuant to a collective agreement. Accordingly, school officials have more flexibility in disciplining or terminating probationary teachers for off-duty, online misconduct.

When disciplining tenured teachers for off-duty, online conduct, school officials must first determine that the conduct violates some statutory authority or school board policy. In most states, tenured teachers may only be removed from employment for "cause." "Cause" typically includes "unprofessional" or "immoral" conduct, among other factors. In North Carolina, for example, school districts may discipline or dismiss teachers for several types of misconduct including: inadequate performance, immorality, insubordination, neglect of duty, moral turpitude, advocating the overthrow of the government, and failure to fulfill teaching duties.⁸ Similarly, Illinois' teacher dismissal statute provides school districts with the authority "to dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause . . . and to dismiss any teacher whenever, in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it."⁹

Offensive teacher blogs or inappropriate online materials arguably constitute "immoral" behavior. In Illinois, if the school administrator determines that the off-duty, online conduct is immoral, the administrator must then determine whether the conduct is "irremediable" or "remediable." A tenured teacher commits irremediable misconduct when: (1) the conduct causes significant damage to students, faculty, or the school; and (2) the teacher would not have corrected his or her conduct, even if the teacher had been issued a written warning and afforded a period of time for remediation.¹⁰ "Remediable" conduct constitutes misconduct in the ordinary course of duties which, if advised of, could ordinarily be remedied.¹¹ Irremediable conduct is subject to termination, while remediable conduct is subject to discipline short of termination.

In most states, "immoral conduct" is irremediable and, depending on the conduct's severity, can lead to discipline and termination.¹² In determining that off-duty, online conduct is irremediable, school officials should consider the dissemination of the online material and the residual effect the posting or image has had on the student body and the community. Specifically, school officials should determine if the misconduct has a significant connection to the teacher's professional responsibilities.

How can school officials determine if off-duty, online conduct bears a significant connection to the teacher's role as an educator? In terms of general off-duty misconduct, criminal conduct has been held to be irremediable per se and to constitute appropriate grounds for teacher discipline and dismissal.¹³ Specifically, the possession of a controlled substance, driving under the influence, and assault and battery charges have been held to constitute irremediable conduct, even without criminal conviction. Accordingly, any illegal misuse of alcohol or drugs or other criminal behavior documented on social networking sites most likely amounts to irremediable conduct justifying a school district's decision to discipline or terminate a teacher.¹⁴

In contrast, a teacher's general misuse of social networking sites will not typically include an illegal component. For example, teachers may post personal pictures of "unbecoming" conduct, including pictures of social drinking, inappropriate recreational activities, or even legal adult pornography, or describe unprofessional behavior in a blog or live journal. If the teacher's online conduct is disruptive to the teaching environment, school boards and administrators should apply a nexus analysis to determine whether the out-of-workplace misconduct significantly and negatively affects the teacher's ability to perform his or her job.¹⁵ The school district must balance the competing interests of the teacher and the district while taking into consideration the community's relevant standards.¹⁶ School districts have broad discretion in determining whether a teacher is capable of being an effective teacher and role model for impressionable students.¹⁷

An example of inappropriate online conduct that negatively affects a teacher's performance and justifies discipline or termination is the disclosure of confidential student information in a blog. Such a disclosure violates FERPA and state student records laws. The issues are many and the stakes are high. School districts should undertake an educational approach to this issue before it happens and inform staff of the consequences for such misconduct.

First Amendment Limits on Disciplining for Blogs

Public school districts, like private sector employers, may discipline teachers for the content of their speech. Unlike private employers, the public school district's right to discipline is limited by the First Amendment, which protects a public school teacher's right to speak as a citizen about matters of public concern under most circumstances.¹⁸ If a teacher's speech was made as a citizen and not pursuant to his or her official duties and is about a matter of public concern, then his or her speech may be constitutionally protected. To determine whether a teacher's speech is constitutionally protected, courts will apply the balancing test first announced in *Pickering v. Board of Education*¹⁹ and later clarified in *Connick v. Myers*.²⁰ Under the *Connick-Pickering* test, a teacher may establish that his or her speech is constitutionally protected if: (1) the teacher spoke as a citizen on matters of public concern; and (2) the teacher's interest as a citizen in commenting upon matters of public concern outweighs the interest of the school district in promoting the efficiency of its public services.

The Supreme Court has provided further guidance as to when a public employee speaks "as a citizen." In *Garcetti v. Ceballos*, the Court held, "[w]hen 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."²¹ After *Garcetti*, courts will only engage in the balancing of public and private interests under the *Connick-Pickering* test when the government penalizes speech that a public employee utters as a citizen.

To date, discipline for off-duty, online blogging in the public sector has not resulted in substantial litigation. However, the Supreme Court appears to have identified two lines of cases under which a public employer's limitations of its employees' speech can violate the First Amendment.²² The first line "involves instances where a public employee speaks out about the functioning of the branch of government for which he or she works, a matter on which he or she is uniquely qualified to comment by virtue of their job status."²³ The second line "involves government regulation of statements that are unrelated to the employ-ee's job."²⁴

After *Garcetti*, it appears that under either line of cases, courts will utilize the *Garcetti-Connick-Pickering* test to determine whether a teacher's speech posted to an Internet blog is protected by the First Amendment. Where the off-duty, online speech is related to the teacher's position, and the teacher has addressed the same issues with the school district, the *Garcetti* analysis will likely apply. However, it remains to be seen whether *Garcetti* is applicable in a situation where the teacher posts text or pictures related to his or her employment to a blog without first raising the issue with his or her employer. If *Garcetti* is applicable, the teacher must demonstrate that he or she did not make the posting pursuant to his or her official duties. If this is established, then the courts will apply the *Connick-Pickering* balancing test. If not, the speech will not be entitled to First Amendment protection, and the school district is free to discipline the teacher.

However, where the off-duty, online speech is unrelated to the teacher's position,²⁵ even if applied, the *Garcetti* analysis will likely be disposed of easily. The courts will then proceed to the *Connick-Pickering* balancing test to determine if the speech is about a matter of public concern²⁶ and whether the teacher's interest as a citizen in commenting upon matters of public concern outweighs the interest of the school district in promoting the efficiency of its public services.²⁷ In such cases, where courts find that the speech is not about a matter of public concern, the speech is unprotected and discipline may be imposed. Where the speech touches upon a matter of public concern and results in no potential disruption to the school environment or the teacher's ability to perform his or her duties, the speech is protected. However, where the speech

touches on a matter of public concern, but is potentially disruptive to the school environment or the teacher's ability to perform his or her duties, then the speech is not protected and discipline may be imposed.

In summary, where a teacher's speech posted on his or her blog, or another's blog, is arguably related to the teacher's job, to successfully discipline the teacher a school district must initially demonstrate that the teacher made these statements pursuant to his or her official duties.²⁸ Where the speech is arguably not related to the teacher's job, to impose discipline, the district must demonstrate that the teacher's speech was not a matter of public concern or that school district's interest in prohibiting the speech outweighs the employ-ee's interest in speaking.²⁹

Additional Potential Limitations on Discipline

Public school districts must also be aware of other potential limitations on their ability to discipline teachers for speech on the Internet including:

- **Personal Privacy Statutes:** Many states have employee privacy statutes that restrict employers from disciplining employees for their off-duty conduct.³⁰
- **Union Activity:** Some states have labor relations laws that guarantee public employees the right to organize and to bargain collectively with their employers and to engage in other protected concerted activity with or without a union. If a teacher is blogging on issues concerning terms and conditions of employment, collective bargaining issues, or union association or activity, the speech likely will be protected by such labor relations laws.³¹
- **Whistleblower Statutes:** Most states and the federal government provide protection against the retaliatory discharge of an employee who has evidence that the employer is breaking the law. These protections may apply when comments or pictures are portrayed on a teacher's blog.

Investigating Blogs

School officials must act carefully and deliberately in investigating the scope and content of alleged online misconduct. When school district officials learn of a teacher's online conduct, school officials must initially review the posting or picture to determine the veracity and accuracy of information received about it. They must next determine whether the online conduct violates any civil or criminal statute or school board policy. Further, school officials should document the effect the online posting has had, or may have, on the educational environment.

If the school officials conclude that the information is true and accurate and violates policy or is disruptive to the educational environment, then school officials should take the following steps:

- Consider whether the conduct has any criminal implications, and, if so, consider contacting law enforcement.
- Meet with teacher to review the situation (if requested, permit the teacher to have union representation at the investigatory meeting).
- Share the information with the teacher. If the teacher admits to posting the online content, inform him or her that the administration will continue to investigate and consider recommending disciplinary action.
- If the teacher denies the allegations, then conduct further investigation to confirm whether: (1) he or she posted the material; (2) if depictions are at issue, determine whether they are unaltered; and (3) investigate all the teacher's claims to determine their validity. It is important to remember that, in the online world, things are not always as they appear. Stories of students creating fabricated MySpace pages or blogs for teachers are becoming increasingly common. For this reason, it may not be easy to verify whether the teacher was the actual poster of the materials in question.
- Review the dissemination of the posted content and the posting's effect on the teacher's ability to perform his or her duties.
- Determine whether the posting disrupted the educational environment.
- Determine whether conduct is irremediable or remediable, and impose the appropriate level of discipline.

Practical Blogging Considerations

School boards and administrators should decide how to address teacher blogs prior to discovering disparaging comments about building staff, the administration, or the school board on the Internet. To address these concerns, school districts should follow the swath cut by private businesses and develop a policy that reflects their desired positions regarding blogs.³²

For over a decade, school districts have adopted technology use policies for their students and staff. Most policies indicate that the school district will discipline a user for inappropriate conduct on the computer system. Blogging, however, may not fall within the policy as written. Moreover, the school district may decide that teacher blogging for educational purposes is an appropriate activity. School districts have two options. The first is to develop a policy that specifically addresses blogging by school personnel. The second is to amend the current technology use policy to include blogging by staff and students. No matter the choice, school district should consider several issues when developing a blogging policy.

School districts that want to be proactive should consider developing the policy in cooperation with staff members who currently blog. Getting first-hand insight will help districts identify potential trouble areas. Blog policies that are not a part of the district's technology use policy and/or user agreements should refer back to those documents to encompass the discipline provisions they include. The policy should make users aware that they have no expectation of privacy when using district equipment to create, maintain, or post comments on their blogs or those of others, and that their blogging may be subject to review by school administration. The policy also should set reasonable expectations regarding the off-duty, online activities of staff.

While the ability to discipline for off-duty blogging is limited, by developing a set of mutual expectations, the school district may alleviate the need for confrontation in the future. The box below discusses some considerations teachers should make when blogging and some considerations school districts should make when adopting policies related to blogging.

Considerations for Blogging Teachers

- *Public v. anonymous*: are you willing to sign your name to the comments you post?
- A blog has the potential to be read by thousands of people, including those you are writing about.
- Do not blog on the job.
- Use your own equipment, not the school district's equipment.
- The truth is always better than the opposite, so think before you blog.
- If your blog is public, do not use personally identifiable information when discussing colleagues, parents, and especially students.

Considerations for District Blog Policies

- Encourage bloggers to take responsibility for their postings.
- Prohibit the use of school mascots, symbols, logos, or other district trademarks on employee blogs.
- Prohibit blogging during the school day.
- Prohibit the use of school district property for personal blogs.
- Require the use of a disclaimer regarding the statements posted on blogs.
- Develop the policy with staff bloggers' input, make sure all staff are aware of the policy, and give notice that administrators may visit the blogs at any time. **I & A**

End Notes

1. Local6.com, Fla. Teacher Fired over MySpace Page, Jan. 25, 2007, <http://www.local6.com/education/10838194/detail.html>.
2. See LEE RAINIE, PEW INTERNET AND AMERICAN LIFE PROJECT DATA MEMO, THE STATE OF BLOGGING (Jan. 2005), http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf.
3. See TastyBlueCrayons, <http://www.tastybluecrayons.com/> (last visited Dec. 3, 2007).
4. Danah M. Boyd & Nicole B. Ellison, Social Network Sites: Definition, History, and Scholarship, JOURNAL OF COMPUTER-MEDIATED COMMUNICATION (Oct. 2007), http://jcmc.indiana.edu/vol13/issue1/boyd_ellison.html.
5. Business Software Alliance, Online CyberSafety, Cyber Safety Glossary, http://www.bsacybersafety.com/threat/social_networking.cfm (last visited Dec. 12, 2007).
6. Ball State University, Security and Policy, Safe Practices for Online Social Networking, <http://www.bs.edu/security/article/0,1384,86675-5031-40336,00.html> (last visited Dec. 12, 2007).
7. *Young v. Bd. of Educ. of City of Chicago*, 788 N.E.2d 1153, 1162 (Ill. App. Ct. 2003).
8. N.C. GEN. STAT. § 115C-325.
9. 105 ILL. COMP. STAT. § 5/10-22.4.
10. 105 ILL. COMP. STAT. § 5/10-22.4.
11. 105 ILL. COMP. STAT. § 5/10-22.4; *Ahmad v. Bd. of Educ. of City of Chicago*, 847 N.E.2d 810 (Ill. App. Ct. 2006).
12. *Id.*
13. See *McBroom v. Bd. of Educ., Dist. No. 205*, 494 N.E.2d 1191 (Ill. App. Ct. 1986).
14. *Id.*
15. *Young v. Bd. of Educ. of City of Chicago*, 788 N.E.2d 1153 (Ill. App. Ct. 2003).
16. *Id.*
17. *Id.*
18. See *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).
19. 391 U.S. 563 (1968).
20. 461 U.S. 138 (1983).
21. *Id.*
22. See *Roberts v. Ward*, 468 F.3d 963, 968 (6th Cir. 2006) (citing *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004)).
23. *Id.*
24. *Id.*
25. For a discussion of "related" and "unrelated" speech see *Dible v. City of Chandler*, 502 F.3d 1040 (9th Cir. 2007) and *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004).
26. See *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004) (termination of police officer for offering explicit videos for sale on online auctions site did not violate First Amendment right to free speech because officer's speech did not qualify as a matter of "public concern" under *Pickering/Connick* and speech was detrimental to the mission and function of police department); *Dible v. City of Chandler*, 502 F.3d 1040 (9th Cir. 2007) (termination of police officer for maintaining sexually explicit website featuring himself and his wife was not speech on a matter of "public concern"); *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185 (2d Cir. 2003) (teacher was member of North American Man/Boy Love Association and wrote articles for organizational newsletter; school district terminated employee and court held that despite finding that teacher's speech touched upon a matter of "public concern," termination should be upheld because school board's interest in orderly operation of school outweighed teacher's interest in commenting on matters of "public concern"); *Pappas v. Giuliani*, 290 F.3d 143, 146-48 (2d Cir. 2002) (assuming that a police officer's off-duty, anonymous mailings of racist materials were of public concern, court held under *Pickering* balancing that the police department was justified in firing the officer); *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026-28 (7th Cir. 1994) (holding that even if an assistant state's attorney's novel about the criminal justice system did not touch on a matter of public concern, his employer had to show legitimate interests that outweighed the social interest in the attorney's speech); *Flanagan v. Munger*, 890 F.2d 1557, 1562-67 (10th Cir. 1989) (holding that the public concern test did not apply to the sale of sexually explicit, non-obscene videos by police officers because the expressive conduct did not occur at work and was not about work, and that *Pickering* balancing tipped in the officers' favor). However, in such cases, it is not clear whether there is a need to apply the public concern test prior to applying the *Pickering* balancing test. *But see Scarbrough v. Morgan County Board of Education*, 470 F.3d 250 (6th Cir. 2006) (superintendent's intended speech to pray or speak before congregation concerning religion and homosexuality, which took place away from school, while off-duty, touched on a matter of public concern).
27. Courts have also employed the *Connick-Pickering* analysis in cases where public employees speak or write on their own time on topics unrelated to their employment. See *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004) (termination of police officer for offering explicit videos for sale on online auctions site did not violate First Amendment right to free speech because officer's speech did not qualify as a matter of "public concern" and was detrimental to the mission and function of police department); *Dible v. City of Chandler*, 502 F.3d 1040 (9th Cir. 2007) (termination of police officer for maintaining sexually explicit website featuring himself and his wife was not speech on a matter of "public concern").

28. See *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007) (high school athletic director's memoranda to office manager and principal inquiring about athletic account balance were written in course of performing his job as athletic director); *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) (superintendent spoke as a school district employee rather than as a private citizen when she raised concerns to the board about lawful and proper conduct of school business).
29. See *Roberts v. Ward*, 468 F.3d 963, 968 (6th Cir. 2006) (*post-Garcetti* decision finding employee's speech unrelated to position; therefore, no analysis of whether speech was required pursuant to employee's official duties).
30. California, New York, Massachusetts, Connecticut, Delaware, North Dakota, Florida, Michigan, Illinois, and Colorado have enacted such laws.
31. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002).
32. Computer giants Microsoft, Sun Microsystems, and Hewlett Packard, Internet search engine Google, social network site Friendster, and other companies such as Delta Air Lines, Disney, and Boston University all have created blogging policies defining their positions regarding the on- and off-duty blogging conduct of their employees. Moreover, many of these companies have also fired employees for engaging in blogging that the company has found detrimental.



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