

# Social Media, The Public Employee & The First Amendment

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# City's Social Media Policy

- Employees may speak as individuals (as opposed to their capacity as an employee) only when expressing a personal opinion on public policy matters, and must clarify those opinions as such.

# The FSPD Policy 1109.07

- “. . . any online activity that detracts from the mission of the Department or reflects negatively on the Department or any of its members will be viewed as a violation of this policy.”
- “Negative comments on the internal operations of the Department or the specific conduct of supervisors or peers that could impact the public perception of the Department are not protected First Amendment speech and are thereby prohibited.”
- “Members may comment on issues of general or public concern (as opposed to personal grievances) so long as the comments do not disrupt the workplace, interfere with important working relationships or efficient work flow, or undermine public confidence in the member, other members, or the Department.”
- Members shall not post, transmit, reproduce, or disseminate information to the internet that would tend to discredit or reflect unfavorably upon the Department or any of its members.

# FSPD Rules & Regulations

- Rule 304 requires police officers to treat supervisors, subordinates and associates with respect. Employees shall be courteous and civil at all times in their relationship with one another.
- Rule 305 prohibits officers from publicly criticizing or ridiculing the Department, its policies, or its employees by speaking, writing, or expressing any manner which:
  - Is defamatory;
  - Is obscene;
  - Is unlawful; or
  - Tends to impair the operation of the Department by interfering with its efficiency, with the ability of supervisors to maintain discipline, or by a reckless disregard for the truth.
- Rule 306 prohibits officers from mocking, ridiculing, taunting, or belittling any person at any time. Officers cannot willfully embarrass, humiliate, or shame any person.

# The FSFD Policy – Article 26

- The Fort Smith Fire Department endorses the secure use of social media to enhance communication and information exchange; streamline processes; and foster productivity with its employees. This policy establishes this department's position on the use and management of social media and provides guidelines on the management, administration, and oversight. This policy is not meant to address one particular form of social media; rather social media in general terms as technology will outpace our ability to discover emerging technology and create policies governing its use.
- Social media provides a valuable means of assisting the department and its personnel in meeting community education, community information, fire prevention, and other related organizational and community objectives. This policy identifies possible uses that may be evaluated and utilized as deemed necessary by fire department administrative and supervisory personnel. This department also recognizes the role that social media tools may play in the personal lives of department personnel. The personal use of social media can have an effect on fire departmental personnel in their official capacity as firefighters. This policy is a means to provide guidance of a precautionary nature as well as restrictions and prohibitions on the use of social media by department personnel.

# The FSFD Policy – Article 26

- Section 26.1 Definitions
- 26.1.1 Blog: A self-published diary or commentary on a particular topic that may allow visitors to post responses, reactions, or comments.
- 26.1.2 Post: Content an individual shares on a social media site or the act of publishing content on a site.
- 26.1.3 Profile: Information that a user provides about himself or herself on a social networking site.
- 26.1.4 Log On: To establish communications and initiate interaction with a network using a profile.
- 26.1.5 Social Media: A category of Internet-based resources that enable the user to generate content and encourage other user participation. This includes, but is not limited to, social networking sites: Facebook, MySpace, Twitter, YouTube, Wikipedia, Google Earth, blogs, and other sites. (There are thousands of these types of sites and this is only a short list.)
- 26.1.6 Social Networks: Platforms where users can create profiles, share information, and socialize with others using a range of technologies.
- 26.1.7 Speech: Expression or communication of thoughts or opinions in spoken words, in writing, by expressive conduct, symbolism, photographs, videotape, or related forms of communication.

# The FSFD Policy – Article 26

- Section 26.2 Department-Sanctioned Use
- 26.2.1 Department personnel representing the department via social media outlets shall do the following:
  - 26.2.1.1 Conduct themselves at all times as representatives of the department and, accordingly, shall adhere to all department standards of conduct and observe conventionally accepted protocols and proper decorum.
  - 26.2.1.2 Identify themselves as a member of the department in their profile.
  - 26.2.1.3 Shall not post, transmit, or otherwise disseminate confidential information, including photographs or videos, related to department training, activities, or work-related assignments without approval of the Fire Chief or his designee.
  - 26.2.1.4 Shall not conduct political activities or private business.
  - 26.2.1.5 Employees shall observe and abide by all copyright, trademark, and service mark restrictions in posting materials to electronic media.
- Section 26.3 Potential Uses
- 26.3.1 Social media is a valuable investigative tool when providing information about, but not limited to: road closures; special events; weather emergencies; major ongoing events that could affect the entire community; and topography of district

# The FSFD Policy – Article 26

- Section 26.4 Personal Use
- 26.4.1 Department personnel shall abide by the following when using social media.
- 26.4.1.1 Department personnel are free to express themselves as private citizens on social media sites to the degree that their speech does not impair or impede the performance of duties, impair discipline and harmony among coworkers, or negatively affect the public perception of the department.
- 26.4.1.2 As public employees, department personnel are cautioned that their speech either on or off duty, and in the course of their official duties that has a nexus to the employee's professional duties and responsibilities, may not necessarily be protected speech under the First Amendment.
  - This may form the basis for discipline if deemed detrimental to the department.
  - Department personnel should assume that their speech and related activity on social media sites will reflect upon their position within the department and of this department.



# The FSFD Policy – Article 26

- 26.4.1.3 Department personnel shall not post, transmit, blog, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the Fire Chief or designee.
- 26.4.2 Members are prohibited from the following while on duty:
  - 26.4.2.1 Log on to any type of Social Network that is of a sexually oriented nature.
  - 26.4.2.2 Post any speech containing obscene or sexually explicit language, images, or acts and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, any religion, or any protected class of individuals.
  - 26.4.2.3 Divulge information gained by reason of their authority; make any statements, speeches, appearances, and endorsements; or publish materials that could reasonably be considered to represent the views or positions of this department without express authorization.
- 26.4.3 Department personnel should expect that any information created, transmitted, downloaded, exchanged, or discussed in a public online forum may be accessed by the department at any time without prior notice.

# Public Employees' First Amendment Rights

- Public employees do not lose their First Amendment rights they would otherwise have as citizens to comment on matters of public concern simply due to their employment.
- A government employer cannot take adverse employment actions against its employees for exercising their First Amendment rights; however, public employees' First Amendment rights are not absolute. *Shockency v. Ramsey County*, 493 F.3d 941 (8th Cir. 2007).
- A public employer can restrict its employees' speech that has the potential to affect the public employer's operations. *Vincent v. Story County*, No. 4-12-CV-00157-RAW (S.D. Iowa 2014); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
- There is a two-part inquiry used to determine whether a public employer may restrict employee speech. *Pickering v. Board of Edu.*, 391 U.S. 563 (1968)
  - (1) First inquiry requires determining whether the employee spoke as a citizen on a matter of public concern. If yes, proceed to second inquiry.
  - (2) Second inquiry requires a court to balance the interests of the employee in commenting on matters of public concern as a citizen and the interests of the public employer in promoting the efficiency of the public services it performs through its employees.

# Matter of Public Concern

- Speech involves a matter of public concern when it addresses a matter of political, social, or other concern to the community at large. *See Connick v. Myers*, 461 U.S. 138 (1983).
- Certain subjects, by their very nature, have been recognized as involving matters of public concern. For example, speech concerning the use of public funds, speech exposing criminal activity or potential misconduct by public officials would be a matter of public concern. *See Vincent v. Story County*, No. 4-12-CV-00157-RAW (S.D. Iowa 2014)
- Speech that criticizes a public employer in his capacity as a public official addresses matters of public concern. *See Mattingly v. Milligan*, No. 4:11CV00215 JLH (E.D. Ark. 2011).
- Heightened public interest, though not dispositive, may also indicate that the issue is one of public concern. *Id.*

# Matter of Public Concern

- If the employee's speech is not a matter of public concern, then the employee has no First Amendment protection and his/her employer can restrict such speech. *See Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999)(officer's statements about conversations with fired officers and witnesses, taken at the request of the police chief, were made in capacity as employee, not as a concerned citizen; therefore, the statements were not a matter of public concern).
- Employee's speech which is purely job related is not a matter of public concern; therefore, no First Amendment protection for such speech. *Id.*
- Courts consider the motive of the speaker in determining whether speech is on a matter of public concern.

# Balancing Employee's Interests with Employer's Interests

- Employee's interest is the right to speak as a citizen on matters of public concern.
- Government has an interest in effective and efficient fulfillment of its responsibilities to the public.
- Government has a legitimate purpose in promoting efficiency and integrity in the discharge of official duties, and maintaining proper discipline in the public service.

# Balancing Employee's Interests with Employer's Interests

- In balancing the employee's and government employer's competing interests, six factors are examined:
  - (1) the need for harmony in the office or work place;
  - (2) whether the government's responsibilities require a close working relationship to exist between speaker employee and co-workers when the speech in question has caused or would cause the relationship to deteriorate;
  - (3) the time, manner, and place of the speech;
  - (4) the context in which the speech arose;
  - (5) the degree of public interest in the speech; and,
  - (6) whether the speech impeded the employee's ability to perform his or her duties.
- Balancing test is flexible; weight given any one factor depends upon the specific circumstances of each case.
- A government employer is not liable for an adverse employment action taken against its employees for their speech if the government interest outweighs the interests of the employees in their expressive conduct. *See Shockency v. Ramsey County*, 493 F.3d 941 (8th Cir. 2007).

# Public Safety Employer—Police & Fire Departments

- Public safety employers have more significant interests than the typical government employers in regulating the speech activities of its employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in its ability. *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993).
- Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than ordinary government employer. *Tindell v. Caudell*, 56 F.3d 966 (8th Cir. 1995).
- When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Public safety employer does not have to allow disruption within department's operations or working relationships before taking action and restricting speech. *See Connick v. Myers*, 461 U.S. 138 (1983).
- The importance of the public safety function is seen to allow greater latitude in regulating employee speech. *Tyler v. City of Mountain Home*, 72 F.3d 568 (8th Cir. 1995).

# Public Safety Employer—Police & Fire Departments

- Public safety employer's determinations of both the potential for disruption as a result of the speech, as well as the employer's response to the actual or perceived disruption are entitled to considerable judicial deference.
- The need for harmony and close working relationships between co-workers in a police department is of great importance. *Tindel v. Caudell*, 56 F.3d 966 (8th Cir. 1995).



# In the context of social media, what is speech?

- Is posting a comment on your or another's page considered speech? Yes, *see Gresham v. City of Atlanta*, NO. 12-12968 (11th Cir. 2013).
- Is “liking” something on Facebook considered speech? Yes, *see Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).
  - It is pure speech and symbolic expression.
  - Clicking the “like” button causes to be published a statement that the user “likes” something, which is itself a substantive statement.
  - Also, when the “like” button is clicked, a “thumbs up” symbol appears in connection with the “liked” comment or page.
- Online speech is worthy of the same level of protection as other speech. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004).

# National Labor Relations Act

- Does a public employee have any protection for his/her speech under the National Labor Relations Act in addition to the First Amendment protection?  
NO!
- Excepted from the definition of “employer” under the NLRA is “the United States . . . or any State or political subdivision thereof . . . .” 29 U.S.C. § 152(2).
- NLRA applies only to private employers.

*Maria Gresham v. City of Atlanta, et al.*  
No. 1:10-CV-1301-RWS (May 7, 2012)

- Gresham, a police officer in the Atlanta Police Department, arrested an individual named Scrubb, who happened to be the nephew of APD Investigator Barbara Floyd.
- Gresham stated in the arrest report that during the arrest Floyd took Scrubb alone to another room where Floyd removed two cell phones and money from Scrubb's pockets and possibly spoke to him.
- A few days later, Gresham posted the following on her Facebook account:
  - Who would like to hear the story of how I arrested a forgery perp at Best Buy only to find out later at the precinct that he was the nephew of an Atlanta Police investigator who stuck her ass in my case and obstructed it?? Not to mention the fact that while he was in my custody, she took him into several other rooms alone before I knew they were related. Who thinks this is unethical?
- Weeks later, a complaint was filed with the APD's Office of Professional Standards asserting that Gresham's Facebook post violated APD rule prohibiting officers from publicly criticizing other officers (think FSPD Rule 305.04)

## *Maria Gresham v. City of Atlanta, et al.*

- APD Chief had policy of appointing officers with open OPS investigations to discretionary rank positions; therefore, Gresham was not promoted to investigator as a result of the pending OPS investigation.
- Gresham sued, asserting that she was retaliated against in violation of the First Amendment.
- District Court concluded that Gresham's interest in speaking (Facebook post) did not outweigh the government's interest in promoting efficiency of its public services, maintaining unity and discipline within the force, and in preserving public confidence in its abilities; therefore, Gresham's First Amendment rights had not been violated.
  - The government's interest as employer in efficient public service is particularly strong in the context of a police department.
- Appellate court noted context of speech (Facebook) was not one calculated to bring the matter to attention of proper authority.

*Tyler v. City of Mountain Home,*  
72 F.3d 568 (8th Cir. 1995).

- Not case concerning comment on social media but important in context of public employee speech.
- Tyler, then a sergeant with the Mountain Home Police Department, wrote a letter, on city letterhead, to a sergeant with the Baxter County Sheriff's Department. In his letter, Tyler complained that deputies within the sheriff's department violated a policy of both the MHPD and the Sheriff's Department which mandated that suspects with blood alcohol levels in excess of the legal limit were to be arrested. Tyler stated that failure to arrest suspect not only violated policy but also posed a threat to public safety.
- Tyler sent the letter despite the fact that his Chief had instructed that any letters sent on official stationery had to be approved by the Chief.
- Shortly thereafter, Tyler was demoted from sergeant to patrolman as a result of his failure to follow chain of command in sending the letter to Sheriff's Dept.
- Tyler filed suit – asserted that his letter was protected by First Amendment.

## *Tyler v. City of Mountain Home*

- Did Tyler's letter address topics which were a matter of public concern?
  - Court held it was “undisputed . . . that Tyler's letter is properly characterized as protected speech,” i.e., it addressed a matter of public concern.
  - Why? The failure to arrest drivers with blood alcohol level in excess of legal limit poses a threat to the public safety, i.e., it's a concern to the community at large.
- Balancing of Tyler's free speech rights against the MHPD's interests
  - Working relationship between the two agencies important
  - Two agencies depended on each other for various functions
  - Recipient of letter and Sheriff informed the Chief that Tyler's letter, sent outside chain of command, could damage the good relationship between the agencies.
  - Tyler's failure to follow chain of command in sending letter “called into question his working relationship with his superior officers and at least potentially impaired the police chief's ability to control the actions of his subordinates and maintain the discipline required by the department to insure public safety.
- Court held that PD's interest in maintaining discipline, morale, and a proper chain of command outweighed Tyler's interest in speech at issue.

*Mattingly v. Milligan,*  
No. 4:11CV00215JLH (Nov. 1, 2011)

- Milligan was elected Saline County Circuit Clerk in 2010, beating the incumbent, Doug Kidd. Mattingly was an employee in the Saline County Circuit Clerk's office.
- On December 27, 2010, Milligan informed three full-time employees and one part-time employee that he was not retaining them in the circuit clerk's office. Milligan knew that two of the employees he let go had supported Kidd in the election; there was evidence that Milligan knew that a third employee had supported Kidd.
- Mattingly was informed that she would be retained in the clerk's office on the same day the others were let go.
- After work, Mattingly posted the following on her Facebook page: "So this week not going so good bad stuff all around"
- Shortly thereafter, a kind friend offered in response: "Will be praying. Speak over those bad things positively"
- Then Mattingly posted in reply, "I am trying my heart goes out to the ladies in my office that were told by letter they were not longer needed . . . It's sad"

## *Mattingly v. Milligan*

- Mattingly's posts attracted a number of responses from Saline County residents who expressed concern for her position and expressed anger for Milligan's decision to terminate the employees.
- Milligan received calls from constituents regarding Mattingly's posts.
- The next day, December 28, Milligan sent Mattingly a letter stating that she would not be retained. The letter provided in part, "The issue is when I have constituents calling me with concerns about comments you have made that are in the public domain."
- The court found that Mattingly's posts touched on a matter of public concern.
  - Based on the comments to Mattingly's posts, some people understood her comments to be about Milligan's decision to terminate the employees in the clerk's office; people's comments included criticism of Milligan's termination decisions.



## *Mattingly v. Milligan*

- There was no evidence that Mattingly's post adversely affected the efficiency of the circuit clerks – this weighs in favor of Mattingly.
- Milligan only offered bare allegations that he was afraid the posts would disrupt his transition into office. Because there was no evidence that Mattingly's speech disrupted the operations of the workplace, Mattingly's interest in speaking outweighed her employer's interest.
- Milligan was not entitled to summary judgment as to Mattingly's free speech claim. The case was subsequently settled.

*Vincent v. Story County, Iowa,*  
Case No. 4:12-cv-00157-RAW (S.D. Iowa, 2014)

- Vincent worked as a victim witness coordinator in the Story County Attorney's office. Her job brought her into frequent contact with the Nevada Police Department and Iowa Attorney General's office.
- Vincent's husband's cousin, Kevin Johnson, was shot and killed by a Nevada, Iowa police officer. Nevada is the county seat of Story County.
- Because of Vincent's relationship with the decedent, the Story County's Attorney's office was not involved in the investigation of the shooting; investigation conducted by the Iowa Attorney General's office. Vincent's supervisor instructed her not to discuss the details of the investigation with anyone.
- After the investigation was completed, Vincent's supervisor gave her the details of the investigation prior to it being released to the public and again told her not to comment about the results.
- The investigation found that the shooting of Johnson was justified.

## *Vincent v. Story County, Iowa*

- After the results of the investigation were released to the public, Vincent's friend, Nick Herridge, who was also a friend of the decedent, posted the following comment on his Facebook page:
  - “My friend was not the piece of sh\*\* you say he was! He was a good person you shot for no reason and now you must cover it up!
- Vincent “liked” the post of Herridge. Vincent's Facebook page identified her as an employee of Story County. Vincent set up her Facebook page so that only her “friends” could see her posts.
- Vincent's supervisors were informed of Herridge's post and Vincent's “like.”
- Vincent was terminated two weeks after her “like” of the above post for “insubordination and direct disobedience” to her supervisor.
- Vincent's “liked” post was the primary reason for her termination.

## *Vincent v. Story County, Iowa*

- “[A] ‘like’ post to a comment can be speech on a matter of public concern if the comment liked is itself speech on a matter of public concern.”
- Was Vincent’s “like” of Herridge’s post speech regarding a matter of public concern? The court thought this was a close question.
- “Speech concerning potential misconduct by public officers is a matter of public concern.” Content is not the sole factor in determining whether speech is a matter of public concern; also look at employee’s role and motivation in speaking.
- Even though Vincent’s motivation in speaking (“liking” the post) was personal, the subject of her speech (potential police cover-up of the reason for the shooting) was not and clearly involved a matter of public concern.
- What if the court had found that Vincent’s “like” was not speech on a matter of public concern? SHE LOSES! No First Amendment protection for speech by public employee that is not a matter of public concern.

## *Vincent v. Story County, Iowa;* Balancing Interest of Vincent and Employer

- The County Attorney's office had a close relationship with the Nevada PD that was important to its operations.
- Vincent's speech had the potential to disrupt the County Attorney's working relationship with the NPD and Iowa Attorney General's office and impeded the performance of her job.
- Comparable to a public safety employer (police & fire departments) the importance of a county attorney's law enforcement responsibilities should permit a higher of deference in regulating its employees' speech that is reasonable to believe may negatively affect working relationships essential to the fulfillment of those responsibilities.

## *Vincent v. Story County, Iowa*

- Vincent's interest in "liking" the post carries minimal weight because it was motivated by a personal interest.
- When self-interest is the motivation behind an employee's speech, the employee's speech is entitled to less weight in the *Pickering* balance than speech intended to serve the public interest.
- Vincent's speech was not intended to serve the public interest by exposing police misconduct – she didn't intend her "like" to convey the implied charge of police misconduct, which could reasonably be taken from it.
- The court concluded "that the interests of [the employer] prevail in the *Pickering* balance owing to the potential adverse effect of Ms. Vincent's 'like' post on the efficient discharge of the law enforcement responsibilities of the County Attorney's office."
- Vincent's termination did not violate her First Amendment free speech rights.

*Duke v. Hamil, et al.,*  
No. 1:13-CV-01663-RWS

- Duke was a Captain and Deputy Chief of Police of the Clayton State University Police Department.
- On November 6, 2012, following the 2012 presidential election, Duke posted a picture of the Confederate flag with the phrase “It’s time for the second revolution” on his Facebook page. Duke was not on duty at the time of the post; Duke’s Facebook page did not identify him as a an employee of the CSU Police Department or reference that Duke was a police officer.
- Duke removed the post within an hour of posting it; however, during that period, someone provided an image of the post to an Atlanta television station. The station ran an evening news story discussing Duke’s Facebook post and his position as Deputy Chief with the CSU Police Department.
- After a department investigation, Duke was demoted to Detective and stripped of his Deputy Chief duties, resulting in a \$15,000 pay cut.

## *Duke v. Hamil, et al.*

- In making his Facebook post did Duke speak as a citizen on a matter of public concern?
  - The court held that Duke’s post could “be fairly considered to relate to matters of political concern to the community because a Confederate flag can communicate an array of messages, among them various political or historical points of view.”
  - Considering the image of the flag with the second revolution comment, the court held it was “plausible that Plaintiff was expressing his dissatisfaction with Washington politicians.”
  - “Plaintiff’s speech was thus a matter of public concern because it expressed disapproval of elected officials . . . .”



## *Duke v. Hamil, et al.*

- Did Duke's interests in speaking on a matter of public concern outweigh the interests of CSU Police Department's interest?
  - Court noted that police departments have an interest in maintaining a favorable reputation with the public.
  - Factors to consider in determining whether the government's interest in efficient public service outweighs employee's interest in protected speech:
    - Whether speech at issue impedes the government's ability to perform its duties efficiently;
    - The manner, time, and place of speech;
    - The context within which the speech was made.
  - Given Duke's position, his speech (post) had the potential to undermine loyalty, discipline, and good working relationships among the department's employees if left unaddressed.

## *Duke v. Hamil, et al.;*

# Balancing Interests of Duke and Police Department

- The public attention Duke's speech received also implicated the Department's reputation and the public's trust. Court found there was a genuine potential for Duke's post to harm the department's reputation.
- Because of Duke's position, his speech reflected on the department's reputation more significantly than conduct of lower ranked officers.
- Duke's comment, appearing to advocate revolution, could undermine confidence in the department.
- Duke's speech had the potential for impeding the department's ability to perform its services efficiently.
- Because Duke made the post off duty and off campus, his First Amendment interest is heightened.
- Despite his intent, Duke's post became public after someone sent it to a news station.

## *Duke v. Hamil, et al.;*

# Balancing Interests of Duke and Police Department

- As for context of his post, Duke appeared to advocate revolution during a presidential election and associated that idea with a Confederate flag. Duke likely sent a partisan, if not prejudicial message to the department and the community.
- Court held that the department's interests outweigh Duke's interest in speaking. Duke's free speech right was not violated when he was demoted from Captain to Detective.

# ATTENTION FSPD OFFICERS

- Recently, the Fort Smith Civil Service Commission stated that “future violations of the FSPD Social Media Policy Rules or Policies that first occur after November 4, 2014 will be resolved by the Commission on a zero tolerance basis and strict compliance with the applicable FSPD Rules and Regulations and Policies and Procedures shall be required by the Commission.”
- The Commission further stated that “NOTICE IS HEREBY GIVEN that Fort Smith Police Officers who have questions about whether a social media posting is permissible under the Rules and Regulations or Policies and Procedures of the FSPD should either ask, and receive permission from, their supervisors before making the posting or should refrain from making the posting until they determine that the posting does not violate FSPD Rules and Regulations or Policies and Procedures.”

# Questions/Comments