OOC BROWN BAG LUNCH SERIES
SOCIAL MEDIA & THE CAA
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I. Introduction

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies thirteen federal labor and employment law statutes to all Legislative Branch employing offices and employees. The prevalent use of social media, both by employees and by employing offices, may have implications for several of these laws. Social media use also presents new contexts for the application of First Amendment principles, including judicial interpretations of the First Amendment rights of public employees.

II. Supreme Court Guidance: First Amendment Rights of Public Employees

The First Amendment to the U.S. Constitution provides that "Congress shall make no law… abridging the freedom of speech…" As the Fourth Circuit has explained, "Not only does the First Amendment protect freedom of speech, it also protects 'the right to be free from retaliation by a public official for the exercise of that right.'" *Bland v. Roberts*, 730 F.3d 368, 373 (4th Cir. 2013) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000)). The Supreme Court has analyzed this protection in connection with a wide variety of government restrictions on speech, including adverse employment actions against public employees. As Justice Marshall explained in the landmark *Pickering* case (see below): "While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

Although to our knowledge the Supreme Court has not yet addressed a free speech issue involving social media in the labor and employment context, current First Amendment litigation involving a public employee's right to engage in more traditional forms of expression generally follows a two-part inquiry: (1) did the government employee speak as a citizen on a matter of public concern? If the answer is no, there is no First Amendment cause of action. If the answer is yes, the possibility of a First Amendment claim arises, and courts ask (2) did the government employer have an adequate justification for treating the employee differently from any other member of the general public?

a) *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) – In this landmark case, the Supreme Court established a framework of analysis allowing a public employee's First Amendment rights to prevail over a government employer who sought to curtail his or her expression. The Court acknowledged that while public employees are entitled to

some First Amendment rights as citizens, these rights are more limited because government employers have countervailing interests in controlling workplace operations and ensuring efficient governance. With these competing interests in mind, the Court established a framework "balanc[ing] the interests of the [public 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." In *Pickering*, a high school teacher was dismissed for sending a letter to a local newspaper criticizing the way the school board handled its finances. The Court held that a teacher's letter to the editor of a local newspaper concerning a school budget addressed a matter of public concern. In balancing the employee's First Amendment interest against the government's efficiency interest, the Court held that because the publication of the letter had not "impeded the teacher's proper performance of his daily duties in the classroom" or "interfered with the regular operation of the school generally," the employee's First Amendment protection prevailed.

b) *Connick v. Myers*, 461 U.S. 138 (1983) – *Connick* emphasizes that the First Amendment protection established in *Pickering* only applies to comments "on matters of public concern." Absent the most unusual circumstances, the First Amendment will not protect a public employee's statements made at work that concern "matters only of personal interest." Courts determine whether a statement addresses a matter of public concern by analyzing the "content, form, and context of a given statement, as revealed by the whole record." In *Connick*, an assistant district attorney distributed a questionnaire at work, implicitly criticizing her supervisors. The Court held that all but one of the employee's statements were not matters of public concern and therefore not protected by the First Amendment. However, the Court found that one statement involving workplace pressure to join political campaigns was a matter of public concern because of the community's interest in non-corrupt government. Applying *Pickering*, the Court held that the government's interest outweighed the employee's because the questionnaire disrupted the office's daily workflow and undermined the employer's ability to effectively lead his staff; therefore, termination was justified.

c) *Rankin v. McPherson*, 483 U.S. 378 (1987) – An employee's controversial and arguably violent statement made in the workplace expressing her disapproval of the President was a matter of public concern, and therefore subject to First Amendment protection. The employee, after learning of an attempted assassination of the President of the United States, told her colleague, "shoot, if they go for him again, I hope they get him." Analyzing the statement's "content, form, and context," the Court found it relevant that the statement came during a political conversation and on the heels of a news bulletin, which weighed in favor of the statement dealing with a matter of public concern; the Court also noted that "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." After finding that the statement was of public concern, the government applied *Pickering* balancing, ruling for the employee because the statement did not interfere with her work relationships or job performance, or otherwise "discredit[] the office." Notably, while the Court reasoned that the harm to the employer was minimal in this case due to the employee's low level of authority, it explained that an employee with higher authority may be entitled to less First Amendment protection: "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails."

d) *United States v. NTEU*, 513 U.S. 454 (1995) – The Court struck down as overbroad a federal law that prohibited federal employees from accepting compensation for making speeches or writing articles, even when neither the subject of the speech or article nor the person or group paying for it had any connection with the employee's official duties. The Court applied the *Pickering* balancing test, for the first time, in the "context of a sweeping statutory impediment to speech." In so doing the Court noted that this case presented "far more serious concerns than could any single supervisory decision" because unlike the evaluation of a government employer's response to specific employee speech, the new law "chills potential speech before it happens" by creating a "large-scale disincentive to Government employees' expression [and imposing] a significant burden on the public's right to read and hear what the employees would otherwise have written and said."

e) *City of San Diego v. Roe*, 543 U.S. 77 (2004) – A public employee's expression, even when made entirely outside of the workplace and not directly related to his or her employment, is not necessarily protected under the First Amendment. Only matters of public concern are protected, such as statements relating to "something that is a subject of legitimate news interest" or "certain private remarks, such as negative comments about the President of the United States." In this case, a San Diego police officer engaged in inappropriate online activity, including the sale of pornographic police-related videos. Because such an expression was not protected as a matter of public concern, and the employer demonstrated "legitimate and substantial interests of its own that were compromised by [the employee's] speech," termination was justified under the First Amendment.

f) *Garcetti v. Ceballos*, 547 U.S. 410 (2006) – When employee's expression is part of his official responsibilities, it is not a matter of public concern and therefore not protected by the First Amendment. In *Garcetti*, a deputy district attorney strenuously opposed a particular prosecution by circulating an internal memo, engaging in "heated" debates on its merit, and voluntarily appearing before a trial court on behalf of the defense during an evidentiary hearing. The Court found that the memo was not protected because it was part of the employee's official responsibilities. The Court determined the extent of the employee's "official responsibilities" by assessing his daily tasks, which included writing memos. The Court held that, when acting according to their official duties, public employees do not deserve full First Amendment protection: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." In dissent, Justice Breyer suggested that in instances where an employee's professional duties are governed by professional or constitutional obligations, employers should be prohibited from retaliating against true statements. Breyer's dissent later informed the majority's opinion in *Lane v. Franks* (below).

g) *Lane v. Franks,* — U.S. —, 134 S.Ct. 2369 (2014) – An employee's sworn testimony in a judicial proceeding, even when related to his or her professional duties, is a matter of public concern and therefore subject to First Amendment protection. In *Lane*, a government director testified against a state representative accused of corruption. Matters of public concern include those which "can be fairly considered as relating to any matter of political, social, or other concern to the community," and those with "a subject

of legitimate news interest; that is, a subject of general interest and of value and concern to the public" (internal quotations omitted). Because the employee's statement was in the public interest, the government applied *Pickering* balancing, and held that the government's interest in preventing an employee from testifying against another employee charged with corruption "is entirely empty." Without evidence that the testimony was "false or erroneous or that [the employee] unnecessarily disclosed any sensitive, confidential, or privileged information while testifying," the employee's obligation to honestly testify outweighed the government's interest.

III. Adverse Actions Based on Social Media Activity – First Amendment

In recent years courts have been asked to apply the analysis in *Pickering* and its progeny to cases involving speech shared via social media, especially Facebook. As the Fourth Circuit noted in dicta, "the particular attributes of social media fit comfortably within the existing balancing inquiry: A social media platform amplifies the distribution of the speaker's message – which favors the employee's free speech interests – but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency… The advent of social media does not provide cover for the airing of purely personal grievances, but neither can it provide a pretext for shutting off meaningful discussion of larger public issues in this new public sphere." *Liverman v. City of Petersburg*, 844 F.3d 400, 407, 414 (4th Cir. 2016).

a) *Grutzmacher v. Howard Cty.*, 851 F.3d 332 (4th Cir. 2017) – A Fire Department battalion chief was fired after posting arguably offensive comments about gun control on his Facebook page, "liking" a colleague's racist comment to that post, and then – after being required to remove his original post – making additional posts criticizing the Department for interfering with his First Amendment rights, and "liking" a colleague's offensive post about the Chief. The court found in favor of the Department on the employee's section 1983 claim, applying the balancing test and holding that although some of the employee's social media posts implicated matters of public concern, "the Department's interest in efficiency and preventing disruption outweighed Plaintiff's interest in speaking in the manner he did regarding gun control and the Department's social media policy." The court noted that the employee's actions had caused tension and conflict among his coworkers, and accorded "substantial weight" to the Department's "interest in preventing Plaintiff from causing further dissension and disharmony." The court also considered the employee's role as a supervisor and the mission of the Fire Department as factors weighing in the Department's favor, citing record evidence that the plaintiff's actions "led to concerns regarding Plaintiff's fitness as a supervisor and role model" and "frustrated the Department's public safety mission and threatened 'community trust' in the Department, which is 'vitally important' to its function."

b) *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016) – The court applied a three-part test based on the *Connick/Pickering* line of cases to analyze the constitutionality of disciplinary actions taken against two police officers who posted comments on Facebook criticizing their department's training and promotion policies. First, it determined that the officers spoke on matters of public concern: the comments mentioned officer safety and questions of liability for the department, and because the comments constituted a "public dialogue" on an online forum rather than private messages, "the context of the speech buttresses our conclusion that [the officers] were not simply airing personal

grievances but rather were joining an ongoing public debate about the propriety of elevating inexperienced police officers to supervisory roles." Second, the court determined that the department had "failed to establish a reasonable apprehension that plaintiffs' social media comments would meaningfully impair the efficiency of the workplace." And third, there was no serious dispute that the plaintiffs' Facebook comments were a substantial factor in the decision to discipline them. Therefore, the discipline was unconstitutional.

c) *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013) – During the Sherriff's reelection campaign, some employees of the Sherriff's Department posted on Facebook in support the incumbent Sherriff's opponent. After the Sherriff was reelected, those employees were not reappointed to their positions, and filed claims alleging retaliation in violation of their First Amendment rights. The court noted that "the First Amendment generally bars the firing of public employees 'solely for the reason that they were not affiliated with a particular political party of candidate'" (quoting *Knight v. Vernon*, 214 F.3d 544, 548 (4th Cir. 2000)), although there is a narrow exception for patronage dismissals of public employees occupying policymaking positions. The court analyzed both the plaintiffs' freedom of association claims and their freedom of speech claims, determining that some of them had raised genuine issues of fact while others had not. Notably, one of the plaintiffs had done nothing more than "like" the opponent's campaign page on Facebook, and a question arose as to whether this action even constituted speech for First Amendment purposes. The court examined what it means to "like" a Facebook page, and held that "Once one understands the nature of what [plaintiff] did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech. On the most basic level, clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance." The court even held that the "thumbs up" icon symbolically represented the plaintiff's support for the candidate. Therefore, this act was constitutionally protected speech, and the plaintiff was able to proceed on his First Amendment claim.

d) *Snipes v. Volusia Cty.*, 704 F. App'x 848 (11th Cir. 2017) – A law enforcement officer employed with the county's Beach Patrol was fired after sharing racist messages on Facebook and via group text message in the wake of Trayvon Martin's death and his killer's acquittal. The court found in favor of the county on the officer's section 1983 claim, holding that the government's interest in performing its duties efficiently outweighed the officer's free speech rights, because "if the County had not terminated Snipes it was reasonably possible that there would have been substantial protests and rallies in the community, that the Beach Patrol's ability to recruit new members from the African-American community would have been hindered, and that the public's confidence in the Beach Patrol—and perhaps all County law enforcement—would have been adversely affected." The court considered the time, place, and manner of the employee's speech, as well as the context in which the speech was made, noting among other things the public nature of Facebook, the "vulgar and insulting manner" in which the messages were delivered, the fact that the text messages were sent while the officer

was on duty (although the Facebook message was not), and the already-high racial tensions in the area.

e) *Munroe v. Central Bucks Sch. Dist.,* 805 F.3d 454 (3d Cir. 2015) – A former high school teacher filed suit against the school district alleging First Amendment retaliation after she was fired for writing public blog posts that made derogatory comments about her students. The court held that although the posts broadly addressed matters of public interest such as academic integrity, the value of honor, and students' lack of effort, they appeared in a context predominated by complaints about particular students and personal grievances. "[R]eluctantly" assuming that the speech satisfied the public concern requirement, the court went on to find that the school district's interests outweighed the teacher's because her statements disrupted the school district's ability to function by eroding trust and respect among students.

f) *Duke v. Hamil*, 997 F. Supp. 2d 1291 (N.D. Ga. 2014) – The Deputy Chief of Police for a state university police department was demoted after posting an image of the Confederate flag on his personal Facebook page with the statement "It's time for the second revolution" after recent elections. Although his Facebook page was private, someone provided the post to the local news. The court first held that the Deputy Chief was speaking as a citizen on a matter of public concern because the image was posted to the officer's personal page while he was off-duty, did not identify his employment, did not refer to any department policies, practices, or employees, and expressed dissatisfaction with politicians. However, applying *Pickering* balancing, the Court held that the police department's interests outweighed the Deputy Chief's interest in speaking, because the flag could convey a variety of messages with different implications, many of which are controversial, divisive, and prejudicial, and could undermine loyalty, discipline, and good working relationships since the Deputy Chief was second in command. Further, the speech threatened the department's reputation and raised concerns about the Deputy Chief's prejudices. Therefore, the Deputy Chief's demotion did not violate his First Amendment rights.

g) *Palmer v. Cty. of Anoka*, 200 F. Supp. 3d 842 (D. Minn. 2016) – The County Attorney hired the plaintiff as his spokesperson, chiefly responsible for communicating to the public and representing the office. The plaintiff subsequently posted accusatory statements regarding police activity and attacking the Republican Party on Facebook, which violated the County's social media policy prohibiting employees from "[p]osting comments that have the potential for causing embarrassment to the Office [or] disruption in the workplace, or that otherwise detrimentally affect the office's reputation or the work that [it does]." The court held that, although the employee was speaking on matters of public concern, her posts "created actual or reasonably foreseeable disruption to the Office" by creating a rift between the County Attorney and the police force. The court noted that the nature of the employee's position as a spokesperson was "unique." Because she represented the County Attorney to the community and served as a liaison between law enforcement officers, it was extremely important for her to have a good relationship with the police and to display good judgment. Therefore, the county's interests outweighed the employee's interest, and termination did not violate the First Amendment.

h) *Howell v. Millersville Univ. of Penn.*, 283 F. Supp. 3d 309 (E.D. Penn. 2017), *appeal docketed*, No. 17-3538 (3d Cir. Nov. 21, 2017) – A music teacher was terminated after posting statements on Tumblr criticizing the Music Department heads' decisions to raise revenue for student activities and treatment of colleagues. The court determined that these statements were not statements of public concern, and therefore not protected by the First Amendment, because they concerned the "day-to-day minutiae" of employment, and addressed the employee's own problems and personal grievances. Public concern relates to broad social or policy issues, discloses officials' misfeasance, and generally adds to the debate on matters of public importance. The employee's statements concerned "office morale" and did not address "high-minded issues"; therefore, they were not protected by the First Amendment.

i) *Shepherd v. McGee*, 986 F. Supp. 2d 1211 (D. Or. 2013) – A state DHS employee was terminated based on comments she allegedly made on social media, including derogatory statements about low-income populations. The court, declining to rule directly on whether or not the speech constituted a matter of public concern, applied the *Pickering* balancing test and held in favor of the employer. Because the employee regularly testified on behalf of the DHS, the employer was justified in terminating the employee because her biased posts could be used by any opposing counsel to attack her credibility as a witness, thus hampering current and future cases.

IV. Adverse Actions Based on Social Media Activity – Pretext

Even if First Amendment concerns are not implicated, adverse actions based on social media activity may still be challenged by employees claiming that the social media posts were not the real reason for the employer's action but were instead merely a pretext for unlawful discrimination. It is therefore important for employers to (1) have clear, lawful social media policies, (2) enforce those policies consistently, and (3) ensure that actions taken against employees based on violations of social media policies are justified and well-documented.

a) *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261 (11th Cir. 2017) – A terminated employee claimed he was suspended and then fired in retaliation for protected activity, namely taking leave to which he was entitled under the Family and Medical Leave Act (FMLA). The employer put forth evidence that it terminated the employee for a legitimate non-discriminatory reason – posting photos of his outings to an amusement park while he was on medical leave – which the employer claimed either violated its social media policies or at least demonstrated poor judgment by an employee in a supervisory position. However, the plaintiff provided sufficient evidence to raise a genuine dispute as to whether that rationale was pretextual: at the time he was terminated, the employer did not mention its social media policies at all, but rather stated that he was being fired for abusing and misusing FMLA leave by engaging in the activities he posted about on Facebook, which the employer believed showed that he was physically able to return to work sooner. These inconsistent bases that the employer stated for the plaintiff's termination were evidence of pretext, and so was the social media policy itself, because as the court explained, "there is evidence that the purpose of [the employer's] social-media policy, as discussed during managerial training, is to prevent employees from posting harmful or negative comments about the company's staff or facilities. Jones's Facebook posts were clearly far afield from this area of concern."

b) *Rodriquez v. Wal-Mart Stores, Inc.*, 540 F. App'x 322 (5th Cir. 2013) – A former Operations Manager, who was over 40 and of Mexican descent, alleged that the employer's stated basis for her termination – violation of the company's social media policy, within one year of another unrelated violation of company policy – was pretext for age and national origin discrimination. The social media policy prohibited conduct that "adversely affects job performance or other associates" and allowed online complaints as long as the comments did not appear "unprofessional, insulting, embarrassing, untrue, [or] harmful." The employee posted a public comment on a coworker's Facebook page criticizing other coworkers who called in sick to attend a party and posted pictures of the event; she deleted the comment later the same day out of concerns about its "severity," but the post came to management's attention anyway, and she was subsequently fired. The court affirmed summary judgment for the company, finding that the employee failed to raise a material issue of fact with respect to her pretext allegation – i.e., that she suffered disparate treatment or that the employer's reason was false or unworthy of credence. She failed to demonstrate that another employee received preferential treatment under nearly identical circumstances, and she could not show that the decision maker either had a discriminatory motive in firing her or lacked a good-faith belief that she had violated company policy.

c) *Smizer v. Cmty. Mennonite Early Learning Ctr.*, 538 F. App'x 711 (7th Cir. 2013) – A male teacher's aide at a daycare center/preschool alleged that the employer's stated basis for his termination – a profanity-laden post that he was accused of posting on Facebook – was a pretext for gender discrimination, and that he was really terminated because some prospective parents were uncomfortable with a male staff member caring for toddlers. The post, which had to do with a family custody battle, criticized the aide's family, including his mother, who was the Center's director and the aide's supervisor. The post came to the attention of the Center's management after a former Center employee emailed a copy of it to the aide's nephew, and the aide was then fired. The court affirmed summary judgment for the employer, finding that the aide failed to establish pretext – i.e., he did not raise disputed material facts regarding disparate treatment or lack of good-faith belief. The court noted that the focus of his argument was his denial that he wrote the Facebook post and the fact that the employer could not produce a copy of the original post. However, the employer was not required to prove that the employee actually posted the comments, only that it honestly believed he did so, and the employee did not present sufficient evidence to show that the decision makers did not honestly believe that he wrote the disparaging post.

d) *Montoya v. Hunter Douglas Window Fashions, Inc.*, 636 F. App'x 744 (10th Cir. 2016) – An employee was placed on a performance improvement plan and later terminated because her excessive use of the internet for personal reasons while in the workplace interfered with her work performance and supervisory duties. She sued the company, alleging gender discrimination and FMLA retaliation, and asserting that the stated reason for her termination was pretextual. She argued that the company tolerated personal internet use by male employees, but the company produced evidence that it only tolerated limited personal internet use, and only when that use didn't interfere with work performance. The plaintiff was unable to identify any male employee who was treated differently under similar circumstances, and so her gender discrimination claim failed, and she was also unable to show any connection between her use of FMLA leave and her

termination. The court affirmed summary judgment in favor of the company on both claims.

V. Discrimination Based on Protected Activity

Section 207 of the CAA makes it unlawful "for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter..." 2 U.S.C. § 1317(a). Additionally, several of the statutes applied to the legislative branch through the CAA contain their own anti-retaliation provisions, including Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act (FLSA), and the Federal Service Labor-Management Relations Statute (FSLMRS), among others. When considering disciplining employees for social media activity, employing offices should take into account whether that activity could potentially be construed as protected activity under the CAA and/or the statutes it applies.

1. Social Media Posts as Protected Union Activity

The CAA applies the rights and protections of the FSLMRS to certain legislative branch employees. 2 U.S.C. § 1351. Among the rights guaranteed to employees under the FSLMRS is "the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal," 5 U.S.C. § 7102, and it is an unfair labor practice "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." 5 U.S.C. § 7116(a)(1).

When employees use social media to raise or discuss workplace concerns, if their posts relate to forming, joining, or assisting a labor organization, then any resulting adverse action by the employer could potentially be deemed an unfair labor practice. The National Labor Relations Board has addressed this issue in several decisions, and its holdings are instructive to the extent that the FSLMRS and the National Labor Relations Act are similar. *However*, it is important to note that the provision upon which many of those decisions rely – the right of workers to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157 – has no counterpart in the FSLMRS. The scope of protected activity is therefore narrower for legislative branch employees than it is for individuals covered by the NLRA. *See U.S. Dep't of Labor, Emp't & Training Admin., San Francisco, Cal.*, 43 F.L.R.A. 1036 (1992) ("In contrast [to section 7 of the NLRA], section 7102 of the [FSLMRS] does not expressly cover concerted activities… Clearly, all concerted activity is not protected under the [FSLMRS] as it is under the NLRA.").

a) *U.S. Capitol Police v. Fraternal Order of Police, D.C. Lodge No. 1, U.S. Capitol Police Labor Comm.*, No. 15-LMR-01, 2016 WL 3753511 (OOC Board July 5, 2016), *aff'd sub nom U.S. Capitol Police v. Office of Compliance*, 878 F.3d 1355 (Fed. Cir. 2018) – To determine whether an employing office has unlawfully discriminated against an employee based on protected union activity, the OOC Board applies the FLRA's burden-shifting framework established in *Letterkenny Army Depot*, 35 F.L.R.A. 113 (1990): the OOC General Counsel must first show that (1) the employee against whom the alleged discriminatory action was taken had engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once the General Counsel has thus established a *prima facie* case of discrimination, the burden then shifts to the employing office to demonstrate, by a preponderance of the evidence, that (1) there

was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.

b) *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2d Cir. 2017) – Two days before a contentious unionization vote, an employee made a profane post on Facebook complaining about his supervisor, not only insulting the supervisor himself but also saying "F*** his mother and his entire f***ing family!!!!" and ending the post with "Vote YES for the UNION!!!!!!!" The post came to the attention of management, and the employee was fired. He filed a charge with the NLRB claiming his termination was retaliation for protected union activity, and prevailed. The court viewed the Facebook post in the context of the unionization effort and held that because the post "explicitly protested mistreatment by management and exhorted employees to 'Vote YES for the UNION'" it was reasonable for the Board to determine that the employee's "outburst was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment in the period before the representation election." The court also pointed out that the record evidence showed the employer "consistently tolerated profanity among its workers" and had never fired anyone solely for profane language. The court opined that the employee's conduct "sit[s] at the outer-bounds of protected, union-related comments," but the post, "although vulgar and inappropriate, was not so egregious as to exceed the NLRA's protection."

c) *AFGE Local 2031 v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989) – The court upheld an FLRA decision finding discipline of Union president for the content of his column published in the Union newsletter did not unlawfully interfere with protected activity because portions of the text were not just critical of management, they also "constituted 'the disparagement of a manager based on racial stereotyping,' and [] as such, they did not fall within the protection of the statute." This decision is consistent with the FLRA's longstanding "flagrant misconduct" principle, pursuant to which the FLRA balances the employee's right to engage in protected activity (which gives leeway for impulsive behavior) against management's right to maintain order and respect for supervision. *Dep't of the Air Force, Grissom AFB, Ind.,* 51 F.L.R.A. 7, 10-11 (1995). Under this framework the question is "whether [the union representative's] remarks were within the ambit of protected activity, allowing leeway for impulsive behavior, or were so opprobrious and insubordinate as to be indefensible under the circumstances, thus constituting flagrant misconduct, appreciably impinging upon the employer's right to maintain order and respect for its supervisory staff and justifying discipline as outside the protection of the Statute." *Dep't of Def., Def. Mapping Agency Aerospace Ctr., St. Louis, Mo.,* 17 F.L.R.A. 71, 81 (1985). The FLRA considers four factors when applying this balancing test: (1) the place and subject matter of the discussion; (2) whether the outburst or conduct was impulsive or planned; (3) whether the employer's conduct provoked the employee; and (4) the nature of the language or conduct. *Id.*

d) *NFFE Local 2189*, 68 F.L.R.A. 374 (2015) – The FLRA upheld the ALJ's decision that a union committed an unfair labor practice in violation of 5 U.S.C. § 7116(c) by denying initial union membership to an employee who had recently become a member of the bargaining unit. The reason given by the union for denying membership to the employee was a Facebook post that the employee had made several months earlier, before he joined the bargaining unit, which included language critical of the union. Because only very specific exceptions exist to the union's duty to admit members, and because the Facebook

post made prior to the employee joining the bargaining unit did not fit under those exceptions, it was not a valid basis for refusing membership. However, the FLRA noted that *after* an individual becomes a union member, the union has the ability to discipline that individual if he "engages in actions that 'threaten or attack the [union]'s existence as an institution'" (citing *AFGE Local 2419*, 53 F.L.R.A. 835, 846 (1997) (noting that "absent a threat to its continued existence, a union may not discipline an employee for mere criticism of its management or policies.")).

e) *520 S. Mich. Ave. Assocs., Ltd. v. Unite Here Local 1*, 760 F.3d 708 (7th Cir. 2014) – Chicago's Congress Plaza Hotel accused the union representing its employees of engaging in unfair labor practices, including allegedly coercing the hotel's customers into cancelling their agreements to book rooms at the hotel through the use of Twitter messages and other social media posts. The court disagreed, holding that "These writings are pure, protected speech about a matter of public concern. They also pose very little risk of harming an unwilling or captive listener; after all, anyone can unsubscribe from Twitter."

2. Social Media Posts Related to Other Statutes

a) *Caplan v. L Brands/Victoria's Secret Stores, LLC*, 210 F. Supp. 3d 744 (W.D. Pa. 2016), *aff'd*, 704 F. App'x 152 (3d Cir. 2017) – Although this case involves a private employer, it is relevant because it assesses employees' rights to engage in protected activities under Title VII. In this case, a white employee brought a Title VII retaliation suit alleging that her employer terminated her for opposing racial discrimination on social media. The employee posted a photo that her employers perceived to be racist, but the employee alleged that her posts were intended to protest racial discrimination. The court held that the activity was not protected because, although the employee may have intended to protest discrimination, her posts did not objectively convey opposition to racial discrimination and therefore were not protected under Title VII.

b) *Trigueros v. New Orleans City*, No. 17-10960, 2018 WL 2336321 (E.D. La. May 23, 2018) – The Fair Labor Standards Act contains an anti-retaliation provision that provides, in relevant part, that an employer may not "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter…" 29 U.S.C. § 215(a)(3). In this case, an employee of the city coroner's office complained on Facebook about her lack of overtime wages, and she alleged that she was terminated for doing so, which she claimed was unlawful retaliation. The court held that the Facebook post was not protected activity under the FLSA, because "while Plaintiff's post may be categorized as a complaint… it was not a complaint directed in any way at her employer." Even if the post could have been viewed as a communication to the employer, rather than just a gripe posted on the employee's personal Facebook page for an audience of friends and acquaintances, it was not an assertion of rights and a call for protection of those rights, because "Nowhere in the post does Plaintiff claim she is legally entitled to overtime pay or even argue that she should be receiving overtime pay." The court therefore deemed the post "not sufficiently clear or detailed to qualify as a protected activity."

c) *Payne v. WS Servs., LLC*, 216 F. Supp. 3d 1304 (W.D. Okla. 2016) – A job candidate's social media posts alleging discrimination in defendant employer's hiring and employment practices were not protected activities for purposes of a Title VII retaliation claim. Before and after submitting her application for employment, the plaintiff – whose husband already worked for the company – had repeatedly criticized the company on social media, often on subjects unrelated to alleged discrimination. First, the court noted that activity that is disruptive or inappropriate may fall outside of Title VII protection "because, weighed against the employer's interest, it is unreasonable." The court found that the manner of plaintiff's complaints was unreasonable because plaintiff used Facebook to disparage and "hurl repeated accusations" at the employer. Second, the court observed that an employee enjoys protection only for activities that oppose unlawful employment practices. Whereas the concerns that the plaintiff's husband (and co-plaintiff) voiced to management about the company's refusal to hire women were covered by Title VII's opposition clause, the court found that the plaintiff's social media posts did not constitute opposition to the company's practices – and therefore were not protected – because she did not believe that the posts would "hasten [the] process" of eliminating the company's alleged gender discrimination, over which she had already initiated a claim with the EEOC.

VI. Social Media Policies

Several courts have addressed challenges to the constitutionality of employers' social media policies. The National Labor Relations Board and some courts have also examined employers' social media policies to determine whether they interfere with employees' rights under the National Labor Relations Act; to the extent that employees covered by the FSLMRS have similar rights to express criticism of their employers and share other types of information or opinions as part of forming, joining, or assisting a labor organization, these decisions could be persuasive.

1. Constitutionality

a) *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016) – A police department's social networking policy contained broad blanket prohibitions on comments critical to the department or the dissemination of information "that would tend to discredit or reflect unfavorably" on the department or other city agencies. The court held that this policy was unconstitutionally overbroad. Because the policy acted as a prior restraint on speech, the city had the burden not only to show that its interests outweighed those of both potential audiences and a vast group of present and future employees in a broad range of present and future expression, but also to demonstrate that the harms resulting from the speech were real and not merely conjectural. The court stated that "the Department's social networking policy unmistakably imposes a significant burden on expressive activity" and held that the Department failed "to satisfy its burden of demonstrating actual disruption to its mission," providing no evidence of any material disruption arising from the plaintiffs' or others' social media comments.

b) *Bode v. Kenner City*, No. 17-5483, 2018 WL 1377609 (E.D. La. Mar. 19, 2018) – City employees brought a claim seeking declaratory and injunctive relief regarding a city charter prohibiting non-elected city employees from participating in any political activity on behalf of any city election candidate. The plaintiffs are "unclassified civil service" public employees in the City of Kenner. The court found that the city's social media

policy was overly broad because it would ban any posting, liking, or sharing of social media posts and therefore affects a "substantial amount" of constitutionally-protected conduct. This case highlights that overbroad prohibitions on social media political activity tip the balancing test in favor of employees' First Amendment rights.

c) *Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) – Although not specific to social media, the court's analysis in this case is instructive. A police department instituted a policy prohibiting communication with anyone outside the department about the department's canine drug interdiction program, and one of the officers challenged the Constitutionality of the policy. The court analyzed the policy as a prior restraint on government employee speech under *Pickering* and *NTEU* (see above) and found that it was an unconstitutionally overbroad work rule. The policy not only covered speech within the scope of employees' official duties but also their speech as citizens, and could apply to communications to community groups, legislators, and "even to family members and friends." The targeted speech reached matters of public concern because it could include commentary about the department's policies affecting the public, and the policy lacked any limiting language – for instance, it was not limited to speech pertaining to "official agency business" or "information that would harm pending investigations or expose sources or methods." The court held that the police department's justification for the restraint did not outweigh the troopers' legitimate speech interests, because the policy did not have a "close and rational relationship" to the department's legitimate interest in its operations.

2. Labor Relations

a) *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542 (D.C. Cir. 2016) – The court affirmed the NLRB's decision that the company's non-disparagement rule violated the NLRA. Among other things, the policy forced employees to agree that they would not "publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym)." The court described this policy as a "sweeping gag order" that would "significantly impede" employees' rights because it "directly forbids them to express negative opinions about the company, its policies, and its leadership in almost any public forum."

b) *Georgia Auto Pawn*, 365 NLRB No. 26 (2017) – The NLRB affirmed the ALJ's decision that the company's social media policy violated the NLRA. The policy prohibited employees from using social media "in a way that... defames or disparages the Company, its affiliates, officers, employees, customers, business partners, suppliers, vendors, etc." and also provided that "Beyond the profile information described above, you may not mention anything else in a social networking environment about the Company, or its business operations, finances, products or services, relationships with customers, third parties, or agencies… You should not post any photographs of company property, interior or exterior." The ALJ concluded that "Employees here would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications such as those critical of the employer or its agents," and because these overbroad provisions would tend to chill employees' exercise of their rights, they were unlawful.

c) *Landry's Inc. & Its Wholly Owned Subsidiary Bubba Gump Shrimp Co. Rests., Inc.*, 362 NLRB No. 69 (2015) – The NLRB affirmed the ALJ's decision that the company did not commit an unfair labor practice by adopting a social media policy that discouraged employees from posting information on social media, including their personal social media accounts, that "could lead to morale issues in the workplace or detrimentally affect the Company's business." The ALJ read the challenged portions of the policy in context, and noted that the rule was not promulgated in response to union activity and not restricted only to union activities, but was instead a more general and facially neutral work rule.

d) *Boch Imports, Inc. d/b/a/ Boch Honda*, 362 NLRB No. 83 (2015), *enforced*, 826 F.3d 558 (1st Cir. 2016) – The company's social media policy violated the NLRA by (1) requiring employees to identify themselves when posting comments about the company, the company's business, or a policy issue, and (2) prohibiting employees from using the company's logos in any manner. The NLRB held that the self-identification rule "was overly broad, because employees would reasonably construe it to cover comments about their terms and conditions of employment, and the self-identification requirement reasonably would interfere with their protected activity in various social media outlets… Similarly, employees would reasonably read the prohibition of using the [company's] logos 'in any manner' to cover protected employee communications."

e) *Chipotle Servs. LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72 (2016), *review denied*, 690 F. App'x 277 (5th Cir. 2017) – The NLRB affirmed the ALJ's decision that certain provisions of Chipotle's "Social Media Code of Conduct" violated the NLRA. Two specific prohibitions in the policy were deemed unlawful: one read, "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information." The other read, "You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors." These prohibitions were found to be overly broad and/or ambiguous, and could serve to chill employees' exercise of their right to engage in protected activity. However, the ALJ noted that the part of the second prohibition that prohibited statements of a "harassing or discriminatory" nature was lawful, citing NLRB precedent upholding "prohibitions against verbal abuse, abusive or profane language, or harassment" and rules that prohibit "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with other employees," even if those facially neutral prohibitions could target speech that would otherwise be protected.

f) *Int'l Bhd. of Teamsters, Local 700 v. Ill. Labor Relations Bd.*, 73 N.E.3d 108 (Ill. App. Ct. 2017) – The union challenged as overbroad an employer policy restricting employee use of social media and networking sites. Under the policy, the employer extended its on- and off-duty conduct rules to all employee internet activity, including activity on social media and networking sites. The union was specifically concerned that an employee "being friended" on social media by someone who was, unbeknownst to the employee, a known criminal, gang member, or former or released felon, could implicate the employer's restriction on gang association and that employees who use social media to vent to their coworkers and distribute information could be disciplined if they one day "said the wrong thing… or had a bad day at work." The union was further concerned that the policy did not specify what employees could and could not do on social

media. Applying NLRB precedent, the court found that the policy did not violate the NLRA-analogous Illinois statutory provision banning employer interference with protected union activity. Rejecting the union's argument that the policy would be reasonably construed by employees to prohibit protected activity, the court found that the policy simply provided that all of the other rules of conduct, which were not challenged by the union, apply to the internet. The union failed to show that "applying the rules of conduct to Internet activity means that employees would construe the rules of conduct as prohibiting protected activity."

3. Guidelines

Decisions like those described above suggest that government employers should consider including limiting language in their social media policies, to make it clear that the policies cover only work-related communications that disrupt the workplace, target non-speculative harm, and do not prohibit protected union-related activity.

a) Executive branch agencies have generally followed the lead of the Office of Personnel Management (OPM) in this regard by promulgating policies that distinguish between government employees' work-related and personal social media usage. These categories are defined as follows:

> 1) Official Use: Social media engagement on behalf of the agency and as authorized by the agency on sites where [the agency] has an official web presence and terms of service agreement.
>
> 2) Non-Official/Personal Use: Personal day-to-day use of social media sites by agency users, not related to official duties.

The OPM policy regulates "official" social media use as it would any other work assignment, but places only limited restrictions on employees' "non-official personal" social media use as follows:

> Non-official/Personal use of social media is the day-to-day use of social media sites by agency users that is not related to official duties. Pursuant to the Standards of Ethical Conduct for Executive Branch Employees agency users must be careful in their personal participation in social media sites; they must not engage as if presenting the official position of OPM. According to guidance issued by the Office of Government Ethics (OGE), an employee is not required, ordinarily, to post a disclaimer disavowing government sanction or endorsement on the employee's personal social media account. Where confusion or doubt is likely to arise regarding the personal nature of social media activities, however, an employee is encouraged to include a disclaimer clarifying that the social media communications reflect only the employee's personal views and do not necessarily represent the views of the employee's agency or the United States. A clear and conspicuous disclaimer will usually be sufficient to dispel any confusion that arises. See OGE Legal Advisory LA-14-08.[1] Further, agency users must

[1] To access the full text of the document, visit https://www.oge.gov/Web/OGE.nsf/All+Advisories/ and click on the link for 2014, then scroll down to the document dated 11/19/14 and titled (Legal) LA-14-08: Reference to Official Title and Position by Employees Affiliated with Private Organizations in Their Personal Capacity.

> comply with the OPM Policy on Personal Use of Government Office Equipment and other applicable policies and procedures. Agency users must also be aware that misconduct committed on a social media site may result in appropriate discipline consistent with federal law and agency policy and practice.

https://www.opm.gov/news/social-media-presence/social-media-policy.pdf; see also the General Services Administration policy, which closely tracks the OPM model: https://www.gsa.gov/about-us/newsroom/social-media/gsa-social-media-policy

b) Employers may have general policies restricting certain employee activity while either on or off official duty time. For example, employers may prohibit employees from endorsing products or engaging in political activity during official time, or may prohibit or restrict employees from using government office equipment for personal, non-work-related purposes. In an increasingly online-oriented world, employers are well advised to review any such policies to identify how they may apply to employee social media activity and, to the extent they are applicable, to advise employees accordingly. This may require updating such policies to include examples of covered online activity, and incorporating cross-references to these policies in any employer social media policies. For example, the OPM Social Media Policy referenced above reminds employees that they "must comply with the OPM Policy on Personal Use of Government Office Equipment and other applicable policies and procedures" and that "misconduct committed on a social media site may result in appropriate discipline consistent with federal law and agency policy and practice." Attached are two useful internal policy examples, one from OPM and one issued by the Treasury Department IG, which include detailed work rules limiting employees' personal use of government electronic communications systems and equipment.

c) It is important that employing offices enforce social media policies equally and consistently for all employees, and keep thorough documentation of all investigations into potential violations, to avoid liability for discrimination. For example, in *Carney v. City of Dothan*, 158 F. Supp. 3d 1263 (M.D. Ala. 2016), a black employee raised a Title VII race discrimination claim based on allegations that she was disciplined for Facebook posts whereas white coworkers were not disciplined for similar social media activity. The court rejected her claim: "The Department suspended Carney because it determined that her Facebook comments, which it determined to be supportive of… murderous actions, violated its social media policies. Carney complained that other officers posted on social media in violation of the policy, but the Department investigated those other comments and determined that they were not violative of city policy. These officers cannot be considered similarly situated because their posts were not objectionable in the way Carney's posts were. The undisputed evidence establishes that the Department did in fact discipline other officers, both black and white, for posts that did violate its policies."

VII. Responsibility of Employers and Unions to Monitor Social Media Sites

Sometimes the question is not whether an employer impermissibly took action based on an employee's social media activity, but rather whether an employer or union should be liable for *failing* to take action.

a) *Maldonado-Cátala v. Municipality of Naranjito*, 876 F.3d 1 (1st Cir. 2017) – A municipality employee's hostile work environment claim was based in part on her employer's failure to investigate derogatory comments about her that were posted to Facebook. A police investigation had revealed that the posts were made from within the municipality, but the poster used a pseudonym and the police had not been able to identify the person's identity, so the plaintiff asked the municipality to conduct an internal investigation, which it did not do. The court held in favor of the employer, explaining that the employee failed to show "how her daily work life was impacted by her superiors' failure to investigate the Facebook posts following the police investigation. We do not doubt that the inaction was upsetting to Maldonado, but without more, a jury could not reasonably view the lack of follow-through as on-the-job harassment that altered her working conditions."

b) *Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010) – In a hostile work environment case, the plaintiff argued that her employer "should have known" about a discriminatory comment posted by a coworker on Facebook about a picture of the plaintiff at a company outing, because the company "allowed its employees to post photos and comments on the website during company time for company purposes." The court rejected this argument as unsupported by the record, finding that "aside from plaintiff's deposition testimony there is no evidence that shows that the Facebook account belonged to [the employer] or that it condoned its use during company time. Hence, it cannot be assumed that [the employer] knew or should have known about the alleged discriminatory comment[.]" Furthermore, the company acted promptly and appropriately upon learning of the harassing conduct by blocking access to Facebook from all office computers.

c) *Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538 (N.J. 2000) – A female airline pilot filed a hostile work environment claim against her employer, alleging that her male coworkers were posting sexist and defamatory messages about her on the airline's electronic bulletin board. The Supreme Court of New Jersey held that if an employer provides an "Internet forum" for its employees' use that is "closely related to the workplace environment," and receives notice that an employee's coworkers are using the forum to engage in a pattern of harassment directed at the employee, then "the employer would have a duty to remedy that harassment." The court explained that, if the employer knew or should have known about the harassment, then the fact that did not occur inside the traditional physical workplace does not let the employer off the hook: "[S]tanding alone, the fact that the electronic bulletin board may be located outside of the workplace… does not mean that an employer may have no duty to correct off-site harassment by co-employees. Conduct that takes place outside of the workplace has a tendency to permeate the workplace. *See Schwapp v. Avon,* 118 F.3d 106, 111 (2d Cir. 1997) (finding that '[t]he mere fact that [the plaintiff] was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim.'). A worker need not actually hear the harassing words outside

the workplace so long as the harassment contributes to the hostile work environment. [*Id*]." The case was ultimately remanded for further development of the record to establish "whether the relationship between the bulletin board and the employer establishes a connection with the workplace sufficient to impose such liability on the employer."

d) *Weigand v. NLRB*, 783 F.3d 889 (D.C. Cir. 2015) – A bargaining unit member charged that the union committed an unfair labor practice by "failing to remove derisive and allegedly threatening comments posted on a Facebook page maintained for Union members." The Facebook page was a private group only for union members and was not accessible or viewable to the public. The contested posts allegedly consisted of "disparaging remarks about people who crossed the Union's picket line." The petitioner argued that "the Union should be held responsible for the Facebook entries posted by Union members because a Union officer controlled the Facebook page." Because the individuals posting the comments were not agents of the union, but rather "persons who acted on their own without the permission of the Union," the ALJ held – and the NLRB and the D.C. Circuit affirmed – that the posts were not the equivalent of misconduct on a picket line and the union was not liable.

e) *Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790 (Cal. Ct. App. 2006) – This case involving the application of the federal Communications Decency Act of 1996 (CDA) stands for the proposition that an employer generally cannot be held liable for messages posted by an employee on the internet, even if the employee sent the message on work time using a work computer. In this case, the two plaintiffs received anonymous threatening messages that were eventually traced back to an employee of Agilent. The plaintiffs sued both the employee and his employer for intentional and negligent infliction of emotional distress, alleging that Agilent was aware that its employee was using its computer system to threaten the plaintiffs but took no action to stop him from doing so. The court held that the company was immune from suit as a "provider… of an interactive computer service" under the CDA, 47 U.S.C. § 230(c)(1).

f) *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), *appeal docketed,* No. 17-2003 (4th Cir. Aug. 29, 2017) – The court held that the Chair of the county board of supervisors violated the First Amendment and engaged in viewpoint discrimination when she blocked a county resident from accessing her official Facebook page for 12 hours after the resident posted a comment on the page criticizing the board members. Although the page was maintained by the Chair in her personal capacity, her enumerated duties did not include maintenance of website, the website would not revert to the county at end of the Chair's term, and the Chair did not use county-issued electronic devices to post, the court nonetheless held that blocking access constituted state action because the website was born out of and inextricably linked to the Chair's public office, and was used as a tool of governance. Further, there was no formal policy that played any role in the Chair's decision to ban the resident from website, and the Chair had previously allowed virtually unfettered discussion on the page and had affirmatively solicited comments from constituents.

In a companion case, *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017), the same plaintiff filed suit against the County Attorney, alleging that his First Amendment rights were violated when he was blocked after leaving lengthy comments on the official

County Attorney's Facebook page. The court held that the County Attorney did not violate the First Amendment by deleting the comments and blocking Davison. The key difference between the two cases is that the County Attorney's Office had developed policies reserving the right to remove comments that violate certain enumerated rules, and Davison's comments were either spam or off-topic under the page's disclaimed rules. The court held that government agencies may police the boundaries of limited public forums that they have created.

VIII. Discovery and Evidentiary Issues

With the rise of social media, courts have had to address an increasing number of disputes over the discoverability and admissibility of social media accounts and their content.

1. Discovery Issues

Generally speaking, the Federal Rules of Civil Procedure apply to the discovery of social media content as they do to other types of information. Courts examine whether the request for social media information is relevant, non-privileged, and proportional to the needs of the case. Social media information is "not entitled to special protection," but discovery requests seeking social media information cannot constitute a "fishing expedition" in the hope of finding something relevant. *Smith v. Hillshire Brands*, No. 13-2605-CM, 2014 WL 2804188 (D. Kan. June 20, 2014). Put differently, "material posted on a 'private' Facebook page is generally not privileged" or protected by privacy concerns, but at the same time, there is no "generalized right to rummage at will through information that [a party] has limited from public view. Rather, consistent with Rule 26(b) and [case law], there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence." *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012).

a) *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566 (C.D. Cal. 2012) – A request for social media documents must be adequately relevant and proportional. Defendant employer sought discovery of social media posts reflecting the plaintiff's mental and emotional states to undermine the testimony of the plaintiff, a former employee, who testified that she suffered from post-traumatic stress disorder, depression, and isolation due to the company's alleged wrongdoing. The court found that although this discovery was relevant because the plaintiff had put her emotional state at issue in the case, the request was vague, overly broad, and burdensome. Indeed, the court noted that nearly all social media posts could be indicative in some way of the poster's emotional state. The court also found that a request for "third-party communications to Plaintiff that place her own communications in context" was too vague, and a request for "any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff's profile or tagged or otherwise linked to her profile" was impermissibly overbroad and not reasonably calculated to lead to the discovery of admissible evidence. However, the court upheld a motion to compel social media communications between the plaintiff and any current or former coworkers referring in any way to the plaintiff's employment with the company. The court reasoned that the request "adequately place[d] Plaintiff on notice of the materials to be produced and [was] reasonably calculated to lead to the discovery of admissible evidence."

b) *Smith v. Hillshire Brands*, No. 13-2605-CM, 2014 WL 2804188 (D. Kan. June 20, 2014) – Terminated employee alleged violations of Title VII and the FMLA, and the company argued that the legitimate reason for his termination was abuse of FMLA leave. The court ordered the plaintiff to comply with a discovery request for all of his social networking activity that directly referenced or mentioned the company or the matters raised in the plaintiff's complaint. However, the employer had also requested discovery of electronic copies of the plaintiff's complete social media profiles, and the court expressed concern over this request, "as it seeks documentation of *all* of plaintiff's activity on the named social networks… regardless of whether the activity has anything at all to do with this case or the allegations made in plaintiff's complaint." The company argued that all of the former employee's social media activity would be relevant to his claims for damages for emotional distress, as well as evidence that he abused his FMLA leave. The court weighed the plaintiff's privacy interests with concerns for relevance and the likelihood that the request would lead to the discovery admissible evidence, observing that overbroad social media discovery can lead to "the proverbial fishing expedition" for relevant information. The court granted the request for electronic copies of the plaintiff's social media profiles, but narrowed the request to include only social media items referencing the plaintiff's emotional state and potential causes of that emotional state, explaining that "The court agrees with courts that have recognized that a discovery request for unfettered access to social networking accounts—even when temporally limited—would permit the defendant 'to cast too wide a net' for relevant information."

c) *United States ex rel Feaster v. Dopps Chiropractic Clinic, LLC*, No. 13-1453-EFM-KGG, 2017 WL 957436 (D. Kan. Mar. 13, 2017) – The defendant submitted an interrogatory asking the plaintiff to identify and describe any social media post that he had deleted, altered, or removed since his resignation from the defendant's clinic. The court found this request overbroad; however, considering the severity of the plaintiff's allegations, the court ordered the plaintiff to review and produce information regarding deleted, altered, or removed social media postings that in any way referenced the defendant or his employment with the defendant. In narrowing the request, the court highlighted the balancing of relevance, burdens, and potential benefits of social media discovery requests, and established that deleted social media information can be discoverable.

d) *Appler v. Mead Johnson & Co., LLC*, No. 3:14-cv-166-RLY-WGH, 2015 WL 5615038 (S.D. Ind. Sept. 24, 2015) – The plaintiff alleged that she was fired because of her narcolepsy in violation of the ADA, along with other claims. In response to the defendant's motion to compel discovery of the plaintiff's entire Facebook profile, the court found that production of the plaintiff's Facebook activity was reasonable because the revelation of times she was active online could be used as evidence regarding her narcolepsy and inability to be at work early in the morning. However, the court found that certain information on the plaintiff's Facebook profile was not sufficiently relevant to overcome her privacy interests and therefore their production was not merited, including: credit cards, facial recognition data, IP addresses, phone numbers, family, and religious views. The court here highlights that analysis of social media discovery requests is specific to the facts at issue in the case.

e) *Kennedy v. Contract Pharmacal Corp.*, No. 12-2664, 2013 WL 1966219 (E.D.N.Y. May 13, 2013) – Plaintiff brought a Title VII action arising from alleged acts of gender

discrimination, hostile work environment, sexual harassment, and retaliation. Defendant company submitted discovery requests and a motion to compel for all documents concerning the plaintiff's utilization of social networking sites and all documents from social media (including postings) reflecting her emotions or her employment with the company. The court found this request to be "vague, overly broad, and unduly burdensome" and denied the company's motion to compel.

f) *Jewell v. Aaron's, Inc.*, No. 1:12-CV-0563-AT, 2013 WL 3770837 (N.D. Ga., July 19, 2013) – In this class action, defendant employer sought discovery of all documents, statements, or activity posted on any website, including social media sites, by 87 plaintiffs. The company sought to show that the named plaintiff posted to social media during compensable time and thereby refute the claim that employees were forced to work through breaks and meals. The court denied this discovery request as overly broad and insufficiently likely to lead to the discovery of admissible evidence because whether employees posted to social media during compensable time may have no bearing on whether employees received a bona fide meal period.

2. Evidentiary Issues

Courts assess the admissibility of social media posts under slightly different evidentiary frameworks. While courts differ on whether the posts are "self-authenticating" under Fed. R. Evid. 902(11), they seem to agree that when substantiated by extrinsic evidence under Fed. R. Evid. 901(a), social media posts are admissible.

a) *United States v. Browne*, 834 F.3d 403 (3d Cir. 2016) – The Third Circuit held that although Facebook posts are not "self-authenticating" business records when certified by Facebook's record custodian under Fed. R. Evid. 902(11), if a party can provide sufficient extrinsic evidence linking the opposing party to the posts, the authentication burden under a conventional 901(a) analysis is satisfied. The Defendant was convicted of sexual offenses with minors based on Facebook chats, and argued that the chats were not properly authenticated because the Government failed to establish that he authored the communications. The Government argued that the records are business records that were properly authenticated pursuant to 902(11) of the Federal Rules of Evidence by way of a certificate from Facebook's records custodian. The Court held that Facebook chats are not self-authenticating business records because the custodian could only attest that the communications were made between certain accounts, on particular dates, and at particular times, which fails to sufficiently confirm the identities of the people exchanging the messages. However, the Court held that the chats were admissible because the Government presented sufficient extrinsic evidence to authenticate the chat logs under Rule 901(a), including cross-references of phone numbers, in-court identification of the defendant by victims, personal details interspersed through the Facebook conversations, and certification that the chat logs were not subject to manipulation.

b) *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014) – Under a slightly different framework yielding the same result as *Browne*, the Fourth Circuit held that Facebook and YouTube posts linking the defendants to terrorist activities *are* self-authenticating business records, but are only admissible when the Government can prove the accounts are linked to the defendants. Under Fed. R. Evid 902(11), the court found that

certifications from the records custodians of Facebook and YouTube were relevant because they proved that the posts were authentic, and that the screenshots were not manipulated. Further, the Government satisfied the authentication burden under 901(a) by tracking the Facebook pages and accounts to the defendants' mailing and email addresses via internet protocol addresses.

c) *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) – The Tenth Circuit held that that sexually offensive posts made through an alias Facebook account were sufficiently tied to the defendant to render them admissible under Fed R. Evid 801(d)(2)(A) (rule against hearsay). The court determined that the Government had met its burden of showing by a preponderance of the evidence that the defendant held the alias account, and that the messages were not falsely attributed to the defendant, when it showed the following facts: (1) the account was registered to the defendant's email address, (2) one message sent through the account identified the sender as the defendant, (3) a witness testified that the alias account identified himself as the defendant, (4) the contact phone number on the account matched a number linked to the defendant, and (5) two witnesses testified that the defendant used the alias on Facebook. Although the defendant presented evidence that other individuals had access to the Facebook account, the court held that because a jury could reasonably find by a preponderance of the evidence that the defendant had authored the messages, they were properly admitted.

d) *United States v. Thomas*, 701 F. App'x 414 (10th Cir. 2017) – This case showcases the important distinction between admitting *individual photos* posted on social media pages, and admitting *the social media pages themselves*. Here, the Government identified the defendant as a wanted armed bank robber based on an anonymous tip that led them to the defendant's Facebook profile, where they confirmed the defendant matched the description of the robber. The defendant challenged the authentication of the photographs used to identify him at trial. The appellate court held that, under Fed. R. Evid. 901(a), the photos were "authenticated by evidence sufficient to support a finding that the photograph is what the proponent claims it is." Distinguishing between authenticating an entire Facebook page and authenticating individually-posted photos, the Court noted that the jury is fully capable of considering whether the photographs actually identify the defendant or not. Because the photographs were admitted only after the lower court heard testimony that the photographs were downloaded by the law-enforcement officers who found them, and the Court was able to look at the defendant and the photographs themselves, the photos were properly admitted.

e) *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958 (D.C. Cir. 2016), *cert. denied*, 138 S.Ct. 88 (Oct. 2, 2017) – Decedent's estate filed suit against the Palestinian Interim Self-Government Authority asserting claims under the Anti-Terrorism Act after the deceased was killed in a shooting attack in Jerusalem in 2000. The lower court excluded two web pages from the Israel Ministry of Foreign Affairs website, which the decedent's estate argued identified particular people as having murdered the deceased, because the posts "lacked trustworthiness." The pages identified their author as "spokesman," and did not offer information explaining who made the findings set forth or how the findings were made. The court required more than a "bare, one-sentenced assertion" that the web pages were admissible "without further explication of how the pages conveyed factual findings from a legally authorized investigation."

f) *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018) – Residents of Gardendale attempted to secede from the Jefferson County school system, and used social media as part of their effort to garner support. Among the topics discussed on social media was the changing racial demographic of the existing school system. After a lower court found that the defendant Gardendale School Board acted with discriminatory intent to exclude African African-American children from its proposed school system, the board challenged the admission of Facebook comments that the plaintiffs alleged proved discriminatory intent. The Fourth Circuit held that the Facebook comments and posts were relevant admissions under Fed. R. Evid. 401 because they shed light on the motivations and intent behind the later actions of the board. Further, the comments were authenticated under 901(a) because the plaintiffs presented sufficient evidence to make out a prima facie case that the proffered evidence is what it purports to be, including that the board leaders controlled the page, and board members conceded that they were active posters.

IX. Internet Background Checks and Recruiting

The Supreme Court has held that when background checks are reasonable and employment-related, the government's interests as an employer in managing its internal operations, ensuring security of facilities, and employing a competent, reliable, law-abiding workforce outweigh employees' right to privacy, and that when requesting job-related personal information in a background check, the government does not have a constitutional burden to demonstrate that its questions are "necessary" or the least restrictive means of furthering its interests. *NASA v. Nelson*, 562 U.S. 134 (2011). However, as demonstrated by the cases and guidance summarized below, employing offices should be mindful of the potential implications of internet background checks for compliance with the laws applied by the CAA, as well as potential Constitutional issues.

1. Internet Background Checks – Data

A study commissioned by CareerBuilder.com found that 45% of the U.S. employers surveyed had used social media sites in screening applicants. Specifically, the survey found that 29% of employers used Facebook.com, 26% used Linkedin.com, and 21% used Myspace.com. http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009

A study commissioned by Microsoft found that 78% of recruiting and human resources personnel use search engines to evaluate potential employees, and 63% visit social networking sites as part of the screening process. The same study found that 70% of these hiring officials had rejected candidates in light of the information that they gleaned from Internet searches. The survey showed that 75% of those employers actually had a formal policy in place requiring online screening of applicants. https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf

2. Case Law

a) *Gaskell v. Univ. of Ky.*, No. 09-244-KSF, 2010 WL 4867630 (E.D. Ky. Nov. 23, 2010) – A search committee member conducted an internet search for the leading candidate for an

observatory director position at the University of Kentucky and found an article by the candidate believed to blend religious thought with scientific theory. The search committee also became aware of other information about the candidate's religious beliefs, including third party comments that the applicant was a "creationist" and that his former students found his belief in God to be "refreshing." His views were widely discussed among the search committee and other faculty, some of whom admittedly expressed concern that his religious position would impact his ability to do the job. When the candidate was not selected, both he and a non-search committee member who had participated in the interviews filed EEO religious discrimination complaints, and the candidate then filed a complaint in district court. The candidate presented direct evidence of discrimination, and the court determined that there were triable issues of fact, denying both parties' summary judgment motions.

b) *Nieman v. Grange Mut. Cas. Co.*, No. 11–3404, 2012 WL 1467562 (C.D. Ill. Apr. 27, 2012) – A job applicant claimed that a prospective employer discovered his age by seeing the year he graduated from college on LinkedIn, and subsequently discriminated against him on the basis of age by denying him employment. The court found that the plaintiff had alleged sufficient evidence of age discrimination to deny the company's motion to dismiss, even though the plaintiff did not plead that the employer actually reviewed his LinkedIn profile, had actual knowledge of the date he graduated from college, or actually determined the plaintiff's age. This case demonstrates that the mere existence of social media information can support a claim of discrimination – at least enough to justify denying a motion to dismiss, and especially when the plaintiff is pro se.

c) *Mullins v. Dep't of Commerce*, 244 F. App'x 322 (Fed. Cir. 2007) – A Department of Commerce employee was terminated for government vehicle misuse, official time misuse, government travel card misuse, and falsification of travel documents. The employee argued that "his guaranteed right to fundamental fairness was seriously violated when [his employer] ' "google searched" my name… and came across… my alleged prior removal from Federal Service by the Air Force,'" and that the employer's decision to fire him was influenced by this online information. The Federal Circuit held that because the record supported the employer's testimony that the employee's prior job losses did not affect his termination, the employee was not prejudiced and his termination did not violate his right to due process.

3. GINA

The Genetic Information Nondiscrimination Act of 2008 (GINA) applies to covered employees (including applicants) and employing offices as defined in the CAA. 42 U.S.C. § 2000ff(2)(A)(iii), (B)(iii). Accordingly, employing offices should be cautious when conducting background checks to avoid running afoul of the statute.

- Under the EEOC's regulations, an employer may not "request, require, or purchase genetic information of an individual or family member of the individual," with certain narrow exceptions, and the term "request" is defined to include "conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information[.]" 29 C.F.R. § 1635.8(a). Given that the OOC looks to the EEOC's regulations for guidance, employing offices should take care not to conduct targeted

searches on social media or other internet sites that would likely result in the discovery of genetic information about employees or job applicants.

- The regulations actually address social media specifically in one of the exceptions: GINA is not violated when genetic information is acquired from "documents that are commercially and publicly available for review or purchase," which includes "electronic media," but the exception does *not* apply to "genetic information acquired through sources with limited access, such as social networking sites and other media sources which require permission to access from a specific individual or where access is conditioned on membership in a particular group, unless the covered entity can show that access is routinely granted to all who request it[.]" 29 C.F.R. § 1635.8(b)(4), (b)(4)(ii).

- Finally, there is an exception for situations in which an employer "inadvertently" acquires genetic information. 29 C.F.R. § 1635.8(b)(1). For example, the exception applies where "[a] manager, supervisor, union representative, or employment agency representative inadvertently learns genetic information from a social media platform which he or she was given permission to access by the creator of the profile at issue (*e.g.,* a supervisor and employee are connected on a social networking site and the employee provides family medical history on his page)." 29 C.F.R. § 1635.8 (b)(1)(ii)(D). Employers should be wary, however, of conducting further probing after inadvertently discovering genetic information, because additional information would not necessarily be considered to have been discovered "inadvertently."

4. Stored Communications Act

The Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq.*, prohibits the government from compelling the disclosure of certain electronically stored information. Although the SCA was enacted in 1986, prior to the advent of social networking sites, courts have since applied its protections to information related to social media accounts, including in the employment context. While these cases do not necessarily concern background checks specifically, a similar analysis could potentially apply.

a) *Pietrylo v. Hillstone Rest. Grp.*, No. 06–5754 (FSH), 2008 WL 6085437 (D.N.J. July 25, 2008) – The court found that if an employer's request for access to an employee's social media forum is obtained by coercion, it is unlawful under the Stored Communications Act. In response to rumors that the plaintiff employee was complaining about work and clientele in his private MySpace group, a restaurant manager asked one of the plaintiff's coworkers to provide access to the MySpace group by providing the coworker's login information. The court reasoned that access to the digital forum was not "authorized," because the disclosing coworker did not freely or voluntarily grant access to the information, as she would likely have been terminated had she failed to comply with the employer's request.

b) *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868 (9th Cir. 2002) – The plaintiff, an airline pilot, created a website that was critical of the employer and invited two other employees to view the website. Those two coworkers never accepted their invitations to access the website until the vice president of the airline asked them to provide him with access to the website. The district court granted summary judgment in favor of the employer, but the Ninth Circuit reversed, holding that when viewing the facts in the light most

favorable to the plaintiff, the two invited employees never "used" the site and therefore could not authorize access to the vice president under the Stored Communications Act.

5. Guidance

An *HR Magazine* article published by the Society for Human Resource Management (SHRM) gives the following tips for leveraging social media information in background checks:

- Never ask for passwords. In several states, employers cannot ask an applicant (or employee) for his or her social media password by law. In all 50 states, asking for an applicant's (or employee's) password creates a real risk of violating the federal Stored Communications Act. For this reason, employers should look only at content that is public.

- Have HR do it. It is best if someone in HR, rather than a line manager, checks candidates' social media profiles. The HR professional is more likely to know what he or she can and cannot consider.

- Look later in the process. Check social media profiles after an applicant has been interviewed, when his or her membership in protected groups is likely already known.

- Be consistent. Don't look at only one applicant's social media profiles.

- Document decisions. Print out the page containing social media content on which you base any hiring decision and record any reason for rejection, such as bad judgment. This protects you if damaging content has been deleted by the time a decision is challenged.

- Consider the source. Focus on the candidate's own posts or tweets, not on what others have said about him or her. You may want to give the candidate a chance to respond to findings of worrisome social media content. There are impostor social media accounts out there.

- Be aware that other laws may apply. For example, if you use a third party to do social media screening, you are probably subject to the federal Fair Credit Reporting Act (and similar state laws). Also, some state laws prohibit adverse action based on off-duty conduct, except under narrow circumstances.

https://www.shrm.org/hr-today/news/hr-magazine/pages/0914-social-media-hiring.aspx

The EEOC offers general guidance on background checks that may be helpful in the social media background check context:

- Employers must treat all candidates equally when requesting or searching for background information – for example, an employer may not request more background information from a candidate because he is of a particular race, gender, or other protected class.

- Employers should be particularly cautious when basing employment decisions on unfavorable background information that may be more common among members of certain protected classes. Such policies may implicate "disparate impact" concerns.

- Guidance for employers: https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm

- Guidance for job applicants and employees: https://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm

The EEOC's guidance to be mindful of the disparate impact implications of using internet background searches to weed out candidates applies with equal force to the candidate sourcing context, where employers focus on particular social network platforms to recruit viable candidates. Many of these platforms are more popular among certain demographics – for example, LinkedIn is used by white and black adults nearly twice as much as it is used by Hispanic adults, and the majority of LinkedIn users are aged 25-49, with slightly higher use attributed to those aged 25-29. If employers limit their candidate pool to applicants from these platforms, this may have a disparate impact on protected groups that either do not use these platforms or use them at a significantly lower rate than other groups.

Sources:

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http://www.pewinternet.org/2018/03/01/social-media-use-2018-appendix-a-detailed-table/