“Facebook Fired”: Legal Standards for Social Media–Based Terminations of K-12 Public School Teachers

Kimberly W. O'Connor
Indiana University-Purdue University Fort Wayne, oconnork@ipfw.edu

Gordon B. Schmidt
Indiana University - Purdue University Fort Wayne, schmidtg@ipfw.edu

Follow this and additional works at: http://opus.ipfw.edu/ols_facpubs

Part of the Industrial and Organizational Psychology Commons, Labor and Employment Law Commons, and the Organizational Behavior and Theory Commons

Opus Citation
http://opus.ipfw.edu/ols_facpubs/82
“Facebook Fired”: Legal Standards for Social Media–Based Terminations of K-12 Public School Teachers

Kimberly W. O’Connor1 and Gordon B. Schmidt1

Abstract
The increased use of social media sites like Facebook has had an impact on employees when their behavior on such sites is deemed to be inappropriate by employers. This has led to a phenomenon that the popular press calls “Facebook Fired,” where an employee is fired for personal social media use. Such terminations have significant potential legal consequences. This article examines the current case law related to social media–based terminations within the job type of K-12 public school teachers. We give legal and practical recommendations to teachers who might potentially face such situations. We suggest legislation and give social media policy language recommendations for school corporations. Finally, we call for research examining the perceptions of fairness of such terminations by workers as well as the public at large.

Keywords
Facebook, social media, terminations, law, teachers

In March 2013, Alan Francis, a full-time Pennsylvania substitute teacher, was fired for “complimenting” a female student online. Francis was never told what comment or post resulted in his termination, or even whether the comment originated from his Facebook or his Twitter account. The school corporation that employed him stated only that the post in question was neither sexual nor inappropriate in nature and that the decision to fire Francis was made after the student’s mother complained to the school board (WPXI, 2013).

In October 2012, Coriann Ulrich, a substitute teacher in Moses Lake, Washington, was fired because of a complaint made by a woman Ulrich had never met. The woman, Jenn Gutterud, lived in California—1,200 miles away from Ulrich. Gutterud’s complaint was based on comments made by Ulrich in 2012 on a public Facebook page about teen pregnancy. Ulrich began her post by writing, “I hate teen moms!” and continued with additional comments related to teen pregnancy. Gutterud saw the post, was offended by the comments, and contacted the school corporation that Ulrich listed on Facebook as her employer. After reviewing the comments, school officials terminated Ulrich’s employment (Hall, 2012).

These are just two of a growing number of employees who have been labeled by the popular press as “Facebook Fired” (Hidy & McDonald, 2013). Such terminations of employment include incidents in which employees have been fired for posts they have made on other social media sites as well (The Facebook Fired, 2010).

Social media is defined as “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content” (Kaplan & Haenlein, 2010, p. 61). These sites are heavily used, with 83% of individuals 18 to 29 years of age frequenting social media sites (Duggan & Brenner, 2013). Facebook has 1.32 billion active users who visit at least monthly (Facebook, 2014). Twitter has 500 million subscribers, with 200 million active users. Other forms of social media include MySpace, YouTube, LinkedIn, Google Plus, Tumblr, Instagram, and dozens of other social media sites, adding millions of additional subscribers combined (Smith, 2014).

Workers’ personal social media use often becomes intertwined with the workplace. One recent survey states that one third of workers use social media for at least 1 hr of the workday (Dougherty, 2013). In addition, workers are often “connected” with one another through social media sites. For example, 60% of employees report having one or more coworker “friends” on Facebook, and 25% of employees report that they are Facebook friends with their supervisors (Weidner, Wynne, & O’Brien, 2012).

1Indiana University–Purdue University Fort Wayne, USA

Corresponding Author:
Gordon B. Schmidt, Department of Organizational Leadership, Indiana University–Purdue University Fort Wayne, Neff Hall 288D, 2101 E. Coliseum Blvd., Fort Wayne, IN 46805, USA.
Email: schmidtgb@ipfw.edu

© The Author(s) 2015
DOI: 10.1177/2158244015575636
sgo.sagepub.com

Creative Commons CC BY: This article is distributed under the terms of the Creative Commons Attribution 3.0 License (http://creativecommons.org/licenses/by/3.0/) which permits any use, reproduction and distribution of the work without further permission provided the original work is attributed as specified on the SAGE and Open Access page (http://www.uk.sagepub.com/aboutus/openaccess.htm).

Downloaded from by guest on March 20, 2015
With workers using social media so widely, social media can have a significant impact on human resource (HR) practices. Davison, Maraist, and Bing (2011) outlined several significant areas in which social media affects HR, including recruiting, selection, and termination decisions. Davison et al. (2011) call for more scholarly work to examine the impact of social media on HR functions. This article answers the call by examining the developing case law as to the legality of worker terminations based on social media posts. We use K-12 teacher termination cases as the basis for our review. This population allows for a consideration of the legal standards unique to public employees, such as First Amendment protections afforded to teachers as public school employees. For example, in Pickering v. Board of Education (1968), a high school science teacher wrote a letter to the editor of a community newspaper, criticizing the board of education’s allocation of funds between academics and athletics. The school board terminated the teacher, finding that the letter contained false statements that compromised the integrity of the school system. The teacher sued for wrongful discharge, claiming that the board had violated his First Amendment rights.

The Pickering decision outlined a “balancing test,” in which the interests of the employer are weighed against the public employee’s free speech right (Estrada, 2010). The U.S. Supreme Court held that a public employee’s speech receives Constitutional protection as long as the employee is speaking as a citizen about matters of “public concern.” The Court in Pickering found in favor of the teacher, holding that his speech was protected because the allocation of public school funds is a matter of public concern. Later courts defined “public concern” as speech “relating to any matter of political, social, or other concern to the community” (Connick v. Myers, 1983, p. 146).

In the years since Pickering, the U.S. Supreme Court has revisited and refined its stance on the free speech rights of public employees. For example, in Connick v. Myers (1983), the Supreme Court held that a public employee’s First Amendment rights are not violated when a termination of employment involves speech that amounts to a personal grievance, rather than to a matter of public concern (Connick v. Myers, 1983). Also, in Garcetti v. Ceballos (2006), the Court held that speech that is based on the public employee’s professional responsibilities does not receive First Amendment protection. The government, as the employer, has the right to control the public employee’s speech as it relates to public service (Garcetti v. Ceballos, 2006).

Taking the aforementioned cases into account, the free speech rights of public employees are notably limited. Only when a public employee’s speech involves a matter of “public concern,” and not a private grievance, will courts acknowledge First Amendment protection. However, even if an employee’s speech is a matter of public concern, the employee’s free speech right may still be trumped by the interests of public service. If an employee speaks as a “public employee” (e.g., in speech made pursuant to a public employee’s job duties) and not as a citizen, there is no First Amendment protection.

The First Amendment as It Relates to Public Employees

The popularity of social media has increased awareness of the conflict between an individual’s right to free speech under the First Amendment and the right of employers to restrict an employee’s speech. The First Amendment states in part that “Congress shall make no law abridging the freedom of speech.” There is a long-standing legal standard that the First Amendment rights of public employees are distinct from those of private sector employees. Whereas private sector employees have almost no First Amendment protection and can generally be hired and fired at their employer’s will, public employees do have some free speech protection (Fulmer, 2010). The U.S. Supreme Court addressed the level of protection afforded to public employees under the First Amendment in the following cases.

In Pickering v. Board of Education (1968), a high school science teacher wrote a letter to the editor of a community newspaper, criticizing the board of education’s allocation of funds between academics and athletics. The school board terminated the teacher, finding that the letter contained false statements that compromised the integrity of the school system. The teacher sued for wrongful discharge, claiming that the board had violated his First Amendment rights.

The Pickering decision outlined a “balancing test,” in which the interests of the employer are weighed against the public employee’s free speech right (Estrada, 2010). The U.S. Supreme Court held that a public employee’s speech receives Constitutional protection as long as the employee is speaking as a citizen about matters of “public concern.”

The Court in Pickering found in favor of the teacher, holding that his speech was protected because the allocation of public school funds is a matter of public concern. Later courts defined “public concern” as speech “relating to any matter of political, social, or other concern to the community” (Connick v. Myers, 1983, p. 146).

In the years since Pickering, the U.S. Supreme Court has revisited and refined its stance on the free speech rights of public employees. For example, in Connick v. Myers (1983), the Supreme Court held that a public employee’s First Amendment rights are not violated when a termination of employment involves speech that amounts to a personal grievance, rather than to a matter of public concern (Connick v. Myers, 1983). Also, in Garcetti v. Ceballos (2006), the Court held that speech that is based on the public employee’s professional responsibilities does not receive First Amendment protection. The government, as the employer, has the right to control the public employee’s speech as it relates to public service (Garcetti v. Ceballos, 2006).

Taking the aforementioned cases into account, the free speech rights of public employees are notably limited. Only when a public employee’s speech involves a matter of “public concern,” and not a private grievance, will courts acknowledge First Amendment protection. However, even if an employee’s speech is a matter of public concern, the employee’s free speech right may still be trumped by the interests of public service. If an employee speaks as a “public employee” (e.g., in speech made pursuant to a public employee’s job duties) and not as a citizen, there is no First Amendment protection.
Post-Garcetti, decisions specifically relating to K-12 public school teachers have highlighted particular difficulties for the profession (McCarthy & Eckes, 2008). For example, in a Tenth Circuit case, a teacher accused his supervisor of abusing students and lacking proper certification for his supervisory position. After the teacher made these accusations, the school district placed him on administrative leave. In the teacher’s lawsuit alleging retaliation, the court held that the teacher’s comments were not protected speech as the statements were made pursuant to his official job duties (McCarthy & Eckes, 2008; Trujillo v. Board of Education, 2007).

In another case, a Connecticut teacher complained to his supervisor after learning that a substitute teacher had shown a naked photo of himself, with two naked women, to middle school students. The supervisor ordered the teacher not to contact the Department of Children and Families (DCF) about the substitute teacher’s actions, but the teacher chose to file a DCF report anyway. Soon afterward, the teacher claimed that the superintendent and others had retaliated against him. The Connecticut federal district court found that the teacher’s report to the DCF was made pursuant to his official job responsibilities and that the teacher was not speaking as a citizen in making the DCF report (McCarthy & Eckes, 2008; Pagani v. Meriden Board of Education, 2006). Therefore, the court refused to protect the teacher from the disciplinary action imposed by the employer.

Although in both cases it was argued that the safety of children is inherently a matter of public concern, the courts focused solely on the origin of the knowledge that gave rise to the speech in question (McCarthy & Eckes, 2008). In the Connecticut case, the court noted that public employees cannot make an employment issue a public concern simply by voicing their grievances through a public medium (Pagani v. Meriden Board of Education, 2006). Against this legal background, recent cases involving teachers’ social media activity have been progressing though the court system.

**Recent Court Cases Involving K-12 Public School Teachers and Social Media**

There are 3.1 million K-12 public school teachers in the United States (National Center for Education Statistics, 2014). A 2012 survey reported that 82% of K-12 educators use Facebook (MMS Education, 2012). With the prevalence of social media only increasing, many school boards across the country have faced the issue of whether or not to fire teachers for their online statements and activities that are deemed inappropriate.

Analysis of recent case law involving teacher terminations and social media illustrates the precarious ground on which K-12 teachers, as public employees, stand. Posting statements about students online, allowing students to access the teacher’s social media sites, or posting off-duty conduct to social media sites can, and often does, result in teachers being fired.

**Teachers Who Post Statements About Students via Their Personal Social Media Accounts**

Tenured New Jersey elementary school teacher Jennifer O’Brien (“O’Brien”) had more than 10 years of teaching experience. At the start of the 2010-2011 school year, O’Brien was assigned to teach a first-grade class, which was made up completely of minority students. Early in the school year, O’Brien encountered several students whom she classified as “discipline problems.” One student struck her, another student stole money from her as well as other students, and some students were violent toward others in the classroom.

Although O’Brien sent several disciplinary referrals to the school’s administrators, she did not believe that the referrals were adequately addressed. Frustrated, she turned to Facebook where she vented, “I’m not a teacher—I’m a warden for future criminals.”

News of O’Brien’s Facebook post quickly spread. Believing that O’Brien’s remarks were racially motivated, angry parents organized a protest and called for O’Brien’s resignation. Major news organizations reported the story. Although O’Brien clarified that she was not calling the students “future criminals” because of their race or ethnicity, the deputy superintendent of schools charged her with “conduct unbecoming of a teacher.” O’Brien was suspended with pay.

The Commissioner of Education for the State of New Jersey referred the matter to the Office of Administrative Law, which is the typical procedure when an administrative agency becomes involved in a matter. Rather than go straight to a court of law, an Administrative Law Judge (ALJ) will typically conduct a hearing on the matter.

During O’Brien’s administrative law hearing, she argued that her comments were protected by the First Amendment. She maintained that her Facebook post was meant to address the issue of students’ classroom behavior, which is a matter of public concern. Despite her argument, the ALJ ruled that O’Brien’s post amounted to a personal expression of dissatisfaction with her job, which is speech that is not protected by the First Amendment. Furthermore, the ALJ found that O’Brien had breached her duty as a professional teacher; failed to maintain a safe, caring, nurturing, educational environment; and endangered the mental well-being of the students. Based on these findings, O’Brien’s employment was terminated.

O’Brien appealed the termination decision to the New Jersey Court of Appeals, which applied the Pickering balancing test. The court further held that even if O’Brien’s comments were on a matter of public concern, her right to express those comments was outweighed by the district’s interest in the efficient operation of its schools. O’Brien’s termination
was upheld as a matter of law. Notably, the Facebook post at issue was O’Brien’s first offense as a teacher (In the matter of the tenure hearing of Jennifer O’Brien, 2013).

In Rubino v. City of New York (2012), tenured fifth-grade New York school teacher Christine Rubino (“Rubino”) posted statements on her Facebook account following the drowning of a student during a class field trip to the beach. Although Rubino had no involvement with the drowning incident, she posted, “After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devil’s spawn!” One of Rubino’s Facebook friends then posted, “Oh you would let little Kwame float away!” To which Rubino responded, “Yes, I would not throw a life jacket in for a million!”

One of Rubino’s work colleagues viewed the post and contacted the school’s principal, who began an investigation and questioned Rubino about the comments. Rubino claimed that she did not remember posting the comments and blamed the posts on a “friend” whom Rubino claimed had access to her Facebook account. The Special Commissioner of Investigation for the New York City School District (“Commissioner”) interviewed the “friend,” who stated that Rubino had posted the comments herself. The Commissioner charged Rubino with misconduct, neglect of duty, and conduct unbecoming of a teacher. During a hearing, Rubino admitted that she had actually posted the statements herself, and she was terminated.

Rubino appealed her termination of employment to the New York State Supreme Court. Rubino argued that her post was protected by First Amendment Freedom of Speech and New York Education Law 3020 (hereinafter the “education statute”). The court agreed with the ALJ’s determination that Rubino’s statements did not involve a “public concern.” As such, Rubino’s statements were not afforded First Amendment protection.

The court also examined Rubino’s case under the education statute, which required a determination of whether the punishment imposed on Rubino was “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness” (Rubino v. City of New York, 2012, p. 10). The court looked to Rubino’s 15-year employment history, which was unblemished prior to the post, and the fact that Rubino had posted the comments outside of the school building and after school hours. In addition, the court noted that there was no indication that Rubino’s posts affected her ability to teach and that her cover-up reflected “panic, not planning” (Rubino v. City of New York, 2012, p. 13).

Based on these considerations, the court vacated, or voided, Rubino’s termination, and the matter was remanded to the Department of Education (DOE) for the imposition of a lesser penalty. The court stated,

There is no reason to believe that petitioner [Rubino] will again post inappropriate or offensive comments online, as she repeatedly apologized during the administrative hearing for the posts, and expressed tearful remorse. . . . While her reference to a child’s death is repulsive, there is no evidence that her postings are part of a pattern of conduct or anything other than an isolated incident of intemperance. (Rubino v. City of New York, 2012, pp. 12-13)

The DOE determined that Rubino’s “lesser punishment” should be a 2-year suspension from teaching without pay (Edelman, 2012).

The O’Brien and Rubino cases both illustrate that teachers who choose to discuss matters involving students online are, at minimum, risking a reprimand from their employers. Neither of these teachers’ Facebook statements received First Amendment protection. Rubino was ultimately reinstated to her teaching position, but that was because New York’s Education Law required an examination of the penalty imposed on her (Rubino v. City of New York, 2012).

Legal and Practical Suggestions for Teachers Related to Posting About Students on Social Media

The erroneous public perception is that First Amendment protection means that citizens are always legally protected if an adverse employment action results from online speech. As discussed above, First Amendment precedent does not protect a public employee who is airing personal grievances online (Connick v. Myers, 1983). With little to no First Amendment protection afforded to public school teachers, it is important for them to know their state laws and understand their tenure documents and/or union contracts where applicable. As illustrated in the Rubino case, the availability of a state statute can be the determining factor in a social media termination case (Rubino v. City of New York, 2012).

Problems also often arise because the intent behind personal statements can be difficult to communicate online, and clarification is rarely sought before the public’s judgment is passed. The O’Brien case showed that, even where there is a potential “public concern” argument, the public’s negative perception of O’Brien’s comments effectively trumped her public concern argument because school operations were disrupted by the amount of attention her statements received (In the matter of the tenure hearing of Jennifer O’Brien, 2013).

Discussing negative personal thoughts online, especially those related to students, crosses into the area where many believe that morally reprehensible behavior has occurred (Debate.org, 2014). Therefore, given the public nature of social media, it is “best practice” for a teacher to refrain from posting thoughts or comments about students online at all. The line between public forum and personal communications by teachers must be observed.

Teachers Who Use Social Media to Interact With Students

Teachers frequently engage students online as a contemporary mechanism to further the education process. Some educators
argue that the use of online tools, including social media, is critical to the future of education (Papandrea, 2012). In 2010, the DOE’s National Education Technology Plan encouraged all states and districts to experiment with social networks and other Web 2.0 technologies as a means of expanding the collaborative learning opportunities for students and creating communities of practice among K-12 teachers (DOE, 2010).

As the use of Web 2.0 technology in the classroom has emerged, so has the issue of whether K-12 public educators should communicate with students via their personal social media accounts. Following several cases from across the country involving questionable teacher–student online interactions, the state of Missouri passed a law in 2011 that barred teachers from having contact with students on any social media site that enabled private messaging. Although the law was ultimately struck down on First Amendment grounds, the issue of the appropriateness of teachers communicating privately with students online remains the subject of much debate (Lieb, 2011).

School district policies regarding teacher/student social media interaction vary greatly, if they exist at all (Walker, 2012). Some school districts completely prohibit personal social media communication between teachers and students. Some allow limited social media use. Many restrict social media use to instructional purposes only (di Marzo, 2012). If a school district fails to clearly articulate a social media policy, teachers are left to use their personal judgment regarding appropriateness. Subjective standards can result in objectionable online interactions with students, especially if students are given access to their teachers’ personal social media sites.

In Snyder v. Millersville University (2008), student teacher Stacey Snyder (“Snyder”) was an education major from 2002 to 2006 at Millersville University, in central Pennsylvania. As part of the education curriculum, the then 22-year-old Snyder had to complete a student teaching practicum in her final semester before receiving her teaching degree. Prior to the first day of their practicum, all student teachers were told as a “precautionary measure” not to communicate with students via social media. There was no official social media policy in this case.

For her practicum, Snyder was assigned to teach English at Conestoga Valley High School. Although she was only a student teacher, at times Snyder was the sole teacher in the classroom. She also had complete responsibility for the students’ learning. At Snyder’s midsemester evaluation, a full-time faculty member noted that Snyder seemed “overfamiliar with the students.” For example, she was observed talking to the class about matters involving her ex-husband and her current boyfriend.

It came to light that Snyder had informed her students of her MySpace page, and Snyder was aware that her students were accessing it. Snyder even acknowledged her awareness in a post. She wrote:

One of my students was on here looking at my page, which is fine. I have nothing to hide. I am over 21, and I don’t say anything that will hurt me (in the long run). Plus, I don’t think that they would stoop that low to mess with my future. So, bring on the love!

Snyder’s post also included a photograph in which she wore a pirate hat and held a plastic cup, to which she added the caption “drunken pirate.”

In Snyder’s final evaluation, her performance was ranked as “unsatisfactory.” The evaluating faculty members attached Snyder’s MySpace post and picture to her evaluation. Due to the negative review, Millersville University denied Snyder’s education degree and instead awarded her a degree in English. Snyder filed a cause of action against Millersville University in the District Court for the Eastern District of Pennsylvania, arguing that her First Amendment rights had been violated.

In examining Snyder’s First Amendment claim, the court determined that Snyder was acting as “teacher,” not as a “student,” during her practicum. As Snyder’s MySpace post and picture did not address a matter of public concern, she did not receive First Amendment protection. The court therefore found in favor of Millersville University (Snyder v. Millersville University, 2008).

In Spanierman v. Hughes (2008), Connecticut high school English teacher Jeffrey Spanierman (“Spanierman”) was terminated after school officials received complaints from students about Spanierman’s MySpace page. Spanierman posted several pictures of naked men, which students viewed and commented on. Also through his MySpace page, Spanierman had several conversations with students, which school investigators found to be “very peer-to-peer like.” The conversations with students included topics like weekend parties or students’ personal problems. One such post was a conversation with a student who used the profile name “Repko”:

Spanierman: “Repko and Ashley sittin in a tree. K I S S I N G G. 1st comes love then comes marriage. HA HA HA HA HA HA HA HA HA!!!!!!! LOL”

Repko: “Don’t be jealous cause you can’t get any lol:)

Spanierman: “What makes you think I want any? I’m not jealous. I just like to have fun and goof off on you guys. If you don’t like it. Kiss my brass! LMAO”

At the conclusion of the investigation, Spanierman was put on paid administrative leave. Following a hearing on the matter, Spanierman was informed that his contract as a non-tenured teacher would not be renewed. Spanierman filed suit in the District Court for the District of Connecticut, arguing that his MySpace posts were protected by his free speech rights. Applying the Pickering test, the court found that only a poem that Spanierman posted in opposition to the Iraqi war
met the qualifications for protected speech. The court held that everything else Spanierman posted amounted to a disruption of school activities (Akiti, 2012). The court upheld Spanierman’s termination, stating,

It is reasonable for the Defendants [the Connecticut school district] to expect the Plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students. This does not mean that the Plaintiff could not be friendly or humorous; however, upon review of the record, it appears that the Plaintiff would communicate with students as if he were their peer, not their teacher. Such conduct could very well disrupt the learning atmosphere of the school, which sufficiently outweighs the value of the Plaintiff’s MySpace speech. (Spanierman v. Hughes, 2008, p. 37)

Legal and Practical Suggestions for Teachers Related to Interacting With Students Through Social Media

The Snyder and Spanierman cases illustrate how important it is for teachers to understand their job classifications, as well as the legal protections that may or may not exist in relation to those classifications. The Snyder and Spanierman cases both failed to meet the Pickering standard for public employees’ First Amendment protection. Also, state statutes did not apply as neither teacher had obtained tenure. Snyder would probably have received greater First Amendment protection had the court treated her as a student. This could have led to a very different result as student speech receives First Amendment protection unless it interferes with other students or disrupts the work of the school (Snyder v. Millersville University, 2008).

Without legislation or policy language to provide guidance, the point at which a divergence occurs between personal expression and unprofessional conduct for K-12 teachers in their personal social media activity can easily be confused. Neither Snyder nor Spanierman engaged in online behavior with students that was illegal or particularly inflammatory with regard to their ability to teach in the classroom. Nevertheless, the social media interactions that occurred in both cases were deemed to be too “peer-like” by administrators. This unfortunately is an ambiguous standard. It could be problematic in cases where teachers communicate with students through social media as part of pedagogy, as the social media environment encourages greater informality and personalized communication. Teachers therefore need to strongly consider how they communicate with students through social media and in fact whether they should accept friend requests from students at all.

Teachers also need to know what online behavior their employers consider grounds for termination. When new contracts between teachers and schools are negotiated, contract language related to teacher social media usage rights is a potentially valuable addition. If a school has an existing social media policy, teachers need to know that policy well. Teachers should also use contract or policy language to help guide what types of communication are seen as appropriate/inappropriate within their own school.

Teachers Who Have Social Media Posts Deemed to Be Morally Objectionable

School administrators have customarily had the ability to regulate teacher conduct, even conduct that occurs outside the classroom (Bathon & Brady, 2010). Likewise, the majority of state teaching licenses incorporate moral codes to which teachers must adhere. Often teacher codes of conduct prohibit “behavior that would otherwise be unbecoming of a teacher” and/or “engaging in conduct that would discredit the teaching profession.” Most state education codes permit a teacher’s dismissal for “immorality,” or “moral turpitude,” even if the incident occurs in the teacher’s personal time (Fulmer, 2010).

Three other cases, the Murmer, Payne, and Land cases, all received a great deal of attention in the popular press because all of them occurred when the teachers in question were “off the clock.” Media outlets also highlighted the seemingly “unfair” or “unjust” results for the teachers involved (Downey, 2009). However, these decisions are not inconsistent with statutes that have historically addressed teachers’ off-duty conduct.

Off-duty conduct is defined as conduct occurring when “not being engaged in the performance of one’s usual work” and is also known as conduct occurring during “personal time.” As the case law illustrates, even when conduct occurs during a teacher’s personal time, is not related to the classroom, and is legal, a termination of employment can result when it is posted online.

In Murmer v. Chesterfield County School Board (2008), Stephen Murmer (“Murmer”), a Virginia high school art teacher who sold his personal artwork outside of school, was terminated by the Chesterfield County School Board after a video surfaced of him painting on YouTube. The video of Murmer was taken during a live cable TV interview for a show called “Unscrewed With Martin Seargant.” In the video, Murmer demonstrated a painting “technique” involving the use of his own buttocks. Murmer used this painting technique only on his personal artwork, and he never demonstrated or discussed this painting technique in the classroom.

During the interview, Murmer used the pseudonym “Stan Murmer.” He also wore a white robe, a white towel on his head, fake glasses, and a fake nose. When the interviewer asked Murmer, “Why the disguise?” Murmer replied, “I do have a real job.” When Murmer disrobed to paint, he wore only a black thong (Gelineau, 2006).

The painting technique involved Murmer covering his own buttocks in paint and pressing them against a canvas (Murmer v. Chesterfield, 2008). Murmer is particularly famous in the
art world for this technique. His paintings can sell for several hundred to a few thousand dollars (Gelineau, 2006). A third party posted the interview on YouTube, where Murmer’s high school students and school officials viewed the demonstration. Murmer’s employment was subsequently terminated for “conduct unbecoming of a teacher” (Murmer v. Chesterfield, 2008).

Murmer sued the Chesterfield County School Board, claiming his free speech rights had been violated. With the help of the American Civil Liberties Union (ACLU), Murmer ultimately reached an out-of-court settlement with the school district in the amount of US$65,000 (approximately 2 years’ teaching salary). Murmer was not reinstated to his position as a high school art teacher (ACLU of Virginia, 2008).

In Payne v. Barrow County School District (2009), non-tenured Georgia high school English teacher Ashley Payne (“Payne”) posted pictures of her summertime European vacation on her Facebook page. One picture showed her holding a beer in an Irish pub. On one “status update,” she used the word bitch.

Payne’s Facebook privacy settings were set to “private.” She was not Facebook friends with any of her students. An anonymous person, claiming to be the parent of one of Payne’s students, sent an email to the superintendent complaining about Payne’s posts (Fulmer, 2010). To date, Barrow County school officials have not revealed the identity of the anonymous person (Downey, 2009).

After receiving this email, the school’s principal gave Payne an ultimatum: either resign or be suspended. Believing that quitting her job was her best option, Payne resigned. Several days later, Payne tried to rescind her resignation after being informed of her legal right to a hearing pursuant to the Georgia Fair Dismissal Act. The school board refused to allow her to rescind her resignation. Payne sued, claiming that her dismissal was in violation of her due process rights. Payne cited the language of her teaching contract, which included a 10-day maximum suspension with pay and a hearing on any matter adverse to her employment. Payne did not raise a First Amendment claim.

In her lawsuit, Payne requested that the court enforce the terms of her teaching contract. By the time the case was tried, Payne’s 1-year period of nontenured employment had already passed, and the court held that Payne’s case was moot. Payne’s termination of employment was upheld (Payne v. Barrow, 2009).

In Land v. L’Anse Creuse Public School Board of Education (2010), tenured middle school math teacher Anna Land (“Land”) was terminated after attending a bachelorette party where she engaged in a simulated sexual act with a male mannequin. Without Land’s knowledge, a picture was taken of her during this act and was posted online without her consent, nearly 2 years after it was originally taken.

Land’s students gained access to the picture online and so did the school corporation. Land was eventually terminated from her teaching position for “engaging in lewd behavior contrary to the moral value of the educational and school community.” Land filed a complaint; however, an ALJ agreed with the board’s decision and upheld the termination. The State Tenure Commission later determined that Land’s conduct was not sufficient for discharge, and she was reinstated.

The school corporation appealed the decision to reinstate Land to the Michigan Court of Appeals. The reviewing court relied heavily on pertinent portions of the Michigan Teachers’ Tenure Act, which states, in part, that a school district may establish just cause to terminate a teacher’s employment “only by showing significant evidence proving that the teacher is unfit to teach.” Michigan courts must also decide whether the issue at hand had an adverse effect on students. The court held,

There are no Michigan decisions holding that a teacher’s legal, off-duty, off-premise conduct not involving students constitutes professional misconduct that renders a teacher unfit to teach. Petitioner’s [Land’s] conduct, while coarse, was not inappropriate for its adult venue. . . . The conduct itself lasted approximately three seconds. The photographs were taken without petitioner’s knowledge, posted without her consent, and were removed from the website approximately two weeks after they became common knowledge. Students who accessed the website and distributed the photographs did so in violation of the website’s restrictions. (Land v. L’Anse Creuse, 2010, pp. 8-9)

The Michigan Court of Appeals held that Land’s behavior was legal, outside the school context, did not affect her ability to teach, and did not constitute misconduct (Land v. L’Anse Creuse, 2010). Land was able to keep her job although she was reassigned to teach elementary school (DeFrank, 2010).

The Murmer, Payne, and Land cases all demonstrate the reality for K-12 public school teachers that “immoral” off-duty conduct does not have to be illegal conduct to cost teachers their jobs. Of the plaintiffs in the three cases that involved teachers’ off-duty conduct, only Land was able to continue her employment. As in the case of Rubino, Land’s job was saved because Michigan’s state statute gave her an additional layer of job protection.

Legal and Practical Suggestions for Teachers Who Have Social Media Posts Deemed to Be Morally Objectionable

Even though Michigan’s tenure statute was favorable to the outcome in Land’s case, teachers also need to know how state laws might adversely affect them. For example, Payne’s postresignation understanding of her rights under the Georgia Fair Dismissal Act proved to be too little, too late. Her resignation actually hurt her chances for a legal remedy under Georgia state law. Opting to be terminated from her employment would have at least guaranteed Payne a hearing on the matter.
Teachers also need to be aware that social media profiles and other online activity can allow for easy identification of their names, positions, and employers by the public. This is clearly illustrated in the Ulrich firing, as Ulrich’s Facebook profile provided the name of the school that employed her (Hall, 2012). Likewise, though Stephen Murmer attempted to wear a disguise and change his first name, his identity was easily revealed because of his signature painting technique. These cases have led some teachers to adopt pseudonyms for their social media profiles that completely conceal their identities and do not reveal the names of their employers.

Teachers can also use privacy settings; however, privacy settings are not foolproof. Although privacy settings may keep “non-friends” from viewing messages on the actual social media site, anyone who has been given access can share the information he or she saw, just as in the Rubino, Payne, and Spanierman cases. The Land and Murmer cases also illustrate the issue of third-party postings, with other users posting objectionable material without the teacher’s knowledge. No matter whether privacy settings have been set or not, all posts are ultimately discoverable in court. Therefore, all employees should strongly consider making their own “cost/benefit” analysis when posting any comment on social media as well as when making decisions on how often they should check for third-party content connected to them.

Legislative and Policy Recommendations

As the docket continues to grow with regard to social media–related termination of employment cases, the question remains, “Where is the line between appropriate and inappropriate social media interactions between teachers and students?” At the forefront in this question is the problem of whether the line should be drawn by the school corporation, the state, and/or the Constitution.

As discussed, there have been attempts to legislatively address social media use by public school teachers at the state level. Although the Missouri law that prohibited teachers from communicating with students via social networking sites was struck down for being vague and overbroad, a 2009 Louisiana law requiring school districts to have an electronic communications policy has yet to face a constitutional challenge (Delgado, 2013). This Act 214 requires every school corporation in Louisiana to have an electronic communications policy. The minimum standards, as defined by the state, are that teachers who contact students by phone, email, or other electronic means use only school-provided devices and discuss only educational services in these communications. If a teacher violates this provision, he or she must report the violation. Sanctions are not automatic, and instead situations are reviewed and handled on a case by case basis (Delgado, 2013). In 2014, New Jersey enacted a similar law in an effort to address electronic communications between teachers and students (Keyes, 2014).

Many legal commentators argue that school district social media policies should be mandated nationwide. Delgado (2013) recommends that school district policies should also contain a “professional code of ethics” that provides specific guidelines for teachers as to what the school corporation deems to be “inappropriate.” This is consistent with recent National Labor Relations Board recommendations that specific examples of inappropriate conduct be included in corporate social media policies (National Labor Relations Board, 2012). Estrada (2010) recommends that legislation should include the requirement that privacy settings be set for teachers who use social networking sites. However, as in the Ashley Payne case, privacy settings may be set, yet the school corporation may still fire the teacher if a complaint is received (Payne v. Barrow, 2009).

Other legal commentators argue that the traditional Pickering analysis may not be appropriate for social media cases. Akiti (2012) argues that Pickering should not apply to teachers who speak as private citizens about purely private matters. We agree. Mcnee (2013) and Miller (2011) both propose that the traditional First Amendment analysis be reevaluated and that teachers should be disciplined only if there has been a substantial disruption to the classroom because of the teacher’s personal social media use. Although this may on the face of it seem like a reasonable standard, there remains a measure of subjectivity when determining whether or not a “substantial disruption” has occurred.

Instead, we advocate that an initial threshold question be posed when a teacher’s online activity has come into question. The question should be whether or not the teacher’s social media speech is job related, which would be defined to include communications made with or about students. If it is job related, then the traditional Pickering analysis should apply. If it is not job related or involves purely off-duty conduct, then the next question should be whether the online conduct depicts the teacher violating state or federal law. If the teacher is not violating an existing state or federal criminal statute, then the teacher’s online speech should not be grounds for termination, thereby ending the inquiry. If the teacher’s online conduct does depict a crime, then it should fall to the school corporation to decide on the issue of employee discipline on a case-by-case basis.

In addition, we advocate that legislation similar to Louisiana’s Act 214 be put into place in all states. Although Act 214 defines “electronic communication” and gives policy “minimum standards” for school corporations, we advocate that state statutes should include particular policy language (Delgado, 2013). Policies should reference mandatory language that protects teachers’ First Amendment and due process rights, including the teacher’s right to know which online communication is in question and the identity of his or her accuser. Policies should also protect teachers from terminations of employment based on third-party posts,
or on those online communications that the teacher is not personally responsible for posting. In addition, we propose that electronic communication policies should protect “academic freedom,” or the use of social media for pedagogical purposes. Finally, we recommend that sanctions for school corporations be implemented for violating this law. These measures would help to protect teachers from being terminated unjustly while still providing mechanisms by which schools could deal with egregious or illegal behavior that is revealed through social media.

General Recommendations

With so many social media cases making headlines, and so many unanswered questions relating to law and policy, what can employees do to prevent being “Facebook Fired”? (Hidy & McDonald, 2013). Employees across all job types should understand what classification of employee they belong to and what laws may or may not apply to them. Although this article addresses several cases involving social media–related terminations of K-12 public school teachers, many more cases involving a variety of professions are currently working their way through the court system. Workers across all job types need to be careful with what they post on social media and whom they allow to access their content. Future research and legal analysis should examine other job types as well as general trends within larger categories of workers.

An additional area of research as it relates to teachers might be an analysis of whether the rolling back of tenure among state legislatures has so negatively affected the profession that otherwise competent teachers are now excessively vulnerable to arbitrary decisions by administrators in social media cases (Coleman et al., 2005). Although this article focuses on legal standards, the public’s perception of fairness regarding the dismissal of teachers in social media cases is crucial as well. For example, although the court upheld the school corporation’s decision to terminate Ashley Payne, the public outcry over the court’s decision was arguably quite damaging to the school corporation (Downey, 2009).

Other workers might see social media termination decisions as lacking in fairness and organizational justice, thereby affecting workers’ attitudes and behaviors toward the organization (such as organizational commitment and organizational citizenship; Colquitt, Conlon, Wesson, Porter, & Ng, 2001). The support of other workers for workers fired for social media behaviors could certainly affect how such terminations are handled and potentially reversed. We agree with Davison et al. (2011) that research needs to look at such fairness-related perceptions.

In addition, an interesting avenue of future research would be to examine the legal differences in the use of social media postings in termination cases across different countries. Different countries have disparate views on the appropriateness of such actions and varied legal solutions to social media–related issues. European human rights laws, for example, afford European citizens greater privacy protection in the workplace than those in the United States (Pagnattaro & Peirce, 2007). Analysis of international social media termination cases would also likely demonstrate a markedly different set of outcomes for workers in other countries.

Also noteworthy would be the potential effect that heightened privacy standards would have on termination of employment cases if adopted by social media sites themselves. Aspects of this issue could include the effect that increased subscriber protection would have on employers’ surveillance of employees’ social media use, as well as the economic effects on social media sites that sell subscriber information to third parties (Cohen, 2008).

Conclusion

Social media is a tool that is still developing and changing rapidly. In this article, we answered the call of Davison et al. (2011) to build up an understanding of how social media affects human resources, focusing on the existing case law of K-12 teacher termination cases. We analyzed existing legal precedent, offered suggestions to teachers regarding how to safeguard themselves in the current legal atmosphere, and proposed potential legislation that could protect teachers’ rights. There is still much work that needs to be done in the area of social media posts and terminations on the empirical, theoretical, and legal analysis levels. Moreover, the law will potentially change over time as more online technology is developed, higher level courts rule on these cases, and additional legislation is passed related to social media issues. Such potential future rulings and legislation will have a significant impact on social media–based terminations of employment and define the protections for workers across all job types.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research and/or authorship of this article.

References


expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/


Trujillo v. Board of Education. (2007). 212 F. App’x 760, 764 (10th Cir.).


Author Biographies

Kimberly W. O’Connor is an assistant professor of organizational leadership at IPFW who received her JD from Loyola University. Her research interests include employment law, social media and the law, and corporate social responsibility.

Gordon B. Schmidt is an assistant professor of organizational leadership at IPFW who received a PhD in organizational psychology from Michigan State University. His research interests include how social media impacts employer-employee relations, motivational processes, and corporate social responsibility.