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Social Media and the Public Workplace: How Facebook and Other Social Tools Are Affecting Public Employment

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I. Introduction¹

The use of social media as a communication tool has skyrocketed in the past decade, as has its impact in the workplace. Social media is any electronic medium where users may create, share, or view user-generated content which can include videos, photographs, speech or sound. Blogs, social networking sites, instant messages, podcasts, and video sharing have become mainstream forms of communication which can be transmitted and accessed via the internet on a computer, tablet, or mobile phone.

There are blogs for every topic under the sun, including those specifically designed as forums for individuals to post negative comments about their supervisors or the company that employs them. Social networking sites allow individuals to provide an unprecedented amount of access to their everyday lives; they provide a forum for comments on a plethora of topics, both personal and work related. Facebook is one such popular social networking site, which boasts over 900 million users with 526 million active daily users. Some of these users include public agencies that have their own official social media account. Employees and employers alike can post messages and images in social media sites, send “tweets,” post videos on YouTube, and send mass email communications to a wide audience. The avenues for disseminating information are easily accessible and wide reaching.

This paper is intended to provide an overview of the current laws and issues that may come into play when social media intersects with the workplace. Part II of this paper provides a general discussion of how social media has impacted the workplace. Part III discusses general legal principles including: (1) employees’ First Amendment rights; (2) employee privacy; (3) defamation; and (4) various statutory duties of employees and employers implicated by social media. Part IV will apply these legal principles in tangible contexts such as: (1) the use of social media in hiring practices; (2) the use of social media in disciplinary actions; (3) liability to the employer for its employees’ social media postings; and (4) the need for employers to have a social media policy.

II. How Social Media Impacts the Workplace

Many agencies use social media sites to recruit new employees. Job postings on the agency’s website or an outside website are common recruitment tools. Social media is also commonly used as part of the screening process for applicants. This type of screening ranges from an agency conducting a Google search of the applicant’s name to requiring an applicant to provide his or her username and password to personal social media accounts. When agencies use this type of information as part of their background investigation or hiring process, they must be careful to avoid using information found on line against an applicant when it cannot otherwise be

¹ This paper is authored in conjunction with a presentation at the League of California Cities 2012 Annual Conference. Additional materials, including draft social media policies will be available at the presentation.

used in a hiring decision, such as information about religion, race, marital status or sexual orientation, to name a few.

In May 2012, Maryland was the first state in the country to adopt legislation to prevent employers from taking action against applicants who refuse to disclose their username and password to personal social media sites that are exclusively used by the applicant. California is following suit with the introduction of Assembly Bill 1844 and Senate Bill 1349.² If these bills are enacted in California, an employer will be prohibited from requiring prospective employees to disclose their username or password to their personal social media accounts as a condition of employment.

Aside from the use of social media in hiring practices, social media can be used to provide information and services to the public, to communicate with employees, and create efficiencies in the workplace. In cases where an agency has an official social media account such as Facebook or Twitter, it is not uncommon to see posts from members of the public or current employees relating to the topics on the agency's site. Can the agency remove a derogatory or unproductive post made by its employees? What if the post involves information that the employee could only have learned of by virtue of his or her employment? What if the post is defamatory?

Other issues relating to social media in the workplace deal directly with employees who have personal social media accounts and access them while at work. It has become commonplace for employees to access their personal accounts on mobile phones or on their work computer. This raises issues of employee productivity. How much time are employees spending on social media during the workday instead of focusing on work? Are they accessing personal accounts while on a break? Are they accessing these accounts from a personal mobile device, and if so, can an employer order an employee not to use such a device during the workday?

It is clear that myriad legal issues surround social media in the workplace. Posts that are related to the work environment, co-workers, supervisors, management or policies could give rise to claims of hostile work environment, discrimination, defamation or improper disclosure of confidential information. Posts could form the basis for disciplinary action, or in the alternative, could be construed as protected free speech. Posts could be protected under labor law, as evidence of concerted union activity. What if employees' posts pertain to their life outside of work? Are they private? Is there a nexus between the personal post and the person's employment? Can employees' posts on their own social media site create liability for their employer? What if an employer provides its employees with phones that have texting capacity? Can the employer regulate the content of the text messages or take action against an employee for the content of the message? These legal questions require answers, but the law evolves slowly in comparison to technology's rapid and constantly changing strides.

III. Legal principles

Although social media provides a new context in which labor and employment issues may arise, the basic legal principles and statutes governing employee-employer relations are

² As of August 1, 2012, neither bill has been adopted.

largely familiar. The following section provides a brief overview of the constitutional, statutory, and common law applicable to employee or employer use of social media in the public sector.

A. Free Speech – First Amendment

Public employees do not relinquish “the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest,” simply by virtue of their employment.³ Nonetheless, it is well settled that “the government has legitimate interests in regulating the speech of its employees,” which may justify restrictions that could not be applied to the general public.⁴ Thus, where a public employee is speaking as a citizen on a matter of public interest, courts will balance 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.”⁵

There are several relevant inquiries in determining whether a public employee may be disciplined for his or her speech.⁶ The first is whether the employee was speaking as a citizen. If not, then the employee is not entitled to any First Amendment protections.⁷ The Supreme Court has recently clarified that speech made pursuant to a public employee’s official duties is not made as a citizen and is therefore not protected.⁸

The second inquiry is whether the speech related to a matter of public concern. Courts look to “the content, form, and context” of speech in making this determination.⁹ For example, speech relating to a private matter, such as an individual grievance, is not intended to inform the public and cannot be fairly considered as relating to any matter of political, social, or other concern to the community.¹⁰

If, however, a public employee speaks as a citizen on a matter of public concern, courts will proceed to the third inquiry – whether the government’s interest in promoting the efficiency of public services outweighs the employee’s interest (and the public’s interest) in the speech. In general, a public employer may only impose “those speech restrictions that are necessary for [the agency] to operate efficiently and effectively.”¹¹ Courts will consider “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.”¹²

B. Privacy

³ *Pickering v. Board of Education* (1968) 391 U.S. 563, 568.

⁴ *Connick v. Myers* (1983) 461 U.S. 138, 156-157.

⁵ *Id.* at 157.

⁶ See *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071-1072 (

⁷ *Garcetti v. Ceballos* (2006) 547 U.S. 410, 418.

⁸ *Id.* at 421. The Supreme Court was careful to note that speech may still be made as a citizen even if it is made in the workplace and even if it concerns the subject matter of the public employee’s job. *Id.* at 420-421.

⁹ *Connick*, supra, 461 U.S. at 147.

¹⁰ *Id.* at 146-148; *Thomas v. City of Beaverton* (2004) 379 F.3d 802, 808.

¹¹ *Garcetti*, supra, 547 U.S. at 419.

¹² *Rankin v. McPherson* (1987) 483 U.S. 378, 388.

a. Fourth Amendment

The Fourth Amendment protects public employees against “unreasonable searches and seizures” by a government employer.¹³ The Supreme Court has not settled, however, on a single standard by which to judge when a search is unreasonable in the public employment context.

Under one approach, that of the plurality in *O’Connor v. Ortega*, courts first determine whether, in light of “the operational realities of the workplace,” a public employee has a reasonable expectation of privacy.¹⁴ If not, then the Fourth Amendment would not apply. If so, then courts determine if the search was performed for non-investigatory, work-related purposes or for the purpose of investigating work-related misconduct. If not, then an employer may be required to justify its conduct under the probable cause standard.¹⁵ If so, the intrusion is judged by a lesser “reasonableness under all the circumstances” standard.¹⁶ A search will be upheld if it is limited in scope and justified at its inception.¹⁷

Under the second approach, that of Justice Scalia in *O’Connor*, courts assume that the Fourth Amendment applies, but would excuse governmental invasions of privacy whenever they involve “searches of the sort that are regarded as reasonable and normal in the private-employer context.”¹⁸

Until the Supreme Court chooses to clarify the applicable law in this context, public employers should seek to satisfy both standards in conducting searches that potentially implicate an employee’s right to privacy.

b. Informational Privacy

The Ninth Circuit has held that the federal constitution protects an individual’s interest in “informational privacy” – i.e. the “interest in avoiding disclosure of personal matters.”¹⁹ This right is generally attributed to the Fourteenth Amendment’s guarantee of liberty rather than the Fourth Amendment’s prohibition of unreasonable searches.²⁰ The right to informational privacy is not absolute; “rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.”²¹ Relevant factors in this balance include: the information involved, the potential for harm in subsequent disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the need for access and the extent to which public policy militates toward access.²²

c. California Constitution

¹³ *City of Ontario v. Quon* (2010) 130 S.Ct. 2619, 2627.

¹⁴ *Id.* at 2628, citing *O’Connor v. Ortega* (1987) 480 U.S. 709, 717-718.

¹⁵ *O’Connor*, supra, 480 U.S. at 725.

¹⁶ *Quon*, supra, 130 S.Ct. at 2628.

¹⁷ *Id.* at 2628, 2630, citing *O’Connor* 480 U.S. 725-726. A search need not be the “least intrusive” means of achieving a governmental goal to be reasonable. *Id.* at 2632.

¹⁸ *Ibid.*, citing *O’Connor*, 480 U.S. at 731-732.

¹⁹ *In re Crawford* (1999) 194 F.3d 954, 958. The Supreme Court recently assumed, without deciding, that such a right exists. *National Aeronautics and Space Admin. v. Nelson* (2011) 131 S.Ct. 746, 752.

²⁰ See *Whalen v. Roe* (1977) 429 U.S. 589, 598 fn. 23.

²¹ *Crawford*, supra, 194 F.3d at 959.

²² *Ibid.*

The California Constitution lists “privacy” among the “inalienable rights” guaranteed to all Californians.²³ In order to prevail on a claim of invasion of privacy, a public employee must demonstrate “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the employer] constituting a serious invasion of privacy.”²⁴ If the employee can meet these threshold requirements, a court will then proceed to balance “the justification for the conduct in question against the [severity of the] intrusion on privacy resulting from the conduct.”²⁵

d. Employees vs. Job Applicants

The California Supreme Court has interpreted both the Fourth Amendment and the California Constitution to provide greater protection to current employees than to job applicants.²⁶ Because an employer has many opportunities to observe and evaluate current employees, the employer generally may advance its interests in an efficient and effective workforce with resort to intrusive searches or inquiries. By contrast, an employer has no such opportunity with new applicants. Thus, not only are job applicants’ reasonable expectations of privacy diminished, but employers also have greater need for otherwise intrusive methods.²⁷

e. Stored Communications Act

The federal Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2711, generally prohibits the unauthorized and intentional access of stored electronic communications,²⁸ including unauthorized access to a third-party email service²⁹ and unauthorized viewing of a password-protected website.³⁰ The SCA contains an exception, however, where access is authorized by the provider or by a user of the website.³¹ An employee’s use of an employer-provided computer, without more, does not represent consent or authorization under the SCA. On the other hand, in some circumstances, courts may find such authorization where the employer has a clear policy stating that personal business on government equipment is prohibited and that activity on work computers will be monitored.³²

C. Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x, imposes notice and disclosure requirements on employers who seek “consumer reports” from third party agencies that assemble information on a person’s “credit worthiness, [. . .] character, general reputation, personal characteristics, or mode of living.”³³ An employer using such a third party

²³ Cal. Const. Art. I § 1.

²⁴ *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.

²⁵ *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893.

²⁶ *Id.* at 885-887, 897-898.

²⁷ *Ibid.*; but cf. *Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147, 1148 (finding pre-employment drug test for library page position unconstitutional because City failed to demonstrate a special need for the test)

²⁸ 18 U.S.C. § 2701.

²⁹ *Pure Power Boot Camp v. Warrior Fitness Boot Camp* (S.D.N.Y. 2008) 587 F.Supp.2d 548, 555.

³⁰ *Konop v. Hawaiian Airlines, Inc.* (2002) 302 F.3d 868, 879.

³¹ 18 U.S.C. § 2701, subd. (c); *Konop*, 302 F.3d at 880.

³² See *Pure Power Boot Camp*, supra, 587 F. Supp. 2d at 559-561.

³³ 15 U.S.C. § 1681a, subd. (d)(1).

service to evaluate applicants or employees must disclose to that it is seeking a report, must seek the applicant or employee's authorization to seek the report. In the event the employer takes an adverse employment action based on the report, it must provide a copy of the report to the applicant upon request.³⁴ Websites that aggregate personal information about individuals from public records and social media sources may fall within the scope of the FCRA.³⁵

D. Workplace Harassment

Several state and federal statutes guarantee an employee's right to work in an environment free from discrimination or harassment on the basis of a protected trait.³⁶ Under California law, an employer is strictly liable for harassment by a supervisor.³⁷ However, the damages recoverable may be reduced or eliminated if the employee unreasonably failed to utilize the employer's anti-harassment policies.³⁸ In contrast, under federal law liability may be avoided if: (1) the harassment does not result in a tangible employment action like hiring, promotion, demotion or reassignment; and (2) the employer exercised reasonable care to prevent and correct the harassment; and (3) the plaintiff unreasonably fails to take advantage of the employer's preventive or corrective actions.³⁹

Where the harassment is not committed by a supervisor, an employer is liable if it knows, or should have known, of the harassment and fails to take immediate corrective action.⁴⁰ Whether conduct is sufficiently severe to create a hostile work environment is judged by the totality of the circumstances.⁴¹ Harassing conduct may be perpetrated by a supervisor, a co-worker, or non-employees.⁴²

E. Defamation

The California Civil Code provides a statutory basis for a claim of defamation (libel or slander).⁴³ The basic elements of a defamation claim are: "[1] the intentional [2] publication of [3] a statement of fact that is [4] false, [5] unprivileged, and [5] has a natural tendency to injure or which causes special damage."⁴⁴

Although an employer is generally liable for defamatory statements made by its employees within the scope of employment,⁴⁵ the Government Code immunizes public

³⁴ 15 U.S.C. § 1681b, subd. (b).

³⁵ See, e.g., Complaint for Civil Penalties, Injunction, and Other Relief, *United States v. Spokeo* (C.D. Cal. June 7, 2012), Case No. 2:12-CV-12-05001-MMM-SH.

³⁶ See, e.g., Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and the California Fair Employment and Housing Act (Gov. Code § 12900 et seq.). Protected traits include: Race, Color, National Origin, Ancestry, Sex, Sexual Orientation, Gender Identity, Gender Expression, Age, Physical or Mental Disability, Medical Condition, Marital Status, Religious Creed.

³⁷ *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041.

³⁸ *Id.* at 1049.

³⁹ *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807.

⁴⁰ Gov. Code, §12940, subd. (j)(1).

⁴¹ *Id.* at 951.

⁴² *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 324.

⁴³ Cal. Civ. Code §§ 44-46.

⁴⁴ *Scott v. Solano County Health and Social Services Dept.* (E.D. Cal. 2006) 459 F.Supp.2d 959, 973.

⁴⁵ See, e.g., *Kelly v. General Tel. Co.* (1982) 136 Cal.App.3d 278, 284.

employers from vicarious liability for defamation. “A public entity enjoys immunity for injuries caused by the misrepresentations of its employees, whether or not such misrepresentations are negligent or intentional.”⁴⁶ Courts have acknowledged a limited exception to this immunity where the alleged misrepresentation leads to physical harm.⁴⁷

IV. Employment Actions in the Context of Social Media

The following section will apply the legal principles identified above to a number of hypothetical scenarios involving social media.

Hypothetical #1: An anonymous individual starts a public blog to post disparaging comments about various city officials and supervisors. For example, one post attacked the City Manager’s integrity and suggested that he had mismanaged city funds. Another post alleged that the Police Chief was an autocratic and controlling micro-manager. Based on the detailed nature and timing of the comments, Alice, the Personnel Director at the city, suspects that the blogger is a city employee who is posting during on-duty hours. May Alice initiate an investigation into the identity of the blogger? If Alice discovers that the blogger is Bob, a disgruntled police officer, may the city instruct Bob to stop blogging or subject him to discipline?

First, Alice’s investigation into the identity of the blogger runs the risk of violating the Fourth Amendment. Only “searches” that are for non-investigatory work-related purposes (e.g., a general inquiry into whether a city policy is functioning correctly), or those investigating work-related misconduct, are entitled to the less stringent “reasonableness under all the circumstances” standard.⁴⁸ Other “searches” may be held to a more exacting standard like probable cause. Because this situation involves an investigation, there is a preliminary issue of whether the blogger would be engaging in actionable misconduct if he or she were a city employee. Here, even if the blogger were posting during work hours, Alice should carefully consider whether this person was being singled out for investigation based on the content of his or her speech.

In addition, Alice may not be justified in conducting a wide-reaching review of employees’ internet usage. Even under the less stringent “reasonableness” standard, any investigation must still be “reasonably related in scope to the circumstances which justified the interference in the first place.”⁴⁹ Thus, an inquiry should focus on specific times of day, and redact irrelevant information.⁵⁰

Second, Bob’s comments likely fall within the scope of the First Amendment. Depending on the specific content and context of Bob’s comments, however, the city may still be justified in limiting his speech or taking disciplinary action.

⁴⁶ Cal. Gov. Code § 818.8; *Tokeshi v. State of California* (1991) 217 Cal.App.3d 999, 1004.

⁴⁷ *Adkins v. State of Calif.* (1996) 50 Cal.App.4th 1802, 1818-1819, disapproved on other grounds in *City of Moorpark v. Sup.Ct. (Dillon)* (1998) 18 Cal.4th 1143.

⁴⁸ *O’Connor v. Ortega* (1987) 480 U.S. 709, 723-725.

⁴⁹ *Id.* at 726. This assumes that Bob had an expectation of privacy with respect to his internet use. Depending on the city’s policies, Bob’s expectation of privacy may be diminished or eliminated which would allow a search of his internet usage. (See, e.g., *City of Ontario v. Quon* (2010) 130 S.Ct. 2619, 2626-2629.

⁵⁰ *Id.* at 2626.

Because Bob is posting as an anonymous blogger, he necessarily is speaking not pursuant to his official duties, but rather as a citizen. Thus, the relevant issues become whether Bob's posts relate to an issue of public concern, and whether the city's interests in minimizing workplace disruption and advancing its mission outweigh Bob's and the public's interests in his speech.

This depends largely on the content of Bob's posts. Workplace grievances – e.g. complaints about a supervisor's personality – are not always issues of public concern.⁵¹ However, criticisms relating to wastefulness and mismanagement generally are.⁵² Thus, the content of Bob's complaint about the City Manager suggests that it should be entitled to First Amendment protection, while complaint about the Police Chief is a closer question. Regardless of the content, the form of Bob's speech suggests that it is matter of public concern: the fact that Bob has posted on a public website indicates that he was motivated by a desire to inform a wide audience.⁵³

The balance of the city's interests and Bob's interests also depends on the content of Bob's posts. For example, the city has a much stronger interest in regulating false statements or statements made in reckless disregard for the truth.⁵⁴ The city's interest would be diminished, however, to the extent Bob's comments could be characterized whistleblowing.⁵⁵ Again, the context also matters. If Bob is posting entirely during his off-duty hours, his interests are entitled to greater weight.⁵⁶ On the other hand, because Bob is a police officer, the city has a greater interest in maintaining discipline, loyalty and trust, and in minimizing destructive criticism.⁵⁷ Nonetheless, the city would be well advised to tread carefully and under-react rather than over-react.

Hypothetical # 2: Charlie, the IT Director at the city, wants to use internet sources to supplement his usual background checks on applicants for an entry-level IT analyst position. Charlie comes across Spokeo, a company that aggregates information on individuals from social media websites and public records, and pays for information on a number of applicants. Charlie also knows that David, a current employee, is friends on Facebook with an applicant named Eve. Charlie asks David to sign into his Facebook account so that Charlie may view Eve's profile. David agrees to do so. Has Charlie violated any statutory or constitutional rights?

Because Spokeo is a company that regularly assembles background information about individuals for the purpose of providing reports to third parties, it is a "consumer reporting agency" under the Fair Credit Reporting Act. Therefore, Charlie has a duty to seek authorization to use Spokeo's services from applicants for the IT analyst job. The same requirement would not apply, however, to a simple Google search, as Google does not assemble "consumer reports" for the purpose of furnishing them to third parties.

⁵¹ *Desrochers v. City of San Bernardino* (9th Cir. 2009) 572 F.3d 703, 712-713.

⁵² *Roth v. Veteran's Admin.* (9th Cir. 1988) 856 F.2d 1401, 1406.

⁵³ See *Gilbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 866.

⁵⁴ *Moran v. Washington* (9th Cir. 1998) 147 F.3d 839, 849.

⁵⁵ *Rivero v. City & County of San Francisco* (9th Cir. 2002) 316 F.3d 857, 866.

⁵⁶ See, e.g., *Berger v. Battaglia* (4th Cir. 1985) 779 F.2d 992, 999.

⁵⁷ *Gray v. County of Tulare* (1995) 32 Cal.App.4th 1079, 1092; *Norton v. City of Santa Ana* (1971) 15 Cal.App.3d 419.

Charlie's use of David's Facebook account to access Eve's profile may violate Eve's right to privacy under the California Constitution. The key issue is whether Eve has a reasonable expectation to privacy in the content of her profile. Because Facebook users can set privacy settings to limit access to certain individuals, Eve may have an expectation that only her Facebook friends would have access to personal information in her profile. On the other hand, a court may find that Eve loses any reasonable expectation of privacy once she publishes information in a manner that is visible to a third party. For example, at least one court has found that an email sender loses any expectation of privacy to the content of an email once it is sent, analogizing to a letter-writer, whose expectation of privacy ordinarily terminates upon delivery of a letter."⁵⁸

Reasonable expectations of privacy are founded upon broadly based and widely accepted community norms.⁵⁹ Thus, the extent to which employers ask to view Facebook profiles of applicants would affect Eve's reasonable expectation of privacy. In addition, legislation prohibiting employers from requiring the disclosure of Facebook usernames and passwords would greatly bolster Eve's expectation of privacy against Charlie's conduct.

Finally, it is unlikely that Charlie's conduct violates the Stored Communications Act. The SCA permits an individual to view the contents of a password-protected website only when authorized to do so by a user of that service or the service provider.⁶⁰ Here, David is a user of Facebook and of Eve's Facebook profile, and he authorized Charlie to use his account.

Hypothetical #3: Fiona is a public relations employee in the city's Parks department. Fiona, who often speaks in public about the Parks department's initiatives, is assigned new duties as the department's social media coordinator. Fiona is responsible for blogging about upcoming events and tweeting about new developments affecting city parks. Several members of the public who are upset with the Parks department begin to leave racially derogatory comments on the blog attacking Fiona, who is African-American. Fiona reports this to her supervisor, George, and tells him that it has dissuaded her from blogging more often. What are George's duties under the law?

Where they are severe and pervasive, comments by members of the public may create a hostile work environment. The fact that the comments have interfered with Fiona's ability to carry out her blogging duties suggest that they are in fact severe and pervasive. Moreover, because the comments were made in response to Fiona's performance of her job duties, the city has a duty to take remedial action. In this case, that may mean moderating or disabling comments on the Park's department blog.⁶¹

Hypothetical #4: Hank, a Deputy District Attorney, has serious doubts about the propriety of the police and prosecutorial conduct in a case that was recently assigned to him. Hank expresses these doubts in a memo to his superiors, which results in his being reassigned to a different case. Hank then makes a Public Records Act request for the memo, and the District

⁵⁸ *Guest v. Leis* (6th Cir. 2001) 255 F.3d 325, 334.

⁵⁹ *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 36-37.

⁶⁰ *Konop v. Hawaiian Airlines, Inc.* (2002) 302 F.3d 868, 880.

⁶¹ Disabling or moderating comments would raise a First Amendment issue over whether the City had created a designated public forum in its blog. That question is beyond the scope of this paper.

Attorney acquiesces. James posts the memo to his personal blog. Can Hank be disciplined for his conduct?

When Hank first wrote this memo, he was acting pursuant to his official duties and was therefore not entitled to any First Amendment protection.⁶² When Hank made a Public Records Act request and posted the memo to his blog, however, he was speaking as a citizen.⁶³ The ethical conduct of the police department and the prosecutor's office are undoubtedly matters of public concern. The question, therefore, comes down to a balancing test, as described in hypothetical #1.

Hypothetical #5: Ian, a civilian employee in the county Sheriff's department, is a supporter of the incumbent sheriff, James, in a recent election. Ian "likes" James' Facebook page and posts several messages on Facebook encouraging others to vote for James. Ian does not, however, engage in any other activities supporting James' campaign. After another candidate, Karen wins the election, she learns that Ian had supported James on Facebook, she wishes to fire him. Are Ian's Facebook postings protected speech?

Although one court has found that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection," the court distinguished cases where there was evidence of actual statements.⁶⁴ Here, because Ian posted messages in addition to "liking" James' page, his comments are likely protected. A court would therefore proceed to analyze whether Ian was speaking as a citizen on a matter of public concern, as outlined above.

In addition, because Ian was engaged in political speech, any disciplinary action taken against him would implicate his freedom of association.⁶⁵ "The First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved."⁶⁶

V. Conclusion and Recommendations

Many cities have adopted social media policies governing the official use of social media by various city departments. Cities should be careful that such policies do not intrude unnecessarily into employees' privacy or First Amendment rights. In addition, as illustrated above, social media creates new contexts for familiar employment issues. Cities should review and update other policies, for example, sexual harassment or computer use policies, to reflect the potential impact of social media in the workplace.

We will discuss more examples and provide additional materials at the presentation at the City Attorneys' Department Track of the League of California Cities 2012 Annual Conference.

⁶² *Garcetti v. Ceballos* (2006) 547 U.S. 410, 421.

⁶³ See generally *Ranck v. Rundle* (SD Fla. June 16, 2009) No. 08-22235-CIV, 2009 WL 1684645.

⁶⁴ *Bland v. Roberts* (E.D. Va. April 24, 2012) --- F.Supp.2d ----, 2012 WL 1428198 at *3.

⁶⁵ See *Elrod v. Burns* (1976) 427 U.S. 347, 358-59.

⁶⁶ *Rutan v. Republican Party of Ill.* (1990) 497 U.S. 62, 64-65.