



michigan municipal league

## Law Enforcement Action Forum Newsletter



October 2009 Edition

Volume 16, Issue 3

### Social Networking - Employees Can Have Personal Web Pages, But Employers Can Hold Them Accountable For Their Content



By Gene King, LEAF Coordinator

On July 27, 2009, The New York Law Journal published an article entitled *Social Networking and Blogging: Managing the Conversation*. The author characterized the Internet as a “worldwide conversation”. The reference was to the proliferation of social networking and communication opportunities available on the web. These websites are very popular and have gained credibility because corporations, social cause activists, and politicians use them to advertise, entertain, raise funds, and promote ideas and products.

The article points out that part of now President Barack Obama’s news media strategy was using these sites to further his campaign and to raise money. It was immensely successful and outshone the old house to house campaign of the past. Like Obama, many people have found these sites to be outlets for communicating their ideas, interests, and activities to the masses or a limited list of friends. In addition, employers have found the sites a readily available source of information on prospective employees. However, employers

should also be aware that the sites may create civil rights and employment liability issues. This issue of the LEAF Newsletter will explore what an employer should do to establish policy governing the use of these sites as it pertains to the reputation and integrity of the department and to safeguard protected or confidential information.

With employees increasingly using social networking technologies in their on-duty and off-duty lives, employers need to recognize that these sites are the place where employees go to vent things that might otherwise get them in trouble at work. Employers, who must balance employee freedom of speech against the need to maintain a safe and protected workplace, must make sure that the technologies their employees participate in are free of any derogatory or inappropriate comments or materials that impact the workplace. These materials can be things such as comments about other employees, photographs from the workplace, or documents and discussion about work product. Inappropriate use can lead to civil rights complaints and litigation.

## RULES IN PLACE

Many employees would be shocked and downright indignant if someone were to challenge them about what they put on their MySpace or Facebook page or in the ramblings of a blog. They may consider it their First Amendment right to express themselves and tell their employers that what they blog or twitter about is none of their business. From an employer's point of view this is an issue similar to the one discussed in the December, 2005 LEAF Newsletter, *A Public Employer's Right to Search in the Workplace*. In that Newsletter we emphasized, among other things, the importance of giving notice to employees that they have a limited right of privacy and that the employer has a vested interest in ensuring the civil rights of the employees, meeting the requirements of integrity, and maintaining privacy and confidentiality as required by law. In this age of technology we are advocating that the protections be taken one more step.

Most police departments probably already have rules governing Conduct Unbecoming, Public Statements and Appearances, Use of Department Uniform or Equipment, Dissemination of Information, Harassment and Discrimination, and the use of computers, e-mail and cell phones. However, unless updated in the past few years, the policies may not contemplate technology currently available to employees (*see LEAF Manual, Chapter 11 Rules in the LEAF Manual of Law Enforcement Risk Control*). Departments need to take stock of what rules and policy they have in place and when they last updated them. Once done, top management needs to train their employees in what management's expectations are about the use of these web based social networking and communications applications and define what rules of the organization apply to their decision to maintain or participate in one.

Employees must recognize that outsiders can read their and others' Facebook or MySpace page, and that personal blogs and "tweets" define them to those viewing the communication. Off hand comments made to be funny; pointed comments

meant to express an opinion, editorial comments, or a photo/video taken at candid moments all express their individuality. At the same time, they may be inseparable from their public life. Comments made about fellow employees or those that may be related to their professional life can become a source of complaint. This can be even more problematic if the employee is a high profile individual in the department such as a person of rank, school liaison or public information officer. Even if the initial site is limited, once posted privacy is at the discretion of those allowed access. Employees also need to be wary of joining groups or becoming friends with unfamiliar people because the links downstream that appear on employees' pages might make it appear that they have "joined" a controversial group.

## STATE OF THE LAW

Employees need to be reminded that any on-line blogging or writing on their personal Web page is now public and can be disseminated anywhere. Even though employees have First Amendment Rights, they can be held accountable for what they post, and employers need to understand that they too can be held accountable for what employees write. Audrey Forbush, Plunkett Cooney P.C., LEAF's Legal Advisor points out that there are several cases involving employee rights in this area.

Forbush said that employers have heightened interests in controlling the job-related speech made by an employee in their professional capacity. They can require that all employee communication on official business, no matter where it is, must be accurate, demonstrate sound judgment, and promote the employer's mission. The Courts have ruled that the law protects them when employees speak as citizens addressing a matter of public concern. The First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences as found in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U. S. 563, (1968)*. In *Pickering* the Supreme Court determined that school board officials in Will

County, Ill., violated the First Amendment rights of high school teacher Marvin Pickering when they fired him for writing a letter to the editor of the local newspaper. In his letter, Pickering criticized the Board of Education for its allocation of school funds between athletics and education. The high court in *Pickering* wrote that the problem in public employee free-speech cases was balancing "the interests of the [employee], 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 services it performs through its employees."

In *Connick v. Myers*, 461 U. S. 138, (1983), an Assistant Prosecuting Attorney sent a questionnaire to fellow employees concerning job practices. One of his questions was whether any assistant district attorneys "feel pressured" to work in political campaigns. The court ruled the question did "touch upon a matter of public concern." They said "We believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." The next question was whether Myers' interest in free speech on a matter of public concern outweighed Connick's interest in a disruption-free working environment. The Court held that "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."

In *Pickering* and then in *Connick*, the Court identified two inquiries to guide the analysis of constitutional protections given to public employee speech. The first requires whether the employee spoke as a citizen on a matter of public concern. If the answer is "no," the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is "yes," there might be a First Amendment claim. The question becomes whether the government entity had enough reason for treating the employee differently from any other member of the general

public. This consideration indicates the importance of the relationship between the speaker's words and employment. A governmental entity has broader discretion to restrict speech when it acts in its role as employer, but the limitations it enforces must be directed at speech that has some ability to affect the entity's operations. The analysis is determined by whether an employee's speech is a matter of public concern which requires assessment of whether the speaker is speaking more like a citizen or a disgruntled employee whose statements are mainly of personal interest. In short, is the person speaking as a private citizen or a mad employee?

When the employee is simply performing his or her job duties through their speech, there is no need for the "public concern, nature of speech" analysis. Forbush points to the U.S. Supreme Court ruled in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) as being a big change in the First Amendment protection for the employee

Richard Ceballos was a senior deputy district attorney for the Los Angeles County District Attorney's Office as a calendar deputy in the office's Pomona branch. In that 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. Acting on the information Ceballos did an investigation and reported the information, in writing, to his superiors. As a result of the report a meeting was held with the prosecution principals of the case and harsh words were had with the officers involved. The decision was made to proceed with the case. An evidentiary hearing was held in which Ceballos was called by the defense to testify about his findings. The prosecution prevailed in the hearing and a subsequent conviction was gained. After the case Ceballos was reassigned to another courthouse with different duties and over time was passed over for promotion. He sued alleging retaliation and violation of his civil rights.

Forbush said that the Court ruled Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. He also did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance. The Court went on to say 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 Court specifically stated that:

**A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.**

Explaining the reasons for its analysis, the Court called attention to the importance of the connection between the persons speaking and their employment. Public employees often have trusted positions in society and when they speak, they can sometimes state views that may be in breach of government’s policies. Their speech may even harm the proper performance of the operations. A governmental entity must have some control over employees’ words and actions so they can provide services efficiently or effectively. On the other hand, employees speaking as private citizens about matters of public concern only have those limits on their First Amendment rights necessary for their employers to operate efficiently or effectively. Thus, the *Garcetti* majority reasoned that where

the comments are made is immaterial as long as they are made pursuant to official duties.

Forbush cites matters of internal office politics, policy and procedure, employee safety, training and staffing, maintenance practices, hostile or discriminatory comments about fellow workers as examples of topics that will often be commented upon and can affect the employer’s operation. Case information, photographs, video, recordings generated as a result of their employment, confidential victim information, employee data are examples of information that must be protected by the employer. Comments and depictions that specifically identify the department in a negative or controversial manner are also included.

## **HAVE A POLICY**

During the discussion of this topic with the LEAF Committee, Chief Richard Mattice of the Kentwood Police Department, a CALEA Accredited Department, offered to share a policy that they had adopted. The policy had its origins in one adopted by the Ohio State Highway Patrol. Chief Mattice has graciously agreed to share the memo sent to the Kentwood Police Department that explains the policy of the City and Department on this issue with anyone who may find it useful. A copy of the policy is attached.

## **FORBUSH ADVISES CAUTION WHEN USING THE WEB AS PART OF A BACKGROUND INVESTIGATION**

Many employers have begun to search the web for candidates’ names looking for background information. Before an employer even thinks about doing this, the best practice is to obtain a signed release from the candidate and give notice that the internet review is part of the background investigation practice and will occur at a specific time in the hiring process.

The most important issue when using the web as part of the background investigation is avoiding

any appearance of violating a person's civil rights. In the hiring process there are a variety of laws that protect a candidate such as: *Americans with Disabilities Act, Michigan Handicappers Act, Civil Rights Act of 1964 & 1991, Michigan Elliott-Larsen Civil Rights Act, Fair Credit and Reporting Act.* Using the internet for a background investigation can reveal information that an employer would not be privy to and can lead to the impression of disparate or out right discriminatory decision making on choosing the final candidate.

Forbush cautions employers to remember that just because it is on the web does not mean it is true. It is easy for anyone to establish an identity on the web under any name. It is also easy to place any information or to manipulate photos to realistically represent a person in a number of unpleasant or

embarrassing situations. All information gleaned over the internet and from the social networking sites must be verified with the candidate before it is used as part of the hiring decision.

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LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.*

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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