



Policy Advisor

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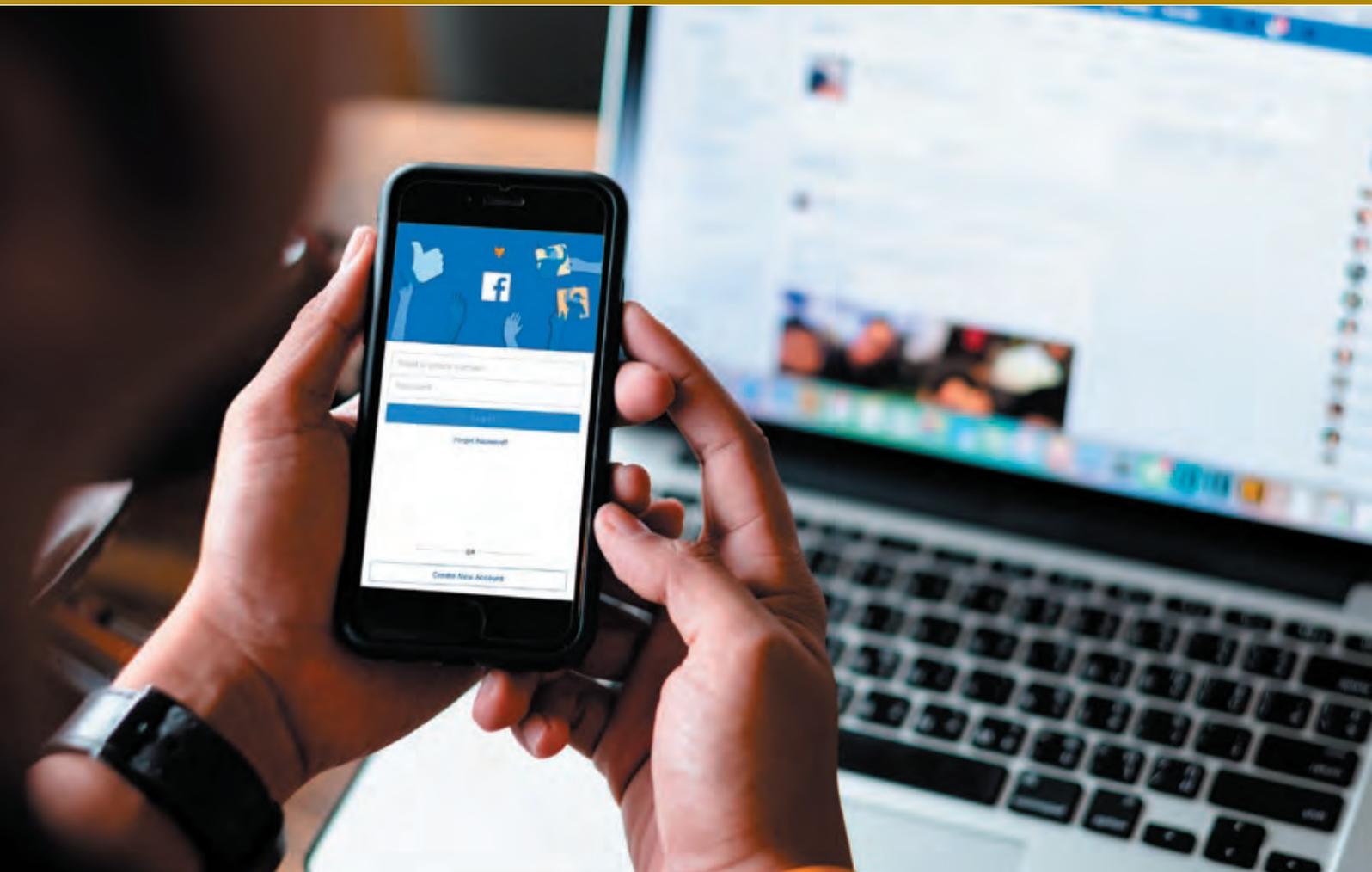
USE OF SOCIAL MEDIA BY EMPLOYEES AND SCHOOL BOARD MEMBERS

It is no secret the use of social media is commonplace in today's society as a means to communicate on a daily basis. People use it to communicate information about themselves, their family, their jobs, and their opinions on various issues, including school employees and school board members. Most of the information shared or posted on social media outlets is harmless and can be informative. But some of the information shared is not and can cause trouble in the school setting or with other school employees and/or students. When this happens, what is the authority of the school administration to discipline the employees? A recent case out of Tennessee, which is being appealed to the United States Supreme Court, provides the answer to a great extent. The case is *Bennett v. Metro. Govt. of Nashville and Davidson County*, 977 F.3d 530 (6th Cir. 2020). This case involves a government employee who posted a message on her Facebook page of a political nature during non-working hours and was fired for the post.

The facts of the case are as follows: Bennett is a white female who worked for the city government as an Emergency Telecommunicator in the city's Emergency Communications Center (ECC). Bennett stayed up to watch the election results of the 2016 Presidential Election. She posted a message expressing support for President Trump after he won the election on her public Facebook page. A few minutes later a man she did not know posted a response that contained a racial slur describing African

American voters. Bennett replied to this post using the same racial slur. Early the next day, she received messages from her friends that the post was offensive and asked why she would use the term. At the ECC, some of her co-workers saw the post and were offended. They reported this to their supervisor. The HR department also received comments from other employees about the post as did the Mayor's Office from citizens who saw the post on the Facebook page. Bennett took the post down later that afternoon at the urging of her friends. Her supervisor and others with the city government saw the post in the morning as part of its investigation and were going to ask Bennett to take it down but noted she had done so in the afternoon. When Bennett came to work the next day, her supervisors talked to her and put her on a paid leave while they investigated the incident as many employees were upset about the post and indicated they were not sure they could trust Bennett as a co-worker. In this meeting, Bennett did not apologize for her post and indicated she was the victim and not her co-workers.

The post resulted in the employees talking about it for weeks. The city brought in counselors and diversity facilitators to address the issues affecting the employees and the work environment. The other emergency telecommunicators Bennett worked with indicated they did not trust Bennett and were not sure they could work with her when she returned. The managers of the ECC did not anticipate the effects of Bennett's post would last as long as it



did, and the extent of the distrust generated toward Bennett. As a result, they terminated Bennett after giving her notice and a due process hearing. Bennett sued the city claiming her termination violated her free speech rights alleging she was not terminated due to the disruption her post caused but due to her post being political in nature. The trial court found for Bennett; the city appealed. The appellate court reversed and found for the city.

The appellate court reviewed the case using the *Pickering* and *Connick* legal standards when reviewing a case of a government employee being fired for speech. The first step is to determine if the employee was speaking as a private citizen or as a government employee. In this case, both parties agree she was speaking as a private citizen as her post did not relate to her job duties and her speech took place when she was not on duty. The second step is to determine if the content of the speech was a public concern such as a social, political, or community matter. The court found Bennett's speech was political as it addressed the election results. But the court ruled Bennett's speech was not purely political speech as it contained a racial slur; thus, it was not subject to the full protection of the First Amendment. The court also noted

Bennett posted the speech on her public-facing Facebook page and she indicated on her Facebook page she was an employee of the ECC. The final step in the legal analysis is the balancing of the employee's interest in commenting on public concern matters and the employer's interest in the efficiency of providing public service through its employees. The factors considered in this balancing test are whether the employee's speech impairs the employee's superiors' ability to discipline or creates disharmony among co-workers in the workplace; has a detrimental impact on the working relationship with other employees that requires loyalty and confidence; interferes with the regular operations of the entity; and/or undermines the mission of the employer.

In reviewing these factors, the court found Bennett's speech created disharmony among her co-workers and in her workplace, had a detrimental impact on her working relationship with her co-workers, and undermined the mission of the ECC. The court found Bennett's post created distrust of her among her African American co-workers especially and their confidence in her ability to provide fair services to all the citizens of the city was diminished. Since Bennett worked in the emergency call center

which was the first line of emergency care for the citizens of the city, the workers had to have confidence in and rely on each other to provide the best and most attentive care to anyone who called the center. This was diminished by Bennett's post and thus the working relationship with her coworkers was impacted negatively as well. The court found Bennett's post undermined the mission of the ECC not only with respect to the damaged relationship with her coworkers but the public as well, given that members of the public who saw the post called into the center and the mayor's office expressing concern about Bennett's attitude and how it would affect the service they receive when they call 911. When deciding to fire Bennett, the manager of the center took all of the above into consideration including the length of time spent to address the aftereffects of Bennett's action and that



Bennett's continued presence in the ECC would continue to contribute to the strife among the workers. The court agreed and based upon the evidence found the balance of interests weighed in favor of the city and found its decision to terminate her employment did not violate her free speech rights.

The court did note if Bennett's Facebook page containing the post was not public-facing, did not mention she was an employee of the city's ECC, and/or contained a disclaimer the posts were her own opinion and she was not making them as a representative of the ECC, the outcome of the case may be different as it would not have reached the public and possibly her coworkers to the extent that it did; also, members of the public would not have known of her employment with the city causing less consternation of their confidence in the fairness of services they would receive from Bennett. The court indicated these factors were key to the disharmony in her workplace and the public's reaction to her post. This illustrates many of these cases depend upon the facts present in the case when a court is looking at the factors when balancing the interests of the employee to speak on matters of public concern and the employer to have an efficient workforce to provide public services.

When a school board is considering a policy on the use of social media by its employees, the above case and legal analysis should be considered. The *Bennett* case and other cases decided on similar issues make clear a government employer cannot discipline employees for posts made as private citizens on their own private social media about public matters when it is clear the posts are their own opinions and are made during non-working hours. Courts have also made clear governmental entities may control the speech of their employees while the employees are acting in the capacity of an employee or as part of their job duties and during working hours, especially when using government-owned equipment or accounts. The policy should address these parameters and the factors considered by the *Bennett* court to be key to finding for the city. The policy should make clear employees have the right to have social media accounts as private citizens and may not be subject to the policy or discipline under the policy if there is no indication on the account or post the employee is an employee of the school corporation and is not speaking on behalf of the school corporation. There still may be some posts for which

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an employee can be disciplined such as speech that does not relate to a public concern and can be shown to cause a disruption in the school educational or work environment.

The next question may be can a school board's policy address the use of social media by a school board member? The answer is Yes. The policy can address the use of social media by a school board member when the member is using school equipment or acting in the capacity of a school board member. The speech of the board member in an official capacity is government speech that can be regulated. A school board member's social media accounts can be subject to similar parameters as for an employee. If the school board member's social media account appears to be one for the member in the capacity of a school board member, it has been considered by various courts to be government speech subject

to the free speech rights of citizens. A case out of Virginia is illustrative of this point. A county official created a Facebook page that contained her position, the seal of the county, and contained in large part information on county business and not any personal information. The official allowed citizens to comment on the page but took down one citizen's comments that she did not like. The court ruled the page as created appeared to be the county official's government office page. The court found the county official violated the citizen's free speech rights by removing his comments. The court ruled the individual was liable in her official capacity, but the county board was not due to its lack of policy on the county officials' use of social media. The case is *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019). A policy addressing the use of social media by the individuals in their capacity as elected

county officials could have aided the county official in this case when setting up and administering her social media account and possibly avoided the lawsuit.

A school board policy on the use of social media by its employees but also by individual school board members could address whether a school board member is allowed to have a separate social media page as a school board member, and if allowed the parameters, requirements, and restrictions of such a page or account. A policy may also address how an individual school board member could use the school corporation's official social media outlets if such exist. Many options exist for such a policy even within the parameters of the *Pickering* and *Connick* legal frameworks and the above-referenced cases. Any policy or provision on this topic should be reviewed by legal counsel before being adopted by a school board as illustrated above, a change in any fact pattern could result in a different outcome or consequences. 🗳️

If you have any questions on the content in this article, please contact Julie M. Slavens, Senior Counsel/Director of Policy Services, by phone: 317/639-4362 or by e-mail: jslavens@isba-ind.org.

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