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**Social Media & the First Amendment:
Employee Issues**

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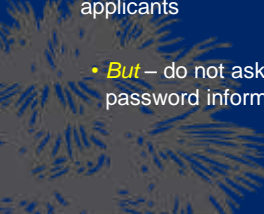
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Social Media

- Facebook, Twitter, Snapchat, Instagram, and whatever else has developed in the last two days.



- **Applicants**
 - Can check social media accounts of applicants
 - **But** – do not ask applicants for login or password information.



• Use of social media by employees

- Can restrict use/access during worktime
- Can restrict use of employer-owned devices
- Apply discipline on a case-by-case basis after careful investigation

• Employees – Legal Issue

- Employees have a First Amendment right to speak on matters of public (not private) concern
- Connick v. Myers*, 461 U.S. 138 (1983)

- Even if public concern, employer can discipline the employee if the employee's interest in speaking is outweighed by the government's interest in providing effective and efficient service to the public

- Consider the context in which the speech was made, including the employee's role and the extent to which the speech impairs the efficiency of the workplace

Written

– Factors: Did the employee’s speech

- Impair the maintenance of discipline
- Impair harmony among coworkers
- Damage close personal relationships
- Impede the performance of the employee’s duties

- Interfere with the operation of the agency
- Undermine the mission of the agency
- Communicate to the public or to coworkers in private

- Conflict with the responsibilities of the employee within the agency
- Abuse the authority and public accountability the employee’s role entailed

Ridpath v. Bd. of Governors Marshall Univ.,
447 F.3d (4th Cir. 2006)

• Social Media Policy

- Remind employees that what they post can be seen, even if “private”
- Remind employees they need to advise readers they do not speak for the City (unless official City communication)

- No “prior restraints.”
- Not overly broad.
 - E.g., “Any information that would tend to discredit or reflect unfavorably” upon the city found to be overly broad.

Liverman, et al. v. Petersburg, et al., 844 F.3d 400 (4th Cir. 2016)

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DECEMBER 4, 2020
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FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised Claims

- PUBLIC EMPLOYEE POLITICAL AFFILIATION CLAIMS
- PUBLIC EMPLOYEE FREE-SPEECH RETALIATION CLAIMS



Illustration by Mark Long

FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised Claims

- PUBLIC EMPLOYEE POLITICAL AFFILIATION CLAIMS
 - Discharge / adverse employment action solely because of political affiliation. (Branti v. Finkel, 445 U.S. 507 (1980).)
 - If employer asserts political affiliation was the reason for adverse employment action, employer must show political affiliation is an appropriate requirement for performing duties of the public office in question.
 - Staff members vs. high-level employees:
 - Employee's job performance is always fair game.
 - High-level employees – can consider whether high-level employees will loyally implement policies.
 - Defense: Dual-Motive Doctrine – same action

Political Affiliation ≠ Cronyism or Nepotism

FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised Claims

- PUBLIC EMPLOYEE POLITICAL AFFILIATION CLAIMS
 - 2-Step Inquiry
 - Step 1: "[A] court must examine whether the position at issue relates to partisan political interests." *McCaffrey v. Chapman*, 921 F.3d 159, 165 (4th Cir. 2019) (citing *Scott v. Haworth*, 916 F.2d 134 (4th Cir. 1990)).
 - If yes, go to Step 2.
 - If no, conduct *Pickering-Connick* analysis.
 - Step 2: "If the 'first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles . . . [an] office holder whose function is such that party affiliation is an equally appropriate requirement.'" *McCaffrey v. Chapman*, 921 F.3d 159, 165 (4th Cir. 2019) (citing *Scott v. Haworth*, 916 F.2d 134 (4th Cir. 1990)).
 - If yes, adverse employment action is not unlawful under the First Amendment.
 - If no, conduct *Pickering-Connick* analysis.

FIRST AMENDMENT FRAMEWORK:

Social Media & Public Employee Issues – Frequently Raised Claims

- PUBLIC EMPLOYEE FREE-SPEECH RETALIATION CLAIMS
 - Retaliation for exercising 1st Amendment right to speak as a citizen on a matter of public concern.
 - Core questions:
 - Was speech pursuant to official duties?
 - Job description helpful, but not dispositive.
 - Was speech on a matter of public concern?
 - Look at content, form, and context of speech.
 - Employee's motive is somewhat relevant, but unlikely dispositive.
 - Broad social interest or political interest vs. personal gripes. (Soapbox)
 - Does employee's speech interest outweigh the government employer's interest in effective governmental operations?

FIRST AMENDMENT FRAMEWORK:

Social Media & Public Employee Issues – Frequently Raised Claims

- PUBLIC EMPLOYEE FREE-SPEECH RETALIATION CLAIMS
 - Matter of public concern – issue of law.
 - Pursuant to official duties – mixed bag. *Andrew v. Clark*, 561 F.3d 261, 266-68 (4th Cir. 2009) seems to suggest it may be a jury question when there is a genuine dispute on this point.
 - *Pickering* balancing – issue of law.
 - Motivating factor analysis. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).
 - Dual-Motive Doctrine applies.

FIRST AMENDMENT FRAMEWORK:

Social Media & Public Employee Issues – Frequently Raised Claims

- PUBLIC EMPLOYEE FREE-SPEECH RETALIATION CLAIMS
 - *Pickering* balancing
 - Speech NOT protected if employee's speech interests are outweighed by government employer's interest in efficient operations.
 - Employment relationship involves confidentiality, personal loyalty
 - Speech threatens the maintenance of employment discipline or harmony, damages close personal relationships, impedes performance of duties or agency mission/operations
 - Employer's judgment regarding disruptive impact is given wide degree of deference.
 - Confidential, policymaking, and public-facing positions likely to result in more disruption

FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised
Claims

EXAMPLE A
Jeffrey Baratheon has been a police officer with the King's Landing Police Department ("KLPD") for ten years.

For the past two years, Jeffrey's duties have required him to transport incarcerated individuals to and from the King's Landing Municipal Court and monitor such individuals while they were in KLPD's custody at King's Landing Jail (a/k/a "The Sky Cells").



FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised

• **EXAMPLE A (CONTINUED)**

Yesterday, Sergeant Theon Greyjoy of the KLPD's Office of Internal Affairs received an anonymous citizen's complaint about some of Jeffrey's Facebook posts, asserting the posts were offensive and insensitive to incarcerated individuals.

The citizen stated that he knew Jeffrey was a KLPD employee because Jeffrey frequently tags her cousin, Joer Mormont, in posts and Mormont is a patrol officer with KLPD. The complainant stated she knew Jeffrey worked in the Sky Cells because several of his posts allude to working in the Sky Cells. The complainant further stated that she knew Jeffrey was KLPD officer working at the Sky Cells because she Googled his name and found numerous King's Landing-related news articles stating this.



FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised

• **EXAMPLE A (CONTINUED)**

The citizen provided KLPD with several screenshots of Jeffrey's posts, including:



FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised

• EXAMPLE A (CONTINUED)

And another shared post:



FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised

• EXAMPLE A (CONTINUED)

And he commented on this post:



FIRST AMENDMENT FRAMEWORK:
Social Media & Public Employee Issues – Frequently Raised

• EXAMPLE A (CONTINUED)

At 7:30 p.m. on Friday, December 4, 2020, you receive a call from Sergeant Greyjoy. He briefs you on the situation over the phone. The Chief of Police, Catelyn Stark, is livid – she wants to fire Joffrey. Sgt. Greyjoy wants to know what they need to do to get rid of Joffrey.

- Evaluate each of these social media posts under *Pickering-Connick*.
 - Does the first post give you enough to terminate? What about the second? Third?
 - What questions do you have?
 - What information do you need?
