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Social Networking and Faculty Discipline: A Pennsylvania Case Points Toward Confrontational Times, Requiring Collective Bargaining Attention

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Erratum

See p. 11 footnote; in eighth bullet deleted "fired" and substituted "suspended but subsequently reinstated."

Social Networking and Faculty Discipline: A Pennsylvania Case Points Toward Confrontational Times, Requiring Collective Bargaining Attention

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On February 26, 2010, the *Chronicle of Higher Education* reported that a sociology professor named Gloria Y. Gadsden had been escorted off the campus of East Stroudsburg University, one of 14 state-affiliated institutions in the Keystone State's system. According to the *Chronicle*, higher education's newspaper of record, a couple of days earlier the associate professor had posted on her Facebook page, "Had a good day today, didn't want to kill even one student." Apparently back on January 21st she had written, "Does anyone know where I can find a very discrete hitman, it's been that kind of day" (Miller, Feb. 2010).

Reportedly, a student blew the whistle on the professor, who was placed on administrative leave. Commented Interim Provost Marilyn Wells, "Given the climate of security concerns in academia, the university has an obligation to take all threats seriously and act accordingly." Not surprisingly, the hapless professor retorted that the school's action was retaliatory. The African-American pointed to an op-ed she had published in the self-same *Chronicle* back in 2008, in which she explored the challenges of being a black faculty member. More proximately, she said, she had filed a complaint of racial harassment with her institution.

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“If it had been one of the more pleasing faculty members, I don’t think they would have been suspended,” she told the newspaper. “I just find it strange that it happened to me around the same time that I filed this racial-harassment complaint.” She added that her Facebook comments were just a way of venting to family and friends. (Berrett, 2010)

While social-networking sites like Facebook are still relatively new to the working world, employers monitoring their employee’s activities and conduct outside the workplace is not. The most alluring aspects of social-networking sites is the ease in which an account can be created and maintained, the personalization options they present to the user, and a uniquely 21st century way of keeping in contact with friends and family. Social-networking sites are truly a wonder of the modern age, where by typing out a few sentences, uploading some photographs, videos and making some friend requests, one can present his or her entire life -up to the second- online for people to see. But who exactly can see this information, and of what exactly do their social-networking activities and communications consist?

Whether that user is a 17-year-old Miley Cyrus fan or a 52-year-old teacher, social networking sites certainly have cross-generational appeal, but neither is necessarily free to post and tag as they please. While ‘MileyRox93’ will have to answer to mom and dad for anything deemed inappropriate, ‘MiltonFan58’ can and increasingly is being held accountable for his social-networking activity by the principal or school administrator. This is not to marginalize the role of school administration to policing homepages. Nevertheless, issues do arise from time to time that require addressing. As previously mentioned, though the subject of an employer monitoring an employee’s off-the-clock activities is not new to our society or our courts, social-networking provides a very unique challenge to both school employees and the legal community. In that regard, there are some very current legal cases out there that address such issues between an educator’s online activity and the responsibility of the school administrators to ensure their employees are not engaging in inappropriate online activity. This inappropriate activity extends from the normal hot-topics of the private sector: illegal activities, divulging industry secrets or speaking ill of employers to include interactions and posts about students, parents, and whether that activity distracts from learning or puts students in awkward, even compromising positions.

The Professor Gadsden saga was only just beginning. By March 4th, a “Support Gloria Gadsden” page had been launched on—where else—Facebook.

[<http://www.facebook.com/group.php?gid=381733064391&ref=search&sid=514912166.2854830049.1>]. Some of the comments on the site’s Wall included:

- [I]t just goes to show that we do not have Freedom of Speech or Freedom of Expression. [A]ll she did was express how she was feeling and said it on her own personal page. [I]t would not be a problem if she wrote it in a diary and showed it to friends so why is it a problem not [sic]??

- I've [sic] had Gloria as a prof. She was always an inspiration to me, and to any other student who was willing to learn and question.... There is not a violent bone in that woman's body, she is a truly great woman... What is happening to her should warn us all about what is to come, we are slowly but surely losing our rights....
- Some people I've talked to, including college profs, feel Gloria was getting what she deserved for such remarks as it is 'common sense' that those are verboten - never mind that it was a supposedly private Facebook discussion. She should've known? With nary a warning?
- Can you believe a school saying it doesn't want to set rules about what people can say in private life as employees because that kind of rule might have 1st Amendment trouble and that same school is suspending an employee indefinitely for saying something it found inappropriate. Am I dense, or aren't they violating 1st [Amendment?]

Part of a Trend?

In attempting to answer this question, we might best begin with a look back... to a 2008 education case, *Spanierman v. Hughes*, 2008 WL 4224483 (U.S.D.C., D. Conn. 2008), which involves inappropriate communications with pupils.

Facts. The plaintiff, Jeffrey Spanierman, was hired by the Department of Education to teach English at Emmett O'Brien High School. The Department of Education (DOE) employed the defendant, Anne Druzolowski, as the Assistant Superintendent of the Connecticut Technical high School system, and defendant Lisa Hylwa was employed by the DOE as the principal at Emmett O'Brien. Spanierman had a collective bargaining agreement that stipulated he could become a tenured teacher after four years of full-time service to the school.

The controversy stemmed from Spanierman's MySpace page, something he originally created at the insistence of his students in the fall of 2005 to look at their own MySpace pages. Spanierman, using the profile name "Mr. Spiderman" claimed he used his account to communicate with students about homework, to learn more about the students to relate to them better, and to conduct casual, non-school related discussions. A school guidance counselor, Elizabeth Michaud, claimed to have received complaints about Spanierman's MySpace page, and after investigating the matter was disturbed by what she saw on his page. She listed everything from photos of Spanierman ten years younger, to photos of him with the children, pictures of naked men with "inappropriate comments" underneath them, and conversations with Emmett O'Brien students that were very "peer-to-peer like." Michaud was of the opinion that the page would be disruptive to students.

After she spoke with Spanierman about the page and its contents, as well as encouraging him to use the school e-mail to communicate with students outside of class, he deactivated “Mr. Spiderman” MySpace account only to open a new account titled “Apollo68.” School employees received more complaints of a similar nature about the “Apollo68” account, and after finding that it contained much of the same pictures and many of the same communications that were in the “Mr. Spiderman” profile, Hylwa got involved and called Spanierman to a meeting, making sure he had union representation, in November 2005. He was informed he was going to be placed on administrative leave with pay while an investigation was conducted. It was at this time Spanierman deactivated “Apollo68.”

Spanierman’s contract was not renewed. On January 13, 2006, Education Labor Relations Specialist and Department of Education employee Rita Ferraiolo met with Spanierman, his union representative and Hylwa to discuss the MySpace activities and Spanierman was given a chance to speak as well. On March 30, 2006, Hylwa sent a letter to Spanierman explaining that he had exercised poor judgment as a teacher. On the same day Druzolowski sent him a letter explaining his contract would not be renewed for the 2006-2007 school year. Spanierman requested a hearing and was granted one on April 26, 2006 in which Spanierman and his attorney met with representatives from the DOE, including Ferraiolo. Not persuaded by Spanierman’s arguments, the DOE agreed with Druzolowski’s decision to not renew his contract.

Spanierman files suit. Spanierman raised several contentions in his lawsuit, including Fourteenth Amendment rights to procedural due process, substantive due process, and equal protection. He also alleged that the defendants violated his First Amendment rights of freedom of speech and freedom of association. The First Amendment claims to freedom of speech and of association are most noteworthy. One could reasonably argue that these communications occurred outside of school and outside the normal hours of a school day and thus weren’t as distracting or ethically questionable as they might appear. Furthermore, Spanierman claimed that the defendants retaliated against him because he exercised his freedom of speech and freedom of association rights. In order to prove this, the plaintiff had to demonstrate that (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination. The following is an example of a communication between Spanierman and a student on his MySpace page:

- Plaintiff: “Repko and Ashley sittin in a tree. K I S S I N G. 1st comes love then comes marriage. HA HA HA HA HA HA HA!!!!!!!!!!!!!!!!!!!!!! LOL”
- Repko: “don’t be jealous cuase [sic] you cant [sic]get any lol ☺”
- Plaintiff: “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”

When interviewed, some of his students mentioned Spanierman's MySpace activities made them feel uncomfortable.

District Court grants summary judgment. The court found for the defendants and granted summary judgment in their favor. In the decision the district judge wrote, "It is reasonable for the Defendants to expect the Plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students... 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 a school, which sufficiently outweighs the value of Plaintiff's MySpace speech. In addition, to the freedom of association claim the court did not find that MySpace can properly be considered an 'organization' for the purposes of this analysis. While people must sign up to use MySpace, it does constitute a specific group but rather as a means in which one can create an online community of friends, family, co-workers, etc. They maintain that the Plaintiff's association with MySpace would into vicariously constitute expressive conduct on a matter of public concern, and thus fails the test to qualify for First Amendment protection of freedom of association."

A More-Recent Public-Employee Case to Consider

A more recent court opinion suggests that employers are prepared to discipline employees who use their social-networking Internet sites for "inappropriate" job-related speech... and that such employers may succeed. While the following case deals not with educators but rather another common type of public employee, firefighters, it is highly instructive. The case, *Marshall v. Mayor and Alderman of City of Savannah, Georgia*, 2010 WL 537852 (U.S. Ct. App., 11th Cir., Feb. 17, 2010), is a prime and current example of how someone's employment and association with a public entity, the reputation of that entity and its ability to serve the purpose for which it was created are all factors to consider when deeming social-networking conduct appropriate or not appropriate. In other words, when it comes to employee monitoring outside the workplace and on the social-network the song remains the same whether you are a fire chief or a school administrator.

Facts. In September 2006, the city hired Marshall as a firefighter- trainee on probationary status for one year. Prior to beginning her employment, Marshall switched her account at *www.myspace.com* ("MySpace") to "private" so that only designated "friends" could view her photographs in the private section of her account. These photos included a picture of firefighters from Savannah Fire, which she obtained without permission from the city's website. Marshall labeled this picture "Diversity." The Diversity picture was the official recruitment photo displayed on Savannah Fire's website and other recruiting materials. Displayed on the same page as the Diversity and another Savannah Fire photo and video link were two photo of Marshall

herself. One, captioned “Fresh out of the shower,” depicted her posing bare-shouldered. The other revealed Marshall's backside. According to the record, it apparently was difficult to tell what clothing, if any, she was wearing. She titled that picture, “I model too--this is from like my second shoot!”

Savannah Fire learned about Marshall's MySpace photographs from an anonymous caller in February 2007. The caller suggested that Marshall's account contained images that “may conflict” with the way Savannah Fire wanted to be portrayed. Captain Matthew Stanley, Savannah Fire's public information officer, was able to view Marshall's MySpace photos, as her account apparently was no longer set to “private.” He printed out the screen page containing the photos and delivered it to his boss. Chief Middleton instructed Assistant Chief of Operations Stephen Bragg to investigate the complaint. Chief Bragg discussed the photo with Marshall's immediate supervisor, Battalion Chief Stanley Mosely. Chief Bragg decided to issue an oral reprimand, the lowest level of disciplinary action, for Marshall's violations of Savannah Fire's rules and regulations. The written summary of the oral reprimand stated that Marshall had violated Article 1300: “Employees are expected to maintain a reasonable and decent standard of conduct in their private life as well as their profession[al] life and not bring discredit to the department by his/her misdemeanors.”³

Chief Middleton agreed with Chief Bragg's assessment of the situation. He explained the rationale for disciplining Marshall as,

...At Savannah Fire we work at having a positive image, and we want to be viewed as a professional, competent department with outstanding members. We don't want to be viewed as the fire department with female firefighters wrapped in towels. Her personal photographs showing her scantily clad and promoting her modeling, next to a Savannah Fire photograph and other clear images of Savannah fire personnel, alluded to her position as a firefighter with Savannah Fire while using her notoriety as a Savannah Fire firefighter to promote herself as a model or for other personal publicity reasons. This use conflicted with, and discredits, the professional image of Savannah Fire.

3 Conduct unbecoming of an employee shall include: 1) Actions that which brings the Department into disrepute or reflects discredit upon the employee as a member of the Department[;] 2) Actions that directly and/or indirectly impairs the operation or efficiency of the Department or employee including further: a) Commercial Testimonials: Employees shall not permit their names or photographs to be used in endorsing any product that is service-connected with the Fire and Rescue Department without the permission of the Fire Chief, and shall not allow their names or photographs to be used in any commercial testimonial, which alludes to their positions or employment with the Department; or b) Personal Publicity: Employees shall not use their positions within the Department to enhance or promote any private enterprise, or to seek personal publicity.

After learning of Marshall's web page, Savannah Fire decided to issue General Order 07.012, "to reinforce everyone's understanding of our existing Rules and Regulations which pertained to posting Savannah Fire photos and images on websites." The order, dated February 28, 2007, stated that Savannah Fire's identity could not be used for personal, recreational, or fraternal endorsement without the permission of the Fire Chief or his designee.⁴

On March 2nd, Marshall met with Chief Middleton, Chief Bragg, and Chief Mosely. Chief Middleton informed Marshall that her MySpace account violated Savannah Fire's rules and regulations as cited in the oral reprimand. Chief Middleton gave her a copy of those rules and explained that she lacked permission to post pictures related to Savannah Fire, including photographs of her co-workers in uniform. Marshall denied violating any rules. Instead, she questioned both Chief Middleton and Chief Bragg as to whether they had shown the pictures to anyone else. Although Marshall indicated that she would remove the Diversity photograph, she never agreed to remove the other Savannah Fire picture, even after Chief Middleton gave her a direct order to do so. Marshall also initially refused to sign the oral reprimand.⁵

When asked why, she stated that she was not the only firefighter on MySpace with photographs related to Savannah Fire. Chief Middleton replied that he was unaware of other such firefighters and asked her for their names. Marshall would not disclose any. Instead, she told Chief Middleton that he could find their web pages himself in the same way he found hers. Marshall further noted that the recently issued General Order afforded all personnel until March 7th to remove any violating pictures, and that she was being denied this opportunity. Marshall ultimately signed the reprimand but added the following: "By signing this disciplinary action, in no way, shape, or form do I agree to the charges posted against me."

Chief Middleton described Marshall's behavior at the meeting as "defensive, at first in denying and not being aware of policy violations, to being combative." In his recollection, Marshall aggressively "demanded that I give her everything that we had, and she demanded to know who else knew about the website, and was I sharing the information with anyone else." Chief Middleton claimed to be shocked by Marshall's refusal to disclose the names of other

⁴ If personnel did not remove the identifiers from their web pages or seek permission to use them by March 7th, they would face disciplinary action. According to Chief Bragg and Chief Middleton, the General Order had "nothing to do" with Marshall's reprimand, which was instead based on her violation of Savannah Fire's rules and regulations.

⁵ When Chief Bragg told her to "give it back," Marshall told him, "[S]ir, I will not be talked to like that." After that comment, Chief Mosely asked Marshall to speak with him in another room. When she went back into the meeting, Marshall protested that she was being singled out.

potential violators, noting that he had never had a firefighter refuse a request for information.⁶ Chief Bragg likewise testified that he viewed Marshall as argumentative, disrespectful, loud, and combative. According to Bragg, Marshall pointed fingers and argued with Middleton about whether he had shown the photos to others. Bragg also said he found Marshall's refusal to address him by his title, as well as her conduct toward Middleton, to be insubordinate. Chief Mosely concurred that Marshall's demeanor and attitude were disrespectful and inappropriate.

Marshall fired and files suit. Three days after the meeting, Chief Bragg advised Chief Middleton that Marshall would be terminated based on her “denial of violation of Fire Department policy, disrespect toward administration and Chief Officers, [and] disregard for [the] oath of a Savannah Fire Department Firefighter.” Middleton, who was responsible for making termination decisions, agreed with the recommendation and accepted Bragg's decision to dismiss Marshall as a probationary employee. Bragg also relayed the decision to Mosely, who agreed that Marshall should be terminated based on her insubordination. In a letter dated March 6th, Bragg notified Marshall that, effective March 8th, she would no longer work for Savannah Fire based on her “unsatisfactory probation period.” In February 2008, Marshall filed suit. In April 2008, she filed an amended complaint. In count one, she alleged she was terminated based on her gender and race in violation of Title VII. Specifically, she claimed that no similarly situated male employees, or white or black employees, “were subjected to this discipline for equal offenses.” Marshall did not allege that she was terminated in retaliation for complaining that she was being singled out as a female. In count two, she added a claim under 42 U.S.C. § 1983, stating that Chief Middleton had violated her Fourteenth Amendment equal protection rights. In count three, Marshall claimed that her termination violated her First Amendment right “to freely communicate on a completely personal basis where no real or imagined damage to her employer has been demonstrated.”

District Court grants summary judgment. In June 2009, the district court granted the defendants' motion for summary judgment. The court first dismissed Marshall's racial discrimination claim on grounds that she did not assert it her in Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC), nor did she address it in her response to the motion for summary judgment. Turning to her gender discrimination claim, the court found that Marshall failed to make out a *prima facie* case of disparate treatment because she did

⁶ He summed up the meeting by stating, "Her combative tone, the sharpness of her words, and her disregard for my authority, I have never experienced with a subordinate to this extent during my thirty-three years of fire service. This was even more astounding since this was a probationary firefighter."

not establish that other similarly situated male employees were treated more favorably.⁷ The court concluded that the lack of fair notice prejudiced the defendants, as evidenced by the absence of any questions about retaliation during Marshall's deposition. Finally, the court determined that her "speech" in disseminating photographs on her MySpace page was not entitled to First Amendment protection.

11th Circuit affirms. In a split opinion, the appeals panel agreed with the district judge, finding that the plaintiff's pleading defects, her inability to prove that male firefighters were treated differently, and the fact that her firing was for something more than merely posting on Facebook, combined to justify summary disposition of her claims. *Marshall v. Mayor and Alderman of City of Savannah, Georgia*, 2010 WL 537852 (U.S. Ct. App., 11th Cir., Feb. 17, 2010).

Whither Social Networking in the Workplace?

Employer interest in workers' social-networking activities is something of a subset of the broader category of employer intrusion into their employees' away-from-work activities more generally. Courts have struggled with this issue for decades and some states have enacted so-called "Life-Style" laws, aimed at discouraging corporations from involving themselves in individuals' outside activities. Results have been mixed. For instance, anti-nepotism rules generally pass judicial muster, since the potential for favoritism is obvious. On the other hand, if an employee elects to get drunk in the privacy of his own home, and this doesn't impact his job performance, his tipping would seem to be nobody else's business.

With regard to social networking, the fact that a site can be made available to tens of millions of potential readers—and even a "private" page probably can be hacked by a determined intruder—posing particular potential for employer embarrassment and even legal liability, depending upon what the employee chooses to post. Nonetheless, in the absence of actual third party complaints, some interested observers suggest analogizing this issue to the U.S. military's former policy of "don't ask, don't tell" treatment of sexual orientation. Comments a Harvard Law School student on the Citizen Media Law Project website:

The trend of password querying was scary enough when it was limited to public employment. Now that it has spread to the private sector, I am at orange alert. The time has come for a blanket prohibition on employer mandated disclosure of cyber identities. If we allow the practice, the boss will always have the power to pressure employees to volunteer

⁷ Specifically, the court found that Marshall had failed to show that Chief Middleton or Chief Bragg knew of other violators at the time they disciplined Marshall. With respect to Marshall's retaliation claim, the court found that this was never pled prior to her response to the motion for summary judgment.

for a head-spinning cyber possession/debriefing. When it comes to private passwords at the work place, it should be “Don’t Ask, Don’t Tell.”

[<http://www.citmedialaw.org/blog/2009/employee-privacy-and-social-networks-case-new-don't-ask-don't-tell>]

One study recently reported that eight percent of companies with 1,000-plus employees have fired at least one worker for social-networking activities. (Madden) Notable incidents, including Gadsden, cited by this source include:

- Nov. 4, 2008: New England Patriots cheerleader Caitlin Davis was cut from the squad over controversial pictures that were posted on her Facebook page. Davis, then 18, was at a Halloween party when she posed for photos with a passed-out man who was covered in graffiti, including swastikas, anti-Semitic remarks and profanity. Davis was fired from the squad after the pictures appeared on various websites and caught the attention of the Patriot's management team. She had been the youngest cheerleader ever to make an NFL squad.
- Feb. 26, 2009: A U.K. teenager was fired for calling her job "boring." According to The Daily Mail, Kimberley Swann posted comments such as, “First day at work. Omg (oh my god)!! So dull!!” and “All I do is shred holepunch and scan paper!!!” [sic]. Swann was let go after her boss discovered the comments.
- March 9, 2009: Dan Leone, a stadium operations employee for the Philadelphia Eagles, was fired for voicing his opinion on the team's trading practices via Facebook. Leone reportedly updated his Facebook status with, “Dan is [expletive] devastated about Dawkins signing with Denver ... Dam Eagles R Retarded!!” [sic].
- April 27, 2009: A Swiss woman was fired after calling in sick and then logging into Facebook on her “sick day.” Apparently the woman had a migraine and called out of work because she thought the light from a computer would bother her and she needed to lie in a dark room. When her employer caught her surfing Facebook, it was presumed that she was indeed well enough to sit in front of a computer, and she was let go.
- April 28, 2009: A Minnesota nursing home employee was fired after rumors spread that she had posted photos of herself with nude patients on her Facebook page. Though no nude pictures were found, the employee did have pictures of herself with clothed patients, which violated the home's privacy policy and led to her termination.
- August 27, 2009: Ashley Payne, a Georgia high school teacher, was forced to resign after the local school board came across pictures of her sipping beer and wine. The pictures, which appeared on Payne's Facebook page, were from a vacation she had taken that summer, which included a trip to the Guinness Brewery in Ireland. Payne

was quoted as saying “I did not think that any of this could jeopardize my job because I was just doing what adults do and have drinks on vacation and being responsible about it.” She sued the school district last November. The case is expected to go to trial this fall.

- Feb. 11, 2010: South Carolina firefighter and paramedic Jason Brown was fired for creating a three-minute-long animated video and posting it on Facebook. The video, which showed a cartoon doctor and paramedic responding to an emergency in a hospital, was meant to be a spoof, Brown said. However, his department didn't find the video funny, calling it “an embarrassment,” and Brown was fired.
- March 3, 2010: Gloria Gadsden, a professor at East Stroudsburg University in Pennsylvania, was suspended but subsequently reinstated⁸ after updating her Facebook status with things such as, “Does anyone know where I can find a very discrete hitman? Yes, it's been that kind of day.” [sic] The school said it was being overcautious because of the Feb. 12 shootings at the University of Alabama, in which professor Amy Bishop was charged with killing three fellow professors.
- May 17, 2010: North Carolina waitress Ashley Johnson was fired from her job at a Brixx pizzeria after posting a negative comment about two of her customers. Johnson called the customers -- who left her a \$5 tip after sitting at their table for three hours – “cheap.” Though she did not mention the names of the customers, Johnson did include the name of the pizzeria in her post. A few days later, management called her to tell her she was fired for violating the restaurant's social media policy.
- May 24, 2010: The city of West Allis, Wis. fired a veteran police dispatcher of 21 years over a status update. Dana Kuchler was terminated after posting that she was “addicted to vicodin, adderall, quality marijuana, MD 20/20 grape and absinthe,” on her Facebook page. Despite saying the post was a joke, Kuchler was terminated by the city. Her union then filed an appeal, claiming the punishment was too harsh for the crime. The arbitrator agreed, instead sentencing Kuchler to a 30-day suspension without pay. The city is currently in the process of appealing the new decision in an attempt to have Kuchler's termination reinstated.
- June 10, 2010: Five California nurses were terminated after it was discovered that they were discussing patient cases on the site. The situation was investigated for weeks by both the nurses' employer, Tri City Medical Center in San Diego, and the California Department of Health before the nurses were fired for allegedly violating privacy laws.

⁸ Originally published as “fired”; corrected June 2, 2014.

- June 21, 2010: A Pittsburgh Pirates' mascot was fired earlier this summer, after posting a comment about the team's choice to extend the contracts of two of its managers. Andrew Kurtz, 24, was fired within hours of posting the comment "Coonelly extended the contracts of Russell and Huntington through the 2011 season. That means a 19-straight losing streak. Way to go Pirates," to his Facebook page. (Madden, 2010)

Varied Judicial Responses

In September 2009, in *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (U.S. Dist. Ct., D. N.J.), a federal judge found,

Sufficient evidence supported a finding that employees' managers violated the Stored Communications Act (SCA) by knowingly accessing a chat-group on a social networking website without authorization. Evidence through witness testimony indicated that although the witness had provided her log-in information to manager, she had not authorized access by the managers to the chat-group, she felt she had to give her password to the manager, she would not have given the information to other co-workers, and she felt she would get in trouble if she did not provide her password. Evidence indicated the managers accessed the chat-group on several occasions, it was clear on the website that the chat-group was intended to be private and accessible to invited members, and that managers continued to access the chat-group after realizing that the witness had reservations about having provided her long-in information.

Can *Pietrylo* be squared with *Spanierman* and *Marshall*? A number of differences are readily apparent:

- In *Spanierman*, the employee was a teacher and his students mostly minors, while in *Marshall*, the employees were police and firefighters, i.e., members of a category of employees with special responsibility for the health and safety of their communities. Just as both of these categories of public employees are restricted by most state labor laws from striking, they may be subject to tighter restrictions on their social-networking activities, than a restaurant's service staff ought to be.
- In *Pietrylo*, management went fishing for damaging information by demanding that their subordinates submit their passwords. In *Marshall*, the disciplinary cycle was started by a citizen's complaint.
- Further, in *Marshall*, the plaintiff turned a reprimand in a termination by her face-to-face—not her Facebook or MySpace—insubordination.

Bottom line. Judicial responses to employers' intrusions and disciplinary actions in the social-networking realm likely will turn on the status of employer and employee (public v.

private; safety forces v. “ordinary” employees); the nature of the posted materials and the readiness of its access to the world at large or to a special category of audience, e.g., minors; the manner and motive of the intruding employer.

Implications for Collective Bargaining in Higher Education.

The college campus is a workplace apart: principles of First Amendment free speech (at public institutions) and Academic Freedom (on all campuses) should and hopefully do provide a measure of protection to faculty. The East Stroudsburg situation may prove to be an important test case, before it plays itself out. In any event, the role and limits of social networking websites in the realms of free speech and academic freedom are issues that will be controversial for the immediate future, if not longer.

For East Stroudsburg’s Professor Gadsen, the story had a more or less happy ending. In April 2010, she was reinstated. Reported the *Chronicle*, “After being suspended for jokes she made on her Facebook page about wanting to kill students a month ago, Gloria Y. Gadsden has been reinstated to her job at East Stroudsburg University of Pennsylvania. The associate professor of sociology returned to work on Wednesday after being cleared by a psychologist.” (Miller. Apr. 2010) She stood fast to her claim that her suspension was due to her earlier stance on the difficulties experienced by minority faculty in higher education.

Organizations representing faculty should place these issues on their collective bargaining agendas. Furthermore, it seems appropriate to this author for faculty representatives to take the position that policies limiting freedom of expression on social networking sites are changes in terms and conditions, requiring bargaining at prior to their inceptions.

There is little evidence that this advice is often taken. If our conclusion is correct, one explanation may be that organized labor, considered collectively, is not yet fully in touch with the brave new world of social networking. In the words of one pundit:

What I’ve found is that Local Unions are often led by older leaders who are steadfast in their unwavering dedication to upholding traditions of the past. The Local is structured and managed in much the same way it was 20 or 30 years ago. Work is down, membership is down and dues are down. And not enough younger members are moving up the ranks fast enough to help influence or encourage change. I’ve also found Labor Leaders to be satisfied with their “techie prowess” if they have an e-mail address and/or an iPhone and use it to read their e-mails. I’ve also found that Labor Leaders consider their Local to be “progressive” if they have a website (even if it hasn’t changed in the past five years or more and still posts an announcement on its home page about an “upcoming” Labor Day picnic that occurred back in 2006).

I've also found that Labor Leaders think Facebook and Twitter are for "kids" and are a fad. They don't trust the Internet and are afraid of putting their Local's information out in a very public way. And Labor Leaders who are not experienced in using the Internet and/or social networking may feel threatened by those who do. Those who aren't familiar or comfortable with social media and networking assume that it would be cost-prohibitive. Of course, operating funds are tight these days, so "playing" on the internet isn't worth the imagined cost. And the Internationals aren't pushing social networking down to the local level (New Labor Media, 2010).

However, the American Association of University Professors appears to have no such reluctance. On its own extensive website, it provides guidance about getting into the Internet game:

Existing social-networking and video-sharing sites can be extremely helpful in spreading the word about financial crises and building coalitions, perhaps especially if you are reaching out to students as well as faculty. For such sites, you need to create an account and can then post information, photos, and/or videos. On social networking sites such as Facebook, you can create a group that other Facebook users can join (AAUP, 2010).

The AAUP page goes on to laud a number of examples of what it calls "academic activism on the Web." (AAUP) The AAUP's presence on Facebook is substantial. (Facebook, 2010) However, academic-freedom provisions in current collective bargaining agreements tend to ignore social networking. Rider University's 2007-2010 collective bargaining agreement (Rider, 2007) is a reasonable example⁹

Two arguments may be made in favor of such a provision. First, it is arguably broad enough to encompass members' social networking activities. Second, we have been able to find no NLRB or judicial decisions involving social-network-related disciplining of college faculty. Similarly, a Westlaw search of state labor and employment cases came up dry.

The argument here is simply that this year's incident at East Stroudsburg University was the fire bell in the night. Though Professor Gadsden was reinstated, the cases we have discussed

⁹Article IV, Academic Freedom, As members of the community, bargaining unit members have the rights and obligations of all citizens. They measure the importance of these obligations in the light of their responsibilities to their subjects, to their students, to their profession, and to their institution. As citizens engaged in a profession that depends upon freedom for its health and integrity, bargaining unit members have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom. Except for reasons that constitute proper cause for discipline under any other provision of this Agreement, the University will not threaten, coerce, or discipline members of the bargaining unit because of what they say or what they do as private citizens, for promoting and preserving the conditions of free inquiry necessary to fulfill the obligations of their academic disciplines, or for discharging their responsibilities to their students, to their colleagues, to their professions, or to their institution. (Rider University).

above--drawn from other segments of the education and , more broadly, public-employee, arenas—predict that it is only a matter of time before our courts will take up cases concerning university faculty. The outcomes of these two cases suggest that we cannot be sanguine about the outcomes of similar courtroom controversies, such academic-freedom provisos as Rider’s notwithstanding. The failure of traditional academic-freedom provisions, such as Rider’s, to specify social-networking activities, considered in the context of organized labor’s alleged aversion to/ignorance of such technologies—an aversion/ignorance which may be shared by the many venerable labor arbitrators who dominate the field today—runs the (unnecessary) risk that an employer-university will successfully persuade a non-technologically-sophisticated arbitrator to distinguish social networking from other, traditional media for the exercise of academic freedom to the faculty member’s detriment.

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