

Social Media Issues:

*What if the Founding Fathers had
Facebook?*

Cara Leahy White
Taylor, Olson, Adkins, Sralla & Elam L.L.P.

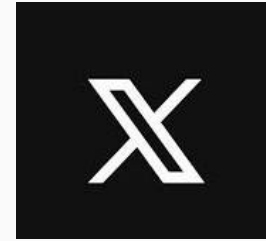
TMHRA Annual Conference
May 7, 2024



Social Media

Popular Platforms

Forms of electronic communications through which users create online communities to share information, ideas, personal messages, and other content. *Merriam-Webster.com.*



Social Media

Pros and Cons



Social Media

Presentation Overview

Personal Social Media
Accounts

Employee Discipline

City Accounts and
Devices



Social Media

Some Legal Issues Covered:

First Amendment

Illegal Discrimination

Open Government Laws



(Photo illustration by Salon/Getty Images)

Personal Social Media Accounts




George Washington 

@GWash

July 4, 1776



General of the Continental Army.
Posts made while fighting for liberty. Please excuse any typos.

I got 99 problems but a king ain't
one 



Personal Social Media Accounts

Do city employees/officials have...

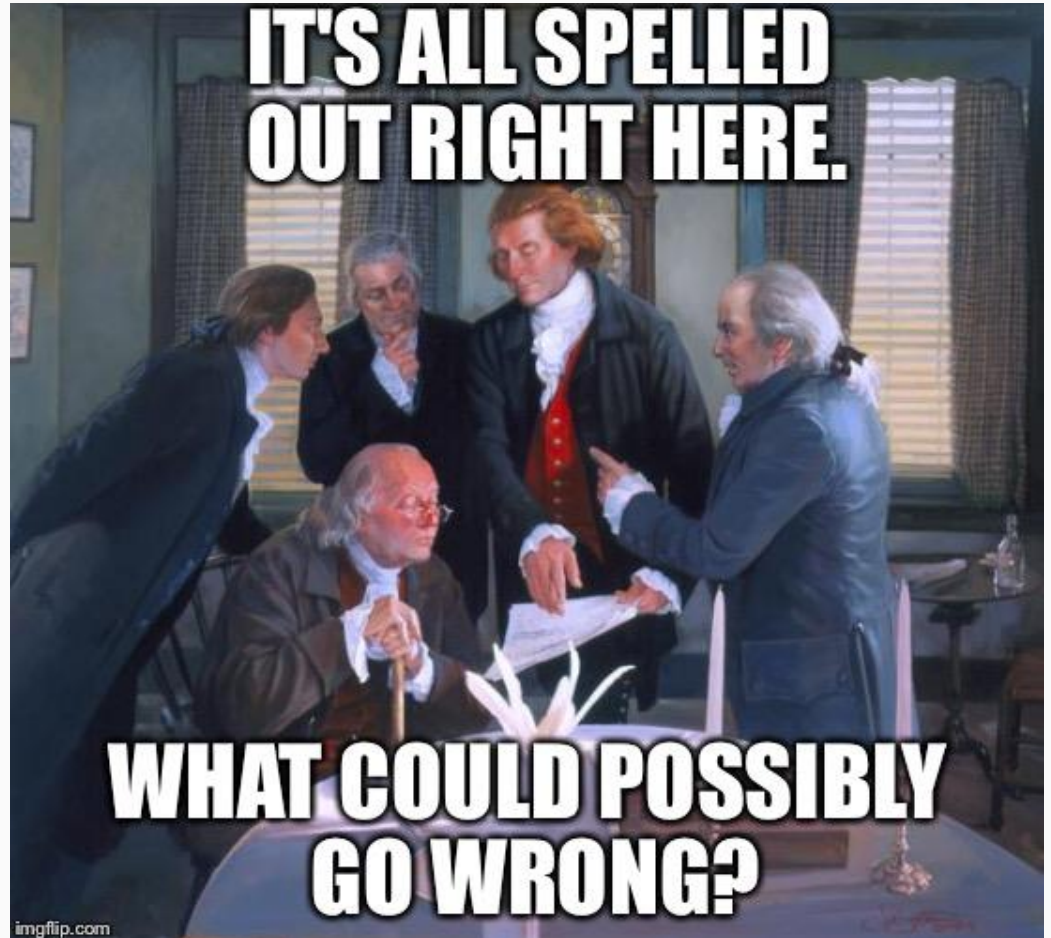
First Amendment right to free speech? Yes.

Right to use social media accounts? Yes.

Right to appear to be speaking on behalf of the city? No.



Personal
Social Media
Posts



Personal Social Media Posts

NEW United States Supreme Court
Decision, March 15, 2024

Lindke v. Freed

Freed deleted Lindke's Facebook
comments and blocked him.

Lindke sued alleging violation of
his First Amendment rights.



Personal Social Media Posts



James Freed

Public Figure

Home Twitter **About** Videos More ▾

Like



i Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.

👍 5,679 people like this including 2 of your friends



✓ 5,975 people follow this

🌐 <http://www.porthuron.org/>

✉ communitycomments@porthuron.org

🕒 Always Open

👤 Public Figure

📍 [@jamesfreed](#)



Freed's Facebook page

Also Freed's

Personal Social Media Posts

The difficulty with a “mixed use” account:

Importantly, the court warned:

“A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.” Lindke v. Freed

Personal Social Media Posts

Freed could have placed clear label or disclaimer indicating that his account was personal.

The court said:

“Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a ‘personal’ page is personal...”



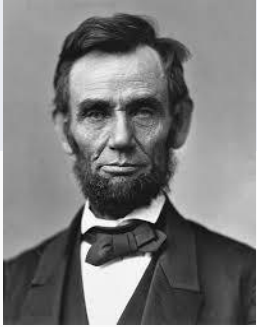
Personal Social Media Posts

Final Note on *Lindke v. Freed*

Deleting comments from purely personal posts is likely OK

Blocking users from entire page is more risky when context of page is unclear (like Freed's)





Abraham Lincoln is wondering what his cabinet members will think of the proclamation he's drafting...

[Wall](#)

[Info](#)

[Photos](#)

[Videos](#)

Write something...

type here.

Share

[View photos of Abraham \(5\)](#)

[Send Abraham a message](#)

[Poke](#)

Information

[Networks:](#)

Washington D.C.

[Birthday:](#)

Feb 12, 1809

[Political:](#)

Republican

[In a Relationship with:](#)

[Mary Todd Lincoln](#)

Friends



Ulysses



Andrew



Frederick



John



David



Elizabeth



Abraham Lincoln is wondering what his cabinet members will think of the proclamation he's drafting...

July 1, 1862



Mary Todd Lincoln to Abraham Lincoln I'm sure everyone will love it, sweetie!



July 1, 1862



Stephen Douglas replying to Mary Todd Lincoln well that's debatable! Get it? Debatable?!



July 2, 1862



Abraham Lincoln has had it UP TO HERE with @GeneralLee!!!

June 25, 1862



George McClellan to Abraham Lincoln you and me both, Boss.

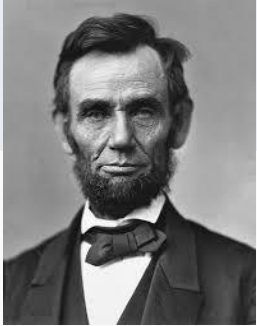
June 25, 1862



Ulysses Grant to Abraham Lincoln put me in, Coach!



June 27, 1862



Abraham Lincoln is wondering what his cabinet members will think of the proclamation he's drafting...

- [Wall](#)
- [Info](#)
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- [Videos](#)

Basic Information

Networks: Washington D.C.

Sex: Male

Birthday: Feb 12, 1809

Hometown: Hodgenville, Kentucky

Relationship Status: Married to [Mary Todd Lincoln](#)

Political Views: Republican

Nicknames: [Abe](#), [Honest Abe](#)

Prefers to be called: "Lincoln"

Personal Information

Activities: Commanding the Army, top hat shopping, abolishing slavery

Interests: Going to the theatre, setting trends in facial hair, reading

Favorite Music: Opera

Favorite Books: [The Life of Benjamin Franklin](#), [Aesop's Fables](#), [Robinson Crusoe](#)

Best Known For: [Being honest](#), [being tall](#), [being the 16th President of the United States](#)

Contact Information

Address: [The Presidential Mansion AKA "The White House" on Pennsylvania Avenue](#), at a distance of over a mile west of the Capitol

Telegraphs: The War Department

[View photos of Abraham \(5\)](#)

[Send Abraham a message](#)

[Poke](#)

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Photos



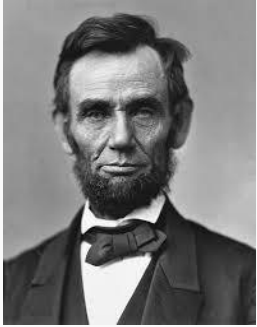
The Family

Updated last Tuesday



White House

Updated two months ago



This is the personal page of Abraham Lincoln. Views expressed are strictly my own.

Abraham Lincoln is wondering what his cabinet members will think of the proclamation he's drafting...

Wall

Info

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Videos

Write something...

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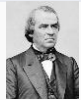
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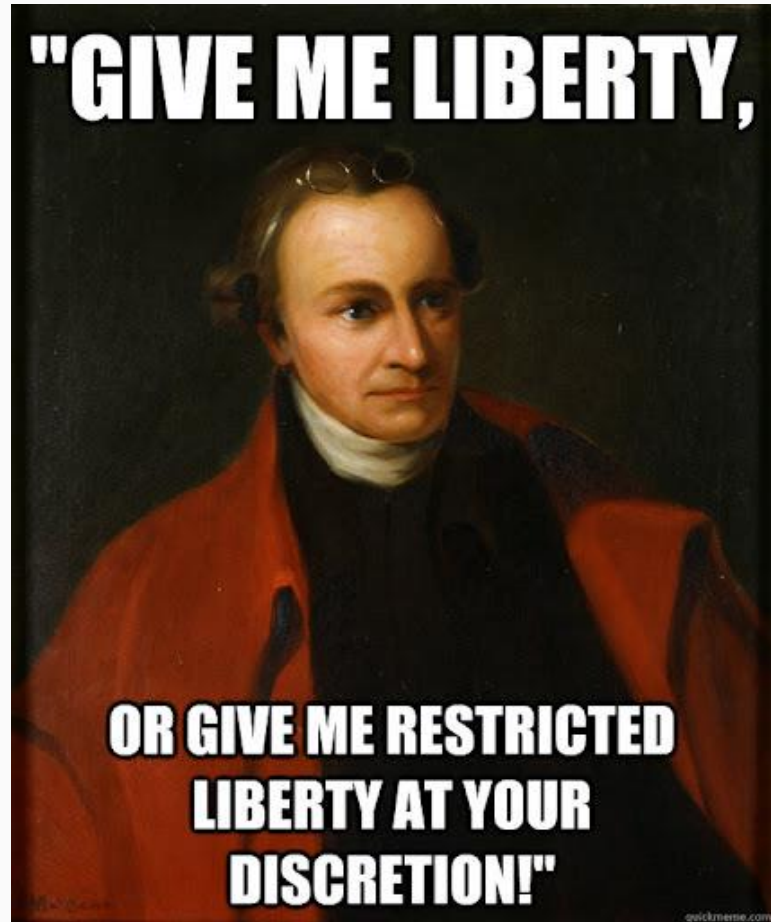


Ulysses Grant to Abraham Lincoln put me in, Coach!

June 27, 1862



Employee
Discipline



Employee Discipline

Remember:

Not all job-related posts are problematic.

Me: This show is boring.

Boss: Again, this is a Zoom conference.

when you tell a joke so funny at work that HR wants to hear it



Alison Burke
@TiredActor

at a job interview

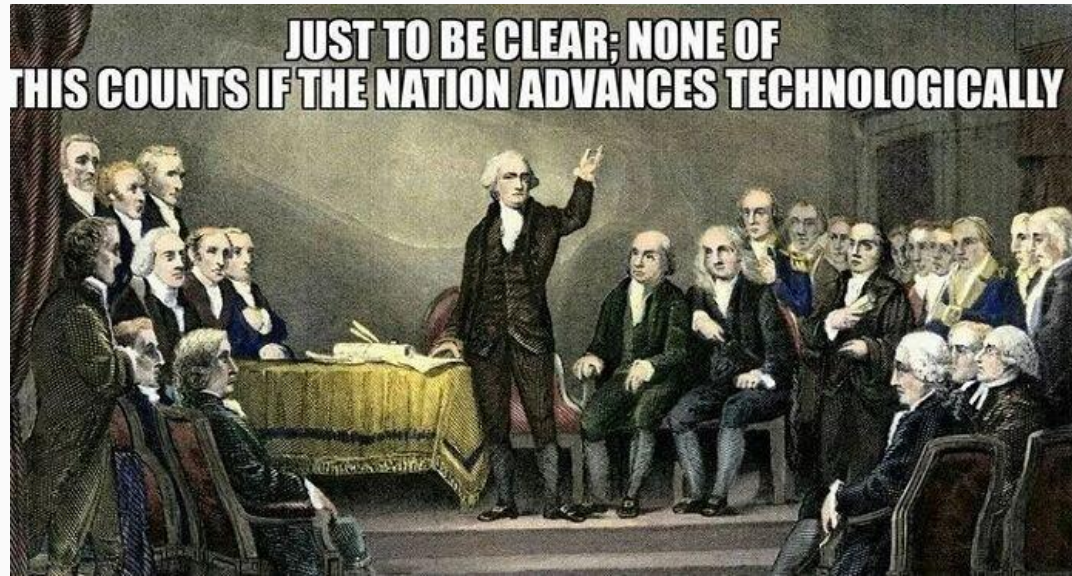
“Can you perform under pressure?”

Me: “I’m not sure I know all the lyrics but here goes nothing.”

Employee Discipline

The First Amendment protects a public employee's:

- Freedom of expression
- Right to be a whistleblower
- Ability to engage in discourse on matters of public concern



Employee Discipline

Courts must balance:

the right as an employer to regulate conduct of employees

versus

the employee's right to speak freely.



Employee Discipline

Pickering – The Connick Three Part Test:

- (1) Whether the employee spoke as a citizen on a matter of public concern;
- (2) Whether the employee's First Amendment interests in speaking outweigh the interest of the government, as an employer, in providing effective and efficient services; and
- (3) Whether the employee has shown that the speech played a substantial part in the government's employment decision.



Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205, Will County, 391 U.S. 563 (1968); *Connick v. Myers*, 461 US 138 (1983).

Employee Discipline

Did the employee speak as a citizen on a matter of public concern?

We hold 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.

Garcetti v. Ceballos, 547 U.S. 410, 421, 126 S. Ct. 1951, 1960, 164 L. Ed. 2d 689 (2006)

Employee Discipline

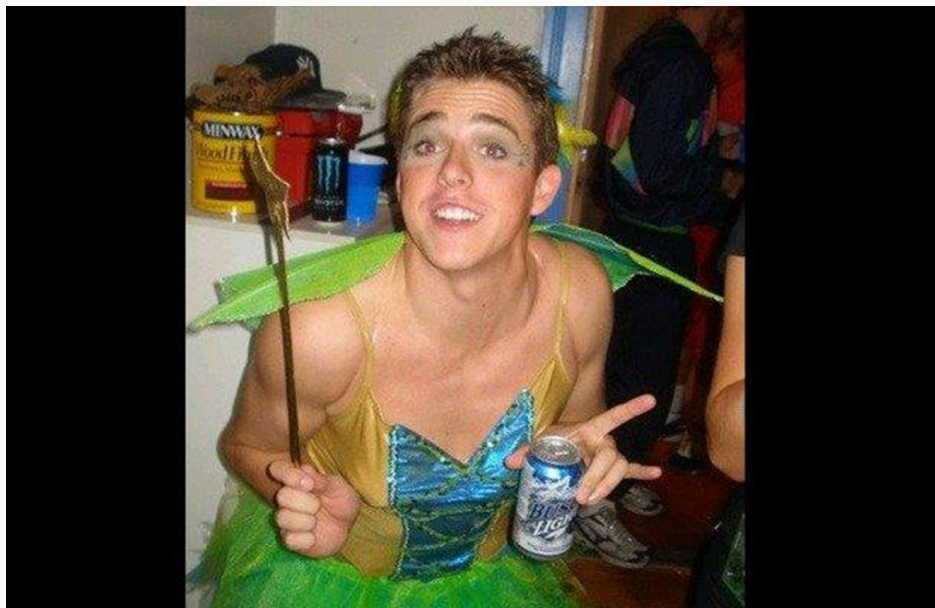
Kevin Colvin thought he could pull a fast one on his manager while interning at Anglo Irish Bank.

Colvin told his supervisor, Paul Davis, that he was going to miss work due to a "family emergency." Turns out his "family emergency" was a Halloween party. Davis discovered as much after Colvin posted a questionable image on his Facebook page.

Employee Discipline

Is this post regarding a matter of public concern?
No.

Employer would be within his rights to terminate this employee.



Employee Discipline

Can an employee be disciplined even if their post touches a matter of public concern?



facebook post

Rant: can we acknowledge the horrible school bus drivers? I'm in PA almost on the NY boarder [sic] bear [sic] Erie and they are hella scary. Daily I get ran [sic] off the berm of our completely wide enough road and today one asked me to t-bone it. I end this rant saying I don't give a flying s*** about those babies and I will gladly smash into a school bus[.]

Employee Discipline

Maryland firefighter sued his employer, a county fire department, after it fired him for several of his social media posts about beating up a liberal (among other things) that the employer said violated its social media policy.

Grutzmacher v. Howard County, 851 F.3d 332 (4th Cir. 2017).

I only pay with cards so the founding fathers can't look at me in disappointment of my life choices



Employee Discipline

Did the employee's First Amendment interests in speaking outweigh the interest of the government, as an employer, in providing effective and efficient services?

Facebook post

“Thank god we have more America loving rednecks. Red spread across all America. Even **** and latinos voted for trump too!”



Employee Discipline

What speech crosses the line?

Hate speech of any kind (regarding any protected classes);

Speech that is severe enough to constitute a hostile work environment (regarding any protected classes);

Threats to employee safety or of workplace violence;

Trade secrets; and

Confidential and proprietary company information.

[Employee Social Media Posts During Turbulent Times \(natlawreview.com\)](http://natlawreview.com)

Employee Discipline

NYC Court Sgt. Terminated For Social Media Post



Employee Discipline

City worker fired for use of N word on social media



Employee Discipline

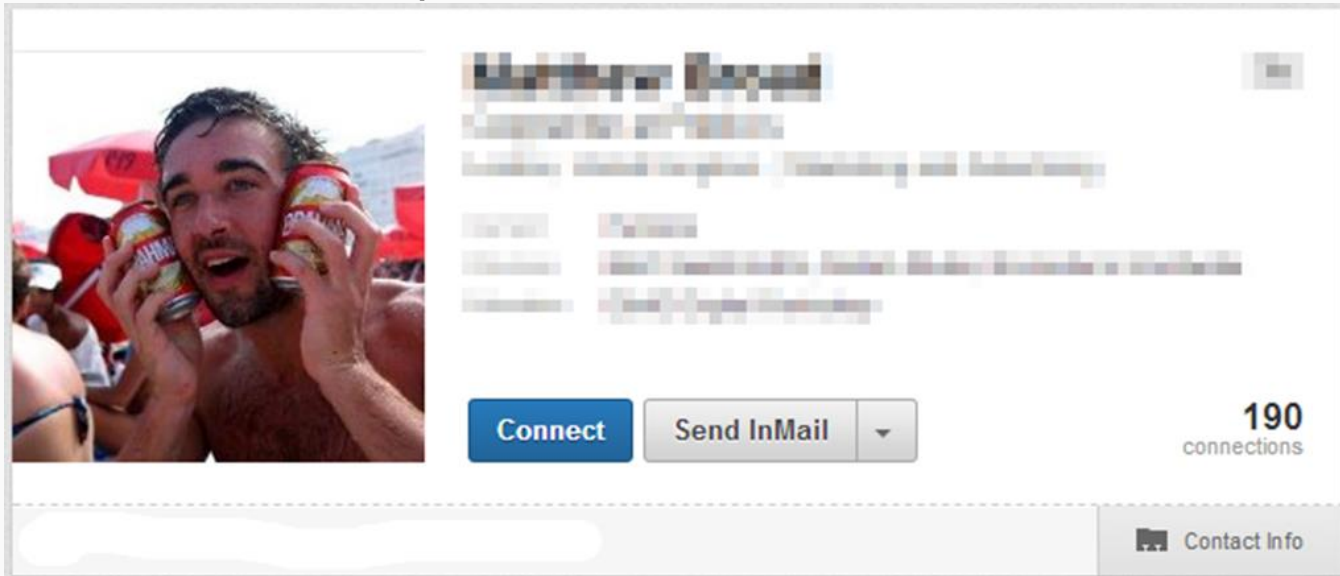


Truck driver urged his coworkers to “pray” that COVID-19 did not “touch” the truck driver’s life because they would “take” all of their co-workers with them.

Despite apology, he was terminated.

Employee Discipline

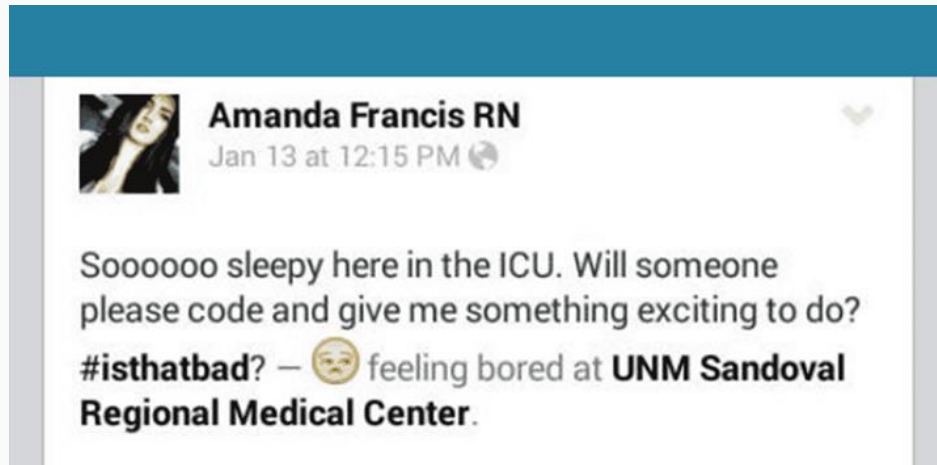
Unprofessional Behavior



The image shows a social media profile for a man. The profile picture is a photograph of a man with dark hair and a beard, shirtless, shouting into two cans of beer. The background of the photo is a crowd of people at an outdoor event. The profile name and bio are blurred. Below the bio, there are two buttons: a blue 'Connect' button and a grey 'Send InMail' button with a dropdown arrow. To the right of these buttons, it says '190 connections'. At the bottom right of the profile, there is a 'Contact Info' button with a location pin icon.

Employee Discipline

Unprofessional Behavior



Employee Discipline

Unprofessional Behavior

Employee fired from Taco Bell for licking shells



A photo of an unnamed employee licking Taco Bell shells caused disgust on social media. [FACEBOOK](#)

Employee Discipline

Unprofessional Behavior



Employee Discipline

Firefighters posted to social media accusing a union official of misusing paid time off donated by firefighters.

They were disciplined. They sued.

11th circuit said the posts were clearly about a matter of public concern: misuse of taxpayer money

Employee Discipline

TECHNOLOGY

A Facebook Like Is Now Covered by the First Amendment

The Founders could not have anticipated Facebook. In another way, though, they totally anticipated Facebook.

By Megan Garber

SEPTEMBER 19, 2013

SHARE  SAVE 



Employee Discipline

**City's Termination of Police Officer
Over Facebook Posts Did Not
Violate First Amendment -
Greenville, Mississippi (National
Law Review)**

facebook post

“If you don't want to lead,
can you just get the hell
out of the way.”

Employee Discipline

This was Graziosi's initial social media post

I just found out that Greenville Police Department did not send a representative to the funeral of Pearl Police Officer Mike Walter, who was killed in the line of duty on May 1, 2012. This is totally unacceptable. I don't want to hear about the price of gas-officers would have gladly paid for and driven their own vehicles had we known the city was in such dire straights [sic] as to not to be able to afford a trip to Pearll, Ms. [sic], which, by the way, is where our police academy is located. The last I heard was the chief was telling the assistant chief about getting a group of officers to go to the funeral. Dear Mayor, can we please get a leader that understands that a department sends officers of [sic] the funeral of an officer killed in the line of duty? Thank you. Susan Grazios

Employee Discipline

County Employee disagreed with State Attorney's decision not to seek the death penalty for man accused of shooting a police officer.

He posted:

"Maybe SHE should get the death penalty"

and

"She should be tarred and feathered if not hung from a tree."



First Amendment Review

Conduct a thorough investigation

Was the employee posting to social media as a private citizen or public employee?

If post not made pursuant to employee's official duties, was the employee speaking on a matter of public concern?

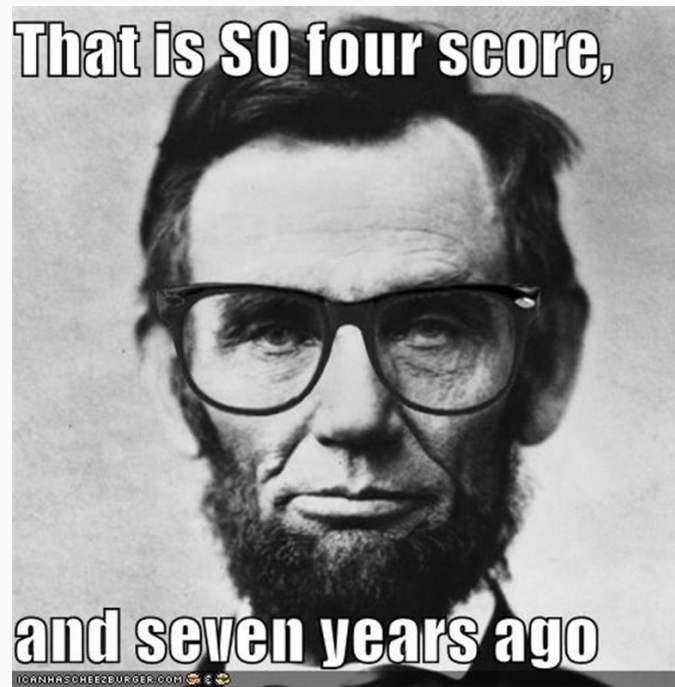
-If no, then no cause of action

-If yes, possibility of a claim arises

If post made pursuant to employee's official duties, was the post accurate? Did it comply with city policy?

Whether post was made as a citizen or employee, did it reveal confidential or sensitive information?

Did the post incite violence or was it harassing or discriminatory?



Government Accounts and Devices

Government Accounts and Devices

Ensure the social media manager is diligent and cautious when posting



Government Accounts and Devices

Ensure the social media manager is diligent and cautious when posting



The image shows a screenshot of a Twitter thread. The top tweet is from 'Entenmanns' (Entenmann's) retweeted by 'blakeley'. The text of the tweet is: 'Who's #notguilty about eating all the tasty treats they want?!'. Below the text are icons for Favorite, Retweet, and Reply. The bottom tweet is from '@Entenmanns' (Entenmann's) and says: 'Sorry everyone, we weren't trying to reference the trial in our tweet! We should have checked the trending hashtag first.' Below this text are icons for Favorite, Retweet, and Reply. In the bottom right corner of the screenshot, there is a photograph of several donuts, including some with white frosting and sprinkles, and some with chocolate frosting.

Entenmanns Entenmann's  by blakeley

Who's #notguilty about eating all the tasty treats they want?!

 Favorite  Retweet  Reply

 @Entenmanns
Entenmann's 

Sorry everyone, we weren't trying to reference the trial in our tweet! We should have checked the trending hashtag first.

 Favorite  Retweet  Reply

Government Accounts and Devices

Ensure social media managers understand the legal implications of managing a government account.

Hunt County Sheriff's Office Facebook page was a public forum for purposes of the First Amendment and removing comments and users critical of the Sheriff's Office constituted a constitutional violation.



Government Accounts and Devices

Tips for Managing a City Account

Remain content-neutral in the moderation of any city social media page.

Do not delete comments or block users for being critical or for supporting/opposing a matter discussed on the page.

Consider seeking legal advice before deleting any comment or taking action to block any user.

Social Media Policies

*"Crap, that's
due tomorrow?"*



- THOMAS JEFFERSON
JULY 3, 1776

Social Media Policies

Policy Suggestions for Employee Social Media Use

Prohibit or limit employee use of social media while on the job;

Prohibit release of confidential information;

Prohibit employees from holding themselves out as the city's spokesperson (unless they are) or from maintaining an account or posting content that appears or purports to be official/governmental.



Social Media Policies

Continued...

Encourage employees and officials to add labels or disclaimers to personal social media accounts;

Extend any existing code of conduct to social media use;

Prohibit employees from posting photos wearing city uniform or insignia;

Prohibit or limit the use of the city's logo or letterhead



Social Media Policies

Sample Language

(A) “Social Media” includes various forms of discussion and information sharing tools including social networking, blogs, video sharing, podcasts, wikis, message boards and online forums. Technologies include picture and video sharing, wall postings, e-mail, instant messaging, and music sharing, to name a few. Examples of Social Media applications include, but are not limited to, Google and Yahoo Groups, Wikipedia, My Space and Facebook, YouTube, Flickr, Twitter, LinkedIn, and blogging.

(B) City time and equipment should not be used for updating social media sites, including updating personal pages or profiles. Time spent on social media sites should be limited in the same manner as time spent on the telephone or internet when conducting personal business.

Social Media Policies

- (C) Employees may not use the City's logo, letterhead or other identifying material including pictures of themselves or co-workers wearing or displaying the City's logo.
- (D) Employees may not post discriminatory, defamatory, libelous or slanderous comments when discussing the City, its governing body, supervisors and employees.
- (E) Employees must comply with City policies and personal sites may be monitored to determine compliance with City policies.
- (F) Employees who fail to follow the policy regarding social media may be subject to disciplinary action, up to and including termination.

Other Legal Considerations



TikTok Ban

You may be aware that the application TikTok was banned at the state level, and later a bill was passed to ban TikTok from city-owned devices and networks.

The bill also requires certain rules to be issued for cities to implement this requirement, and no such rules have been issued yet.



Public Information Act

Status as a personal account mattered in the Lindke case. That does not matter under the PIA.

Lindke looked at First Amendment and discussed the state-action doctrine to determine whether the city manager was making posts or taking action in his official capacity.

The PIA is an entirely different law regarding the release of public information. PIA defines public information and specifically includes communications (even social media posts!) if made “in connection with the transactio



Public Information Act

Information that may be subject to the Act:

- E-mails in a personal account,
- Text messages on a personal cell phone,
- Posts to social media accounts, even if restricted to “friends” or “followers” only,
- Direct or private messages using a personal Facebook (or other social media) account.



Public Information Act

Social Media Challenges under the PIA

How does the City know if
information exists?

How does the City gather the
information?

Final Suggestions

- Analyze whether employee posts comply with city policy;
- Ensure the accuracy of all posts made on behalf of the city;
- Adopt or update social media policies that include limit on-duty use of cell phones and social media;
- Include provisions in your policies related to posts that may reveal sensitive or confidential information;
- Consider provisions that address whether the post or message is required to be maintained for records retention or public information purposes;
- When in doubt, call your attorney.

