

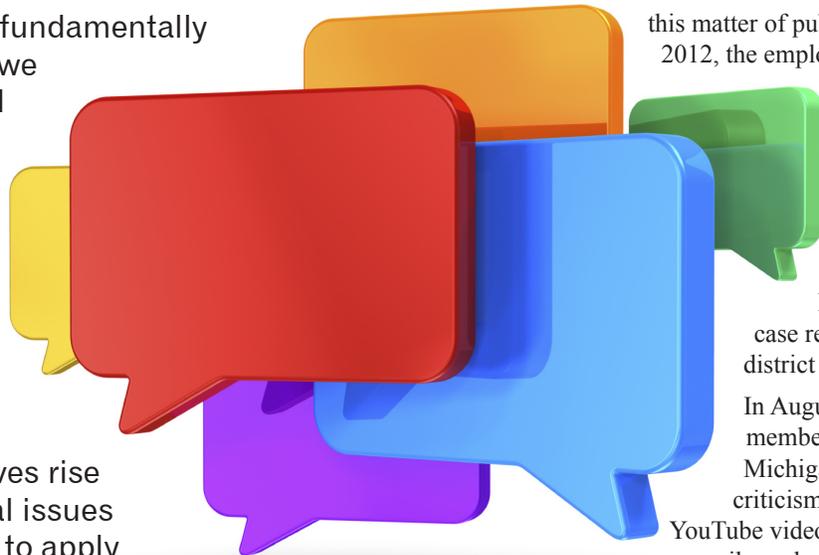
# PUBLIC EMPLOYEES AND THE FIRST AMENDMENT: THE INTERSECTION OF FREE SPEECH RIGHTS AND SOCIAL MEDIA

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Social media has fundamentally changed the way we communicate and impacts almost every part of our lives, from personal, to professional, to commercial. This poses special challenges for employers and gives rise to interesting legal issues as courts attempt to apply long-established precedent from the non-digital era to the Internet age. "In dealing with social media issues, judges are asked to make decisions based on statutes that can never keep up with technology. In some cases, those same judges have no understanding of the technology themselves."<sup>1</sup>

Take the example of free speech rights of governmental (i.e., public) employees who claim First Amendment protection when they are fired or disciplined for social media use.<sup>2</sup> There is no shortage of recent examples:

An Alabama paramedic posted critical comments on his Facebook page regarding the City of Valley's planned elimination of the emergency medical services department, and encouraging his friends to attend an upcoming council meeting. The town's mayor allegedly berated him on Facebook and then fired him, claiming that the city's interest in promoting efficiency was greater than the paramedic's interest in commenting on



this matter of public concern. In March 2012, the employee filed a wrongful termination lawsuit against the city and the mayor, claiming that the paramedic's First Amendment rights were violated when he was fired for his Facebook remarks. The case remains pending in federal district court in Alabama.<sup>3</sup>

In August 2012, a city council member in Sterling Heights, Michigan, came under intense criticism after a three-year-old YouTube video surfaced in which the councilmember was participating in a protest where he carried signs depicting graphic violence against former Michigan governor Jennifer Granholm, President Barack Obama and former Speaker of the House Nancy Pelosi. Amid calls for his resignation, as well as a visit from Secret Service agents, the councilmember asserted "free speech" rights and vowed to remain in office.<sup>4</sup>

Following an investigation, 17 employees of the New York City Police Department were disciplined in August 2012, for making racist and other derogatory comments on Facebook about participants in the 2011 West Indian American Day Parade in Brooklyn.<sup>5</sup>

## First Amendment Balancing Test for Employee Speech on Matters of Public Concern

Courts have long recognized the First Amendment rights employees of public agencies have to speak on matters of "public concern."<sup>6</sup> Such rights, however, are not absolute and are balanced against the public employer's right to avoid disruption and maintain efficiency in its operations. There are

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a multitude of cases in the traditional context analyzing whether or not an employee is speaking on a matter of “public concern” and, if so, whether it was permissible for the public employer to discipline or terminate the employee for such speech.

However, with a constantly evolving array of communication and expression, social media use by employees poses the even more fundamental question of what constitutes “speech.” For example, is a “Tweet” or a “Retweet” protected speech? What about the act of posting a hyperlink, posting a photo on Flickr or uploading a video on YouTube? A recent federal case in Virginia involving Facebook’s “like” button demonstrates how courts and employers are struggling with the unique free speech issues arising in the context of social media.

## Is a Facebook “Like” Protected Speech Under the First Amendment?

In 2009, Sheriff B.J. Roberts was running for re-election as the Sheriff of Hampton County, Virginia. Six of his subordinates used their private Facebook pages to “like” the Facebook page of Roberts’ opponent, Jim Adams. Roberts was reelected and, after the election, fired the six employees (and several others) who had liked Adams’ page. Some of the dismissed employees sued Roberts in his official and personal capacities alleging that he violated their First Amendment rights to freedom of speech and freedom of association. In a decision that received widespread attention in the media, the Eastern District of Virginia granted summary judgment in favor of the sheriff, ruling that merely “liking” a Facebook page (without making other statements) is insufficient speech to merit constitutional protection. The court reasoned:

Simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has previously warranted constitutional protection. The Court will not attempt to infer the actual content of [the employee’s] posts from one click of a button on [a] Facebook page. For the Court to assume that the [employees] made some specific statement without evidence of such statements is improper. Facebook posts *can* be considered matters of public concern; however, the Court does not believe [the employees] have alleged sufficient speech to garner First Amendment protection.

The employees appealed to the United States Court of Appeals for the Fourth Circuit. Both Facebook and the American Civil Liberties Union (ACLU) have submitted amicus curiae briefs in support of the employees’ free speech rights via social media. Facebook argues in its brief:

When [the employee] clicked the Like button on the Facebook Page entitled “Jim Adams for Hampton Sheriff,” the words “Jim Adams for Hampton Sheriff” and a photo of Adams appeared on [the employee’s] Facebook Profile in a list of Pages [the employee] had Liked – the 21st-century equivalent of a front-yard campaign sign. In addition, an announcement that [the employee] likes the campaign’s

Page was shared with [the employee’s] Friends, and [the employee’s] name and photo appeared on the campaign’s Page in a list of people who Liked the Page. If [the employee] had stood on a street corner and announced, ‘I like Jim Adams for Hampton Sheriff,’ there would be no dispute that his statement was constitutionally protected speech. [The employee] made that very statement; the fact that he did it online, with a click of a computer’s mouse, does not deprive [the employee’s] speech of constitutional protection.

The ACLU’s brief amplifies these points and characterizes “Liking” something on Facebook as both “pure speech and symbolic expression that warrants constitutional protection.” The ACLU argues that the fact that it is easy for individuals to express themselves via social media should not undermine the legitimacy or protected status of such speech:

The Internet has made it significantly easier to express thoughts and ideas publicly.... The amount of effort necessary to engage in speech is not, however, dispositive as to whether that speech is protected by the First Amendment.... With “one click of a button,” an Internet user can upload or view a video, donate money to a campaign, forward an email, sign a petition, send a pre-written letter to a politician, or do a myriad of other indisputably expressive activities. The ease of these actions does not negate their expressive nature.... Indeed, under the district court’s reasoning, affixing a bumper sticker to your car, pinning a campaign pin to your shirt, or placing a sign on your lawn would be devoid of meaning absent further information, and therefore not entitled to constitutional protection because of the minimal effort these actions require. All of these acts are, of course, constitutionally protected.... Liking a political candidate on Facebook, like other forms of Internet speech, is not different just because it only involves “one click” of a button. It is constitutionally protected.

Employees and employers alike in the government sector should stay tuned for the Fourth Circuit’s ruling in *Bland* and other court rulings on social media. As one court recently noted:

As the laws, rules and societal norms evolve and change with each new advance in technology, so too will the decisions of our courts. While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today’s twitter user names).... The Constitution gives you the right to post, but as numerous people have learned, there are still consequences to your public posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you.<sup>7</sup>

The intersection of the workplace and social media poses new legal and practical risks. The law is clear that Constitutional protection exists for *some* social media speech by public employees. However, both employers and employees must be mindful that not all speech is protected by the First Amendment, and activities in the virtual world can have serious implications in the more traditional spaces of their lives, including the workplace. ■

- 1 *People v. Harris*, 949 N.Y.S.2d 590, 597 (Crim. Ct. New York Co. June 30, 2012).
- 2 First Amendment protections under the Constitution generally apply to employees in the public, not private sector. See *S.O.C., Inc. v. The Mirage Casino-Hotel*, 117 Nev. 403, 410, 23 P.3d 243, 247 (2001) (stating the “general rule ... that the Constitution does not apply to private conduct”).
- 3 *Hamil v. City of Valley, Alabama, et al.*, 3:12-cv-229-MEF.
- 4 ‘Harsh’ Video of Sterling Heights Official in Spotlight, *The Detroit News* (Aug. 9, 2012); *Secret Service Visits Sterling Heights City Councilman Who Made Violent, Derogatory Comments about President Obama, Jennifer Granholm, Nancy Pelosi*, *The Oakland Press* (Aug. 10, 2012).
- 5 *Police Workers Punished for Racist Web Posts on West Indian Parade*, *The New York Times* (Aug. 22, 2012).
- 6 See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
- 7 *Bland v. Roberts*, --- F. Supp.2d ---, 2012 WL 1428198, \*4 (E.D. Va. 2012).



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