



Use of Social Networking Websites: What's Legal, What's Not

Kathryn B. Forster
Attorney at Law



LASHLY & BAER, P.C.
ATTORNEYS AT LAW

Data & Statistics

- Over 52% of world's population is under 30-years-old.
- 96% have joined a social network.
- 76% of companies are now blocking social networking sites. (ScanSafe)
- 54% of American companies completely block access to social networking sites. (Robert Half Technology).
- According to Cisco's 2010 mid-year security report:
 - 50% of employees ignore company policy on social media access
 - 27% said they knowingly alter settings on their corporate devices to access restricted applications.



Social Networking Sites

- **Facebook**
 - Web of user profiles and “friends” social network where you create a profile and share videos, pictures, games, and links all about you. With more than 500 million active users in July 2010.
- **LinkedIn**
 - Web of user professional profiles and “links” social network much like an online resume. LinkedIn adds 1 million new users every 17 days with over 35 million profiles in total.



Social Networking Sites *(Cont.)*

- **Blogs**
 - Blogs are an online journal or point of view on a subject chosen by the author. With free blog-hosting sites like Blogger and Wordpress – almost one quarter of the U.S. population writes, uploads original content, and posts stories on a blog.
- **Twitter**
 - Web of user profiles and “followers” social network where users post 140 character statements. Twitter is the fastest growing social network with a 950% growth rate in 2009. According to Burson-Masrsteller, over 50% of the Fortune 100 use Twitter.



Other Websites

- **YouTube**
 - A video-sharing website on which users can upload, share and view videos. In May 2010, it was reported that YouTube was serving more than 2 billion videos a day.
- **TeachAde**
 - NEA sponsored social networking website for teachers



Other Websites *(Cont.)*

- **TheSchoolsUnited.com**
 - Social networking website for teachers
- **RateMyTeacher.com**
 - A controversial review site used to rate elementary and secondary school teachers' performance and popularity. Participants give numerical ratings on a scale of 1 to 5 to their current or former elementary and secondary school teachers. As of April 2010, over eleven million teachers were graded on the website.



Use of Social Networking by Students

- **Off-Campus Online Activities**
 - Student-created websites (MySpace, Facebook, YouTube)
 - Typically critical of school and staff; and/or
 - Containing lewd, violent, or threatening information.



Primary First-Amendment Supreme Court Cases Involving Students Rights

- Tinker v. Des Moines Independence Community School District, 393 U.S. 503 (1969) (Invalidating disciplinary action against students for wearing black armbands to protest the Vietnam War).
- Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (Upholding disciplinary action against student for delivering assembly speech laden with sexual innuendo).



Tinker Standard

- Conduct that would cause material and substantial interference with school work or discipline; or
- Conduct that would materially and substantially disrupt the work and the discipline of the school; or
- **Conduct that might reasonably have led school authorities to foresee substantial disruption or material interference with school activities.**



Fraser

- Court upheld the suspension of a student who delivered a sexually graphic speech at a high school assembly.
 - School boards have the authority to determine “what manner of speech in the classroom or in school assembly is inappropriate.”
 - Fraser established the mode of analysis set forth in Tinker is not absolute, since the Fraser Court did not conduct the “substantial disruption” analysis.
 - Fraser Standard: language must be “vulgar or lewd” and undermine the “fundamental values” of a school education.



**Where Threats are Involved –
Courts May Apply the “True Threat” Doctrine**

- The Supreme Court has recognized an exception to the First Amendment free speech protection where “true threats” are concerned. Watts V. U.S., 394 U.S. 705 (1969).
- Supreme Court has described “true threats” as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Virginia v. Black, 538 U.S. 343 (2003).



The Test Is:

- Whether the student’s statements on a website constitute true threats as viewed by a reasonable person. If they do, the speech is not protected by the First Amendment.
- The speech must be knowingly communicated to the object of the threat or to a third person.



The following two cases, both in the U.S. Court of Appeals for the Third Circuit, were decided on the same day with two completely different outcomes. The cases are currently scheduled for rehearing.



Note the high standard to satisfy the Substantial Disruption language of Tinker in the following case:

Layshock v. Hermitage School Dist., Civ. No. 06-cv-00116 (3rd Cir. Feb. 4, 2010) decision vacated, pending decision of June 3, 2010 Hearing

- Student Justin Layshock created a *MySpace* profile of the school principal on his own time on a personal computer. As word of the *MySpace* profile spread through the school, students began accessing it on school computers. School officials suspended Justin for ten days and placed him in an alternative education program.



- The Court of Appeals ruled that the school district violated the student's free speech rights when they disciplined him for his off-campus creation of the parody *MySpace* profile of the school's principal, which included a photo of the principal imported from the school's website.
- The Court rejected the school district's argument that the speech subject to discipline actually began when Justin entered school property, *i.e.* the school website and misappropriated a photo of the principal, calling it "unpersuasive at best."



- The Court of Appeals held that "It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities."
- The Court rejected Fraser's applicability to off-campus conduct.
- The Court held that the school district had no authority to discipline Justin for "his out of school expressive conduct." To allow this would set such a precedent and constitute a violation of the free expression guaranteed by the First Amendment.



J.S. v. Blue Mountain Sch. Dist., Civ. No. 06-cv-00116
(3rd Cir. Feb. 4, 2010) decision vacated, pending
decision of June 3, 2010 Hearing

- A U.S. district court in Pennsylvania has ruled that school officials did not violate a student's free speech rights by disciplining her for creating a parody online profile of her principal.
- Middle School student J.S. created a fake *MySpace* profile of James McGonigle, principal of Blue Mountain Middle School (BMS).
- The profile included a photograph of him from the school district's website.
- The personal profile section depicted him as a pedophile and sex addict, for example by describing his interests as "... f***ing in my office, hitting on students and their parents."



J.S. v. Blue Mountain Sch. Dist., (Cont.)

- Although the profile was created at J.S.'s home, word of its existence spread the next day at school and sparked a general "buzz" throughout the school.
- Mr. McGonigle determined that J.S. had violated the school discipline code, which prohibits the making of false accusations against school staff members, as well as the district's computer use policy, which informs students that they cannot use copyrighted material without permission from the agency or website from which they obtain it.



J.S. v. Blue Mountain Sch. Dist., (Cont.)

- When J.S. received a 10-day out-of-school suspension, she sued, alleging that the School District had violated the First Amendment by excluding her from classes for two weeks for a profile that was non-threatening, nonobscene, and a parody.
- The court found "unconvincing" J.S.'s argument that based on *Tinker*, the District was liable because it was unable to demonstrate the profile "caused, or was likely to cause, a substantial and material disruption at the school."



J.S. v. Blue Mountain Sch. Dist., (Cont.)

- Her speech was more akin to the lewd and vulgar speech that the U.S. Supreme Court ruled in *Fraser* was not protected by the First Amendment, the court found, noting that the profile contained derogatory expletives and “does not make any type of political statement.” The Court found the following links to school:
 - The website addresses the principal of the school.
 - Its intended audience is students at the school.
 - A paper copy of the website was brought into school, and the website was discussed in school.
 - The picture on the profile was appropriated from the school district’s website. Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code.
 - J.S. lied in school to the principal about the creation of the imposter profile.



J.S. v. Blue Mountain Sch. Dist., (Cont.)

- The Court stated the following:
- **Although a substantial disruption so as to fall under Tinker did not occur, as discussed above, there was in fact some disruption during school hours. Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school. On these facts, and because the lewd and vulgar off-campus speech had an effect on-campus, we find no error in the school administering discipline to J.S.**



Evans v. Bayer, 684 F.Supp.2d 1365 (S.D. Fla. 2010)

- U.S. District Court in Florida held that creation of a group on *Facebook* by a high school student, expressing dislike for a teacher was protected speech.
- Suspension of the student for creation of the group violated her First and Fourteenth Amendment rights, since the group was an opinion of the student about a teacher; was published off-campus; did not cause any disruption on-campus; and was not lewd, vulgar, threatening or advocating illegal or dangerous behavior.



Evans v. Bayer, (Cont.)

- The court stated the following:
 - Where the speech occurs should be determined at the outset in order to decide whether the “unique concerns” of the school environment are implicated.
 - While the student’s speech was arguably aimed at a particular audience at the school it is not enough by itself to label the speech on-campus speech.
 - The speech was made off-campus, was never accessed on-campus and was no longer accessible when the school district learned of it.



Evans v. Bayer, (Cont.)

- Tinker analysis:
 - The school failed to demonstrate any disruption, either future or present.
 - The school may not prohibit student speech based solely upon the emotional impact that its offensive content may have on the listener.
- Fraser analysis:
 - Student’s speech did not involve Fraser type speech – “vulgar or lewd” language and did not undermine the: “fundamental values” of a school education.
- True Threat:
 - Student’s speech did not pose a true threat to the teacher.



Response by School Districts

- School districts are now incorporating off-campus activities and the “substantial disruption” standard into their Bullying and Discipline Policies.
 - Off-Campus Activities – Section 160.261.4 of the Missouri Revised Statutes was recently amended to allow school districts to discipline students for off-campus conduct that “negatively affects the educational environment to the extent allowed by law.”
 - “Extent allowed by law” – Look to case law.
 - Cyber-bullying - Section 160.775 of the Missouri Revised Statutes, which requires every school district to adopt an anti-bullying policy, was recently amended requiring school districts add “cyber-bullying” and “electronic” communication to the list of required elements in school district anti-bullying policies. Specifically, the amendment added “cyber-bullying” to the definition of “bullying” as well as “electronic” communication.



Use of Social Networking by Employees

A. Employee Rights

- Potential Claims by Employees & Applicants
 - Discrimination
 - First Amendment – Free Speech
 - Privacy Concerns



Discrimination

- Potential for employee/applicant claims against employer based on content posted on prospective employee's social-networking site.
- Issues regarding employer's knowledge of discriminatory material posted on an employee's social networking page, blog, tweet, etc.
 - Disclosure of Protected Classifications
 - Religion/Ethnicity
 - Gender and Sexual orientation
 - Political affiliations



First Amendment – Freedom of Speech

- Private Speech
- District must have a legitimate justification for discipline:
 - Focus on substantial disruption in the academic process
 - Districts should only restrict speech that prevents the District from operating efficiently and effectively



Privacy Concerns

- Potential Claims regarding invasion of privacy
 - Typically unreasonable for employee to have expectation of privacy in anything that is posted by him or her on a social networking website
 - Typically unreasonable for employee to have expectation of privacy regarding information stored in District's computers



District Policies

What restrictions can you impose as a public employer on an employee's use of *Facebook*, *Twitter*, *MySpace*, *blogging*, etc.?



District Policies

- The key for any school district is to develop a policy to govern the use of social networking sites by employees. Based on such policies, school districts can set clear guidelines regarding social networking activities and provide disciplinary measures in the event violations occur.



District Policies

- Effective Policies
 - Ensure that policies address the latest technologies:
 - Social Networking
 - Email & Internet
 - Instant Messaging
 - Intranets
 - GPS
 - Blackberries
 - Cell phones & Camera Phones



District Policies

- Effective Policies
 - Consider what constitutes appropriate business use of District's technology resources
 - Balance free speech and District management/operation issues
 - Consider prohibiting student-teacher communications through social-networking sites
 - Consider online off-duty conduct in the same manner as one would consider offline off-duty conduct



District Policies

- Effective Policies – Technology
 - Closed Forum
 - The District's policy should note that the District's technology resources are not a public forum
 - The District's website should provide information about the District, but should not be used as an open forum



District Policies

- Effective Policies - Technology
 - District Equipment
 - Personal Equipment used while on-duty
- Address User Privacy
 - A user does not have a legal expectation of privacy in the user's electronic communications or other activities involving the District's technology resources, including e-mail and access to the Internet or network drives.
 - Policy should note that the District will monitor online activities involving District equipment and the District will operate technology protection measures (filtering/blocking devices) on the network and all computers with Internet access.



District Policies

- Effective Policies – Conduct
 - District's should maintain policies that clearly express the rules and responsibilities that apply to all users of the District's technology resources, including:
 - Users are required to obey all laws, including criminal, defamation, copyright and obscenity laws
 - Users are prohibited from using District technology resources to access, view or disseminate information that is pornographic, harmful to minors, indecent or harassing
 - Include a statement regarding the District's policy on using the District's technology resources to access social networking websites
 - Include a statement regarding the District's policy on using the District's technology resources for personal use
 - Be realistic



District Policies

- Effective Policies – Discipline
 - On-duty Conduct
 - Violation of Social Networking Policy
 - Violation of Technology Usage Policy
 - Violation of Staff Conduct Policies
 - Immoral Conduct
- Off-duty Conduct
 - Issues re Immoral Conduct
 - Balance between free speech rights and District management obligations



District Policies

- Discipline
 - Off-Duty Conduct Cases:
 - Spanierman v. Hughes, U.S. District Court Connecticut
 - Non-tenured teacher brought Section 1983 lawsuit against school superintendent after his employment contract was not renewed after discovery of his profile and activity on MySpace.
 - The Court struck down the teacher's due process, equal protection and First Amendment freedom of speech claims.
 - 2007 Florida middle school teacher fired for posting inappropriate but not illegal or pornographic, material on his MySpace web-page.
 - Two Charlotte-Mecklenburg teachers discharged for inappropriate posting on *Facebook*.
 - 2009 Florida teacher suspended without pay for five days after posting on *Facebook* that he hated his job and his students.



Student/Teacher Relations

- While a teacher can use some networking sites, such as Twitter, to extend classroom discussions or offer quick homework assistance, networks like *Facebook* and MySpace easily blur the student-teacher relationship because of the personal information made available on profiles.



Student/Teacher Relations (Cont.)

- General Provisions
 - Across Missouri, school administrators are questioning student-teacher relationships, especially on the internet
 - Many Missouri schools have adopted guidelines set by the Missouri School Boards Association for student-teacher relations online
 - Those guidelines say staff members should not:
- Knowingly allow students access to the staff member's personal social networking website or webpage that discusses or portrays sex, nudity, alcohol or drug use or other behaviors associated with the staff member's private life that would be inappropriate to discuss with a student at school.



Student/Teacher Relations *(Cont.)*

- Knowingly grant students access to any portion of the member's personal social networking website or webpage that is not accessible to the general public.
- Post information about identifiable students on a personal website or webpage on a social networking site without the permission of a supervisor



Student/Teacher Relations *(Cont.)*

- Contact with Students
 - District staff should avoid "Friending" students
 - Do not accept students as friends on personal social networking sites. Decline any student-initiated friend requests.
 - Do not initiate friendships with current students.
 - Remember that people classified as "friends" have the ability to download and share your information with others.



Employer Liability

- Outside the School Day
 - Employees are not always the only ones liable for what they post online. Public employers can be vicariously liable for an employee's blog or twitter, leading to liability to the third party affected. Employers could also be held liable for employees' activities online, regardless of whether their participation is on the job or during their off hours.



Positive Side of Social Networking

- The vast majority of educators are taking cues from their students and jumping onto social networking websites, using social networking discreetly and professionally to make connections that can enhance careers, not jeopardize them.



Student/Teacher Relations *(Cont.)*

- District Use of Social Networking
 - Notification & Communication
 - Alumni Connections
 - Community
 - Recruiting
- Numerous Missouri School Districts utilize *Facebook* and *Twitter*



Thank You

Questions

Kathryn B. Forster, Esq.

Lashly & Baer, P.C.
714 Locust Street | St. Louis, MO 63101
Phone: 314.621.2939

E-mail: kforster@lashlybaer.com

www.lashlybaer.com


