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Validity of Adverse Personnel Action or Adverse Action Affecting Student's Academic Standing Based on Internet Posting or Expression, Including Social Networking

George L. Blum, J.D.

Freedom of speech and of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. The issue arises as to the validity of an adverse personnel action or an adverse action affecting a student's academic standing based upon the individual's Internet posting or expression. In *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 238 Ed. Law Rep. 170, 156 Lab. Cas. (CCH) ¶ 60690, 49 A.L.R.6th 699 (D. Conn. 2008), for example, the court held that even if an Internet networking site could be considered an "organization" for First Amendment purposes, there was no evidence that such organization purported to speak out on matters of public concern, as required to support a freedom-of-expressive-association claim of a nontenured high school teacher, whose contract was not renewed after his personal profile on the Web site and his activity on the Internet networking site were discovered. This annotation collects and discusses all of the cases which have considered the validity of adverse personnel actions or adverse actions affecting a student's academic standing based upon the employee's or student's Internet posting or expression, including information posted on social network sites such as Facebook or MySpace.

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I. Preliminary Matters

§ 1. Scope

This annotation collects and discusses all of the cases which have considered the validity of adverse personnel actions or adverse actions affecting a student's academic standing based upon the employee's or student's Internet posting or expression, including information posted on social network sites such as Facebook or MySpace. Also included in the scope of this annotation are comments posted to online bulletin boards or discussion groups, blogs, and messages, or "tweets," sent via Twitter.[FN1]

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

§ 2. Summary and comment

The First Amendment to the Constitution of the United States and the bills of rights of most of the states contain express prohibitions against the enactment of laws which would abridge the freedom of speech or of the press. It has been held, consistent with the general rule as to the first eight amendments to the Federal Constitution, that the First Amendment limiting federal abridgment of such rights is not itself applicable to state action. The modern and now firmly established view, however, is that the same fundamental principles which are contained in that amendment protect the rights there enumerated from any state abridgment by virtue of the Due Process Clause of the 14th Amendment. Thus, the rule is that the rights of freedom of speech and of the press are among the fundamental rights and liberties protected by the Due Process Clause of the 14th Amendment from impairment by state action and that any government action which chills constitutionally protected speech or expression contravenes the First Amendment.[FN2]

If there is a bedrock principle underlying the scope of the First Amendment, it is that the government may

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not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable. An absolutely free discussion of the problems of society is a cardinal principle of Americanism, and the vitality of civil and political institutions in our society depends on such discussion. Freedom of speech and of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. The First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom but must itself be protected if that freedom would survive. Under the First Amendment, the public has a right to every individual's views and every person has the right to speak them, without regard to whether the persons involved are famous or anonymous. The First Amendment's basic guarantee is that of freedom to advocate ideas and freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech.[FN3]

Minors are entitled to a significant measure of First Amendment protection. However, the First Amendment rights of minors are not coextensive with those of adults, and a state may permissibly determine that at least in some precisely delineated areas, a child is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. In assessing whether a minor has the requisite capacity for individual choice, the age of the minor is a significant factor.[FN4]

Moreover, by accepting public employment, one does not forgo his or her right to freedom of speech. Although the state's interest in regulating the speech of its employees as a class differs significantly from its interest in regulating such activities by the general public, even so a public employee is entitled to First Amendment protections which include the right, within limits, to criticize and to comment upon matters touching the public service in which the employee is engaged. The wholesale practice of dismissing public employees based on their political affiliation, historically characterized by the saying "to the victor goes the spoils," is prohibited under the First and 14th Amendments.[FN5]

In order to prove a prima facie case of retaliation prohibited by Title VII of the Civil Rights Act of 1964, or the Age Discrimination in Employment Act, a worker must establish that he or she engaged in activities in opposition to practices made unlawful by those statutes, such as complaining about discrimination covered by Title VII, or that the employee participated in a proceeding, and that the employee's activity was protected, that the employee suffered some sort of adverse employment action based on his or her treatment by the employer or labor union, and that there was a causal connection between the employee's opposition or participation and the adverse treatment. To establish the prima facie case of retaliation, the employee need not prove that the employer's practices were actually unlawful, only that the employee reasonably believed that the employer was engaged in unlawful employment practices.[FN6]

An employee who has shown that he or she has engaged in activity protected by retaliation prohibitions must also show that the employee was subjected to some adverse treatment by the employer in order to establish a prima facie case of retaliation. For purposes of a Title VII of the Civil Rights Act of 1964 retaliation claim, an adverse employment action is one that is materially adverse, meaning more than a mere inconvenience or an alteration of job responsibilities. An employer's action can be called retaliation sufficient to support a Title VII claim only if it makes the employee worse off on account of the protected activity. Thus, an adverse action may include termination of employment, demotion evidenced by decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.[FN7]

Discipline of public employees is subject to the same requirements generally applicable to discharge where

such action is based on the employees' exercise of protected First Amendment free speech rights. While in some cases, the courts have held supportable First Amendment protection for law enforcement employees allegedly subjected to transfer or demotion because of speech that included statements not made to the public but communicated or apparently communicated to employing agency personnel only, under the circumstances of other cases, the courts held that law enforcement employees did not establish entitlement to First Amendment protection against transfer or discipline because of speech that included or apparently included statements made not to the public but to employing agency personnel only.[FN8]

The issue arises as to the validity of an adverse personnel action or adverse action affecting a student's academic standing based upon the individual's Internet posting or expression, including social networking.

In a number of cases, for example, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, the courts held that the employer's action against the employee was valid or supportable, where the employee posted information which was critical of his or her employer, or information which was potentially disparaging or offensive in nature (§ 8), though other courts, given the particular circumstances presented, ruled to the contrary in similar factual scenarios (§ 9).

In other cases in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, the courts determined whether the employer's action against the employee was valid, where the employee generally posted personal information on publicly accessible Internet pages (§ 4), where the employee specifically posted his or her resume with an employment service (§ 5), where the employee posted information which purportedly resulted in the breach of a duty of confidentiality to others (§ 6), where the employee posted allegedly misleading or false information about others (§ 7), and where the employee posted alleged threats against the employer or others (§ 10).

In those cases in which the courts addressed the validity of an adverse action affecting a student's academic standing based upon the student's Internet posting or expression, including social networking, the courts held that the school's action against the student was valid, where the student posted information critical of school officials, or information which was potentially disparaging or offensive in nature (§ 12), though other courts, given the particular circumstances presented, ruled to the contrary in similar factual scenarios (§ 13).

In other cases in which the courts addressed the validity of an adverse action affecting a student's academic standing based upon the student's Internet posting or expression, including social networking, the courts determined whether the school's action against the student was valid, where the student posted allegedly misleading or false information (§ 11) and where the student posted alleged threats against school officials or others (§ 14).

§ 3. Practice pointers

A student or employee may be subject to an adverse action affecting the individual's employment or academic standing based upon Internet posting on Web sites such as "Myspace.com" (Myspace). One case described the service as follows: "Myspace is a website that allows its users to create an online community where they can meet people. Myspace can be used to share photographs, journals, and 'interests' with mutual friends. People with Myspace accounts can create a 'profile,' to which they can link their friends, and the owner of the profile can either invite people to become friends, or other Myspace users can ask the owner of the profile to become friends with the owner of the profile. If the owner of a profile accepts another Myspace user as a friend, the friend's profile picture is posted on the profile owner's Myspace page, along with a link to the friend's

Myspace profile. The owner of a profile can kick friends off his [or her] profile, deleting that friend's profile picture from the owner's profile page. In addition, a profile owner can completely block other Myspace users from viewing his [or her] profile page. The owner of a profile can post blogs on his [or her] own profile page, allow other Myspace users to post comments on his [or her] profile page, or post comments on other users' profile pages."[FN9]

To comply with free speech guarantees in cases involving, inter alia, a student's act in posting allegedly offensive material on the Internet, school administrators need not wait until a substantial disruption has already occurred prior to taking disciplinary action against students, but rather, school administrators may preempt problems if they have a specific and significant fear of disruption. A mere desire to avoid discomfort or unpleasantness will not suffice to justify a school's discipline of a student in the face of a free speech challenge, however. The test for school authority, for purposes of determining whether discipline of a student violates his or her free speech rights, is not geographical, and the reach of school administrators is not strictly limited to the school's physical property, but on the other hand, the mere presence of a student on school property does not trigger the school's authority.[FN10]

In some employment cases, including those involving adverse employment reactions due to an employee's Internet posting, it has been held that there is no single definition of what constitutes good cause for termination, and that "good cause" depends on a variety of factors, including the nature of the particular employment, any understandings reached between the employer and employee, the employer's rules and standards of performance, whether expressly set forth in employment policies or employee handbooks or established through past practice, generally accepted industry-wide standards of performance for the position in question, and the application of basic standards of performance that commonly adhere to practically all employment, such as the employee's obligation to refrain from any acts of disloyalty, dishonesty, or insubordination.[FN11]

When a public employee speaks out on a subject involving his or her public employer, a determination of whether the First Amendment has been violated typically requires striking a balance between the employee's interest, as a citizen, in commenting on the matter and the employer's interest in the efficient discharge of its public responsibilities. To prevail on a 42 U.S.C.A. § 1983 claim, based on a violation of his or her First Amendment rights, a public employee must show that his or her expression involved matters of public concern, his or her interest in commenting upon those matters outweighed the government employer's interests in the efficient performance of its public services, and his or her protected speech was a substantial or motivating factor in the adverse employment actions.[FN12]

A high school's disciplinary actions against students who were suspended for creating fake Internet profiles for a teacher and school administrator on a public Web site satisfied procedural due process requirements, where the students and their parents received notice of and were present at the student's disciplinary hearing, where the students had the opportunity to rebut the allegations against them, and where the parents had the opportunity to question school officials during the hearing.[FN13]

II. Employment-Related Actions

§ 4. Employee's posting of personal information on publicly accessible Internet pages; generally

In the following cases, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, the courts determined whether the employer's action against the employee was valid, where the employee generally posted per-

sonal information on publicly accessible Internet pages.

The court in *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 238 Ed. Law Rep. 170, 156 Lab. Cas. (CCH) ¶; 60690, 49 A.L.R.6th 699 (D. Conn. 2008), held that even if an Internet networking site could be considered an "organization" for First Amendment purposes, there was no evidence that such organization purported to speak out on matters of public concern, as required to support a First Amendment freedom-of-expressive-association claim of a nontenured high school teacher, whose employment contract was not renewed after his personal profile on the Web site, and his activity on the Internet networking site were discovered. The case involved the plaintiff's use of Myspace.com (Myspace), a Web site that allows its users to create an online community where they can meet people. Myspace can be used to share photographs, journals, and "interests" with mutual friends. The plaintiff originally began to use Myspace because students asked him to look at their Myspace pages, and he subsequently opened his own Myspace account, creating several different profiles. One of his profiles was called "Mr. Spiderman," which he maintained on Myspace for a few months. A fellow teacher at the plaintiff's school advised a guidance counselor that the plaintiff had a profile on Myspace, and the counselor alleged that she received student complaints about the plaintiff's profile page. The counselor ultimately viewed the plaintiff's "Mr. Spiderman" profile page, and she testified that she was disturbed by what she saw on the profile page. According to the counselor, the page included a picture of the plaintiff when he was approximately 10 years younger, under which were pictures of some of the students at the subject school. In addition, the counselor stated that near the pictures of the students were pictures of naked men with what she considered "inappropriate comments" underneath them. The court, granting the defendants' motion for summary judgment, held that a several-month interval between the counselor's viewing of the profile and the nonrenewal of the teacher's employment contract was insufficient to demonstrate causation between protected expression on the profile, which consisted of an antiwar poem, and the adverse employment determination, as required for a retaliation claim under 42 U.S.C.A. § 1983, where there was no additional evidence that the poem played any part in the decision to not renew the teacher's employment contract, the court adding that the teacher also failed to show a violation of his protected expressive association on the site. Moreover, the court stated, the subject teacher failed to compare himself to a similarly situated employee, as required on his selective prosecution equal protection claim, for while the teacher alleged that two coworkers had profiles on the same networking site, he failed to submit any evidence with regard to the coworkers' activities on that networking site.

A student teacher enrolled in a university teaching program did not have her First Amendment free speech rights violated when the program failed to certify her, allegedly due to Myspace Web pages posted by the plaintiff found on the Internet, the court held in *Snyder v. Millersville University*, 2008 WL 5093140 (E.D. Pa. 2008) (an unreported decision), the court reasoning that here, the teacher's Web site posting was not speech that touched on matters of public concern but rather the posting was only related to personal matters. The plaintiff was assigned to student teach at a high school, where a full-time high school faculty member would serve as her "Cooperating Teacher" (CT). Student teachers were cautioned not to refer to any students or teachers on their personal Web pages. Contrary to the advice and directives she received, the plaintiff sought to communicate about personal matters with her students through the Myspace Web page that she maintained throughout her teaching placement. On several occasions, she informed the students during class that she had a Myspace Web page; the CT warned the plaintiff that it was not proper to discuss her Myspace account with the students and urged the plaintiff not to allow students to become involved in her personal life. At one point, the plaintiff posted the following message: "I have nothing to hide. I am over 21, and I don't say anything that will hurt me (in the long run). Plus, I don't think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They

keep asking me why I won't apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?" While the plaintiff denied at trial that the CT was "the problem" at school, that denial was not credible, the court noted at the outset. Moreover, the court related, the plaintiff's posting also included a photograph that showed her wearing a pirate hat and holding a plastic cup with a caption that read "drunken pirate." Here, the court noted, the plaintiff proceeded under 42 U.S.C.A. § 1983, which allows suits against persons acting under color of state law for constitutional violations, the plaintiff arguing that her right to free expression protected the text and photograph in her disputed Myspace posting, and that university administrators violated her rights because the posting "played a substantial part" in both their decision to deny a degree and in their refusal to ensure that she received her teacher certification. However, the court stressed, the defendant did not have the authority to award the plaintiff a degree because she failed to complete the requisite Student Teaching, the court adding that the defendants did not violate the plaintiff's First Amendment right to free expression, as a result of which her demand for mandatory injunctive relief would be denied.

§ 5. Employee's posting of personal information on publicly accessible Internet pages; employee's posting of resume

In the following cases, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, the courts determined whether the employer's action against the employee was valid, where the employee specifically posted his or her resume with an employment service.

An employer met its burden to show a legitimate, nondiscriminatory reason for termination of an employee's employment, in response to the employee's prima facie case under 42 U.S.C.A. § 1981 that his termination constituted discrimination on the ground of national origin, the court held in *Malik v. Amini's Billiard & Bar Stools, Inc.*, 454 F. Supp. 2d 1106 (D. Kan. 2006), where the employee's supervisor told the employee that he was being terminated for posting his resume on an Internet employment Web site, and where the supervisor had a handwritten note from the employer's president stating that as the reason for the employee's termination. A former employee brought action against the employer, alleging national origin discrimination and retaliation, the employer moved for summary judgment, and the court, on review, granted the motion. The defendant terminated the plaintiff's employment, a defendant supervisor explaining to the plaintiff that he was being fired because the president found the plaintiff's resume on the Internet employment Web site, Monster.com, and determined that it was not in the defendant's best interest to continue to entrust the management, supervision, and overall responsibility of its store to an individual who was looking for other employment opportunities. With respect to the plaintiff's assertion that the employer's reason for his termination was pretextual, the court noted that to establish pretext, a plaintiff must show either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation was unworthy of credence, and that a plaintiff can demonstrate pretext by showing contradictions in the employer's reasons for its action, which a reasonable fact finder could rationally find unworthy of credence. In response to the defendant's proffered legitimate, nondiscriminatory reason for discharging the plaintiff, that is, because the plaintiff posted his resume on the Internet and was actively seeking other employment, the plaintiff's sole argument as to pretext was that plaintiff believed other employees posted their resumes on the Internet and were not fired, the court pointed out. However, other than asserting his belief, the plaintiff did not submit any specific evidence on this issue, such as the actual resumes of other employees of the defendant who posted their resumes on the Internet and were not fired, or affidavits of others to this effect, the court held. The only potential evidence the court could glean from the plaintiff's scant briefing on this issue was the plaintiff's deposition testimony to the effect that because a coworker had a second job, the plaintiff concluded that the coworker must have had his resume posted on the Internet, the court stated, but, without more, it

could not conclude that the defendant's legitimate nondiscriminatory reason for the plaintiff's discharge was pretextual.

Material issues of fact existed as to whether a former employee was terminated for posting his resume on a job-posting Web site and whether such conduct constituted "cause" for termination under Maryland law, precluding summary judgment for the former employee on his breach of contract claim against the former employer, the court held in *Corman v. UCG*, 369 F. Supp. 2d 923 (N.D. Ohio 2005) (applying, in part, Maryland law). The employer, a limited partnership principally located in Rockville, Maryland, found the plaintiff's resume on www.Monster.com, a resume posting Web site for prospective employers and employees. The employer terminated the plaintiff's employment, citing "issues of integrity and honesty" resulting from the posting of his resume on the Internet in search of employment. The employer considered the plaintiff's termination to be "with cause" and, therefore, that he was not entitled to notice or severance pay. The plaintiff, conversely, contended that his termination from employment was solely for posting his resume and, therefore, "without cause." Under Maryland law, there is no definitive answer as to what constitutes "with cause" for termination, the court noted, and whether conduct amounts to "just cause" necessarily varies with the nature of the particular employment. Since determinations of "cause" are inherently case specific under Maryland law, this determination becomes a factual determination to be made at trial and not a question of law, as a result of which summary judgment would be inappropriate in the present case, the court stressed. Furthermore, significant factual discrepancies existed surrounding the plaintiff's termination, making summary judgment inappropriate, the court elaborated. The plaintiff contended that his termination from employment was based upon his posting his resume online and that the employer had not offered any evidence to justify his termination for integrity and honesty issues, the court elaborated, and he argued that posting one's resume cannot constitute cause because it violates Maryland public policy and would significantly hinder employment mobility. The employer, however, contended that the plaintiff was terminated for honesty and integrity issues based upon the misrepresentation of his accomplishments at the job and the fact that he was seeking new employment after he convinced the employer to hire him based on his willingness to relocate, the court stated. A determination for the reasons behind the plaintiff's termination was paramount for accessing whether his termination was with or without cause and only once such a determination is made can the issue of whether such a termination would be "with cause" or "without cause" be resolved, the court declared. As there was a significant factual discrepancy over the plaintiff's termination, summary judgment was not appropriate in the present case, the court concluded.

§ 6. Employee's posting of information resulting in purported breach of a confidential duty to others

The following authority, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, determined whether the employer's action against the employee was valid, where the employee posted information which purportedly resulted in the breach of a duty of confidentiality to others.

See *In re ADC Telecommunications ERISA Litigation*, 35 Employee Benefits Cas. (BNA) 2473, 2005 WL 2250782 (D. Minn. 2005), a case addressing, inter alia, the issue as to whether a particular party should be appointed as class representative in a class action brought by employees against an employer related to the employer's investment of company assets, where the defendant asserted that the subject employee posed issues of forthrightness and credibility not shared by members of the proposed class, where, shortly before his termination from employment, the employee purportedly posted on the Internet an internal company memorandum which detailed future company actions, commented on the effect of reduced spending in the telecommunications industry, and predicted cost reductions. The court pointed out that the plaintiff admitted that his actions violated

company policy. Following his actions, the company terminated the plaintiff from employment, the court indicated, and while the plaintiff investigated and consulted counsel about filing a wrongful-termination suit against the employer, he ultimately did not sue on the claim.

In *Ranck v. Rundle*, 29 I.E.R. Cas. (BNA) 576, 2009 WL 1684645 (S.D. Fla. 2009), a case in which an employee was suspended after publicly posting supposedly confidential information on an Internet blog about an ongoing police shooting investigation, the court held that while the plaintiff's speech, in the form of the posting, would be an appropriate exercise of the plaintiff's First Amendment rights meriting protection against adverse employment action by his employer, in light of the overall evidentiary record in the case, the plaintiff failed to establish that he had been deprived of his constitutional rights when he was suspended by his employer, as a result of which the defendants' motion for summary judgment would be granted. The plaintiff made public an internal memo by posting it on a blog he created and sending a link to his posting to a Justice Building blog, a well-known public forum used by lawyers practicing criminal law in the area. The memo involved the "police shooting" of a particular individual at a time when the investigation was still open. A short time thereafter, the plaintiff posted to his blog other internal emails, procured by way of a public record request, relating to his removal from that particular investigation, along with his personal commentary on the veracity of statements made by his superiors (§ 8). The plaintiff was suspended without pay for 30 days, and the reasons for the suspension were set forth in a notice of disciplinary action, which included his public posting of information about an ongoing police shooting investigation, the posting of derisive and offensive comments, and inflicting harm to the integrity, reputation, and well-being of the state attorney. The notice contained additional reasons for the suspension, citing the plaintiff's lack of candor with respect to securing approval for payment of expert-witness fees and his alleged in-court misconduct before the circuit court. As to whether the defendants suspended the plaintiff in substantial part because of the plaintiff's publication of the memo on a public blog, the court pointed out that the plaintiff's burden was not a heavy one, the court adding that the court is to examine the record as a whole to ascertain whether the plaintiff presented sufficient evidence for a reasonable jury to conclude that his protected speech was a "substantial" motivating factor in the decision to suspend him. While the plaintiff met this burden, the court instructed, the defendants could still prevail if they were able to demonstrate that the posting of the memo was not the "but for" cause of the adverse employment action and that legitimate reasons would have motivated the employer to make the same decision. Determining that there were legitimate grounds for the adverse action, the plaintiff could not establish as a matter of law that he had suffered a violation of his First Amendment rights, the court concluded.

§ 7. Employee's posting of allegedly misleading or false information

The following authority, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, determined whether the employer's action against the employee was valid, where the employee posted allegedly misleading or false information about others.

See *School of Visual Arts v. Kuprewicz*, 3 Misc. 3d 278, 771 N.Y.S.2d 804, 20 I.E.R. Cas. (BNA) 1488 (Sup 2003), a case in which no adverse employment action, per se, had been taken against an employee, but where a defamation claim was brought against the former employee on the grounds that the employee had, inter alia, posted false job postings on an Internet Web site and caused unsolicited job applications and pornographic e-mails to be sent to the plaintiffs, where the court, on review of the former employee's motion to dismiss the complaint for failure to state a claim, held that the false job postings did not defame the plaintiffs. That is, the court elaborated, the false job postings on the Internet Web site advertising one plaintiff's position did not de-

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fame her, the court adding that the simple statement that the plaintiff's position was vacant could not be reasonably construed as imputing professional unfitness or incompetence to her, and that even if the postings implied that the plaintiff had been terminated, that would carry no imputation of dishonesty or lack of professional capacity. Moreover, even if the former employee's alleged act of subscribing the plaintiff director of human resources to pornographic websites and catalogs constituted a "statement" that the director was interested in pornography, it would not defame the director in her profession or business since it would not impute professional unfitness or incompetence to her, the court related. Additionally, the court stated, false job postings on the Internet Web site advertising the plaintiff's position did not defame her employer since the postings merely announced a job opening, nor did they amount to trade libel since the postings did not contain any false matter derogatory to the company's business.

A lawyer's act in engaging in conduct involving dishonesty by posting an online message purportedly written by a local high school teacher stating that the teacher had engaged in sexual conduct with students warranted public reprimand, the court held in *In re Complaint as to Conduct of Carpenter*, 337 Or. 226, 95 P.3d 203 (2004). The lawyer engaged in conduct involving dishonesty in violation of a disciplinary rule (Or. Code of Prof. Resp., DR 1-102(A)) when he posted the online message, the court noted, for the lawyer's conduct demonstrated a willingness to disregard the teacher's legal rights, and that willingness reflected adversely on the lawyer's fitness to practice law. By adopting the teacher's identity and posting the online message that he composed, the accused created a significant risk that his actions would affect the teacher's legal rights adversely and the message purported to be an admission by the teacher that he had engaged in socially and legally unacceptable behavior, the court related. The purported admission had the potential to harm the teacher's career and subject him to a criminal investigation, and the medium through which the accused chose to act increased the likelihood of that potential harm because the Classmates.com Web site provided no contextual clues that the teacher was not the author of the message or that someone intended the message to be a joke, the court indicated. The lawyer violated his duty to the public to maintain his personal integrity, for purposes of determining the appropriate sanction in the attorney disciplinary proceeding, the court explained, the court adding that the attorney acted intentionally, inasmuch as he had the conscious objective to harm a high school teacher. Moreover, the court related, the lawyer's conduct caused actual harm for purposes of determining the appropriate sanction in the disciplinary proceeding, after the lawyer knowingly made affirmative false statements in the online message, purportedly written by the high school teacher. Here, a teacher, law enforcement officers, and the District Attorney's office had to expend time investigating the matter, the court continued, such that the lawyer's conduct created risk of potential injury to the teacher's career and reputation, and the lawyer's conduct also created potential injury to the high school and community. Mitigating circumstances outweighed the aggravating circumstances, where the lone aggravating circumstance was the vulnerability of the victim, but mitigating factors included the fact that the lawyer had no prior disciplinary record, he made full and free disclosure and had a cooperative attitude toward the disciplinary proceeding, he was inexperienced in the practice of law, he showed genuine remorse, and a police officer testified that he had good character and a good reputation with law enforcement and the local court, the court concluded.

§ 8. Employee's posting of information critical of employer, or potentially disparaging or offensive in nature—Employer's adverse action valid or supportable

In the following cases, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, the courts held that the employer's action against the employee was valid or supportable, where the employee posted information which was critical of his or her employer or information which was potentially disparaging or offensive in

nature.

In *Curran v. Cousins*, 509 F.3d 36, 26 I.E.R. Cas. (BNA) 1696, 155 Lab. Cas. (CCH) ¶; 60551 (1st Cir. 2007), a case in which a corrections officer sued a sheriff's department, claiming termination in retaliation for the exercise of his First Amendment free speech rights, the federal district court granted the department's motion for judgment on the pleadings, the officer appealed, and the court, on review, affirmed, the court holding, inter alia, that the sheriff's department had adequate justification for terminating the corrections officer and that the termination thus did not violate the officer's speech rights, where the officer made statements on the union Web site comparing the sheriff to Hitler, those who followed the sheriff's instructions to Hitler's generals, and officers to Jews who were marched into death chambers, and where the officer referred to the plot by Hitler's generals to kill him, thus urging a similar plot by analogy. The court pointed out that the plaintiff corrections officer had earlier been disciplined, through a suspension, for threats made to others, though the suspension did not involve speech by the plaintiff which had First Amendment protection. The plaintiff's initial threats were made not as a citizen but were made in the course of his duties within the department, to his superiors, and during a discussion of official department policy, as a result of which the first event in the history leading to the plaintiff's termination involved speech which had no constitutional protection, the court elaborated. Here, the court pointed out, the plaintiff conceded that he was fired because of his November 30 posting, and, as to the issue whether the posting involved speech the plaintiff made as a citizen and on a matter of public concern, the court assumed, arguendo, that the plaintiff was acting as a citizen since the posting was on a union Web site that was open to public posting and viewing. The court agreed that the posting did contain speech on matters of public concern. The first and second paragraphs of the plaintiff's posting may be read as accusing the plaintiff of using political favoritism rather than merit in making personnel decisions as to nonpolicymaking employees, the court held. The topic of a public official basing personnel actions, as to nonpolicymaking employees, on political affiliation rather than merit is a topic of public concern, the court continued, such that there was public interest value in certain portions of the posting. However, the court stressed, that did not establish that there was First Amendment value in the remainder of the posting. Given the circumstances presented, the court concluded that the sheriff's department had adequate justification for terminating the plaintiff and that the termination thus did not violate the officer's speech rights, where the officer made statements on the union Web site, inter alia, comparing the sheriff to Hitler.

The court in *Lukowski v. County of Seneca*, 2009 WL 467075 (W.D. N.Y. 2009), a case in which plaintiffs, county employees, brought an action pursuant to 42 U.S.C.A. § 1983 against the defendant employer, claiming that their civil rights had been violated in connection with the retaliation they experienced for their public criticism of the defendants on the Internet, and that they had been denied certain promotions and assignments due to their expression, dismissed the plaintiffs' First Amendment claim with prejudice. The plaintiffs alleged that prior to the election for county sheriff in November 2003, each of the plaintiffs frequently posted comments on a community Web site known as "Fingerlakes1.com" critical of Seneca County government officials, including the subject defendants. Indeed, the plaintiffs claimed that they posted their comments anonymously using "handles" to identify themselves. Additionally, the plaintiffs claimed that subsequent to the election, until the plaintiffs' discovery of the defendants' activities in March 2007, the plaintiffs' criticism increased in both frequency and ferocity. According to the complaint, the defendants started a campaign of retaliation against the plaintiffs, and the plaintiffs alleged that the defendants compelled the Web site to disclose the e-mail addresses of the anonymous individuals who were posting comments critical of them. This conduct was allegedly performed without a warrant or subpoena and under the pretext of a pending criminal investigation. The alleged retaliation included surveillance and monitoring by county deputies involving other defendants, denial of promo-

tions, job assignments, and additional training for the plaintiffs that were employed by the county. The court found that the plaintiffs failed to sufficiently allege that the defendants' retaliatory conduct adversely affected the plaintiffs' constitutionally protected expression. That is, the court explained, not every action taken in retaliation against a plaintiff's constitutionally protected activities will necessarily adversely affect those activities. The plaintiffs alleged that they made comments critical of the defendants on the Web site from 2003 until approximately March 2007 and that the defendants retaliated against them for making those critical comments, but the plaintiffs also alleged that they first learned of the defendants' conduct in March 2007, which was years after the Web site posting began, the court noted. The plaintiffs did not allege facts that suggested they were prevented from making posts, and, indeed, they continued to post messages to the Web site from 2003 through March 2007 when they learned of the defendants' actions. Accordingly, there was no allegation that the defendants' retaliation against the plaintiffs actually chilled or silenced their speech, the court concluded.

Even assuming that a confrontational questioning of a state trooper as to whether he had authored anonymous negative comments on the Internet about another trooper could be regarded as a "materially adverse" employment action, the trooper failed to demonstrate the requisite causal connection between such questioning and his earlier complaints, while he was assigned to another police station, regarding alleged racial profiling conducted by troopers in connection with traffic stops, as required for the trooper to make out a retaliation claim under the civil rights statute (42 U.S.C.A. § 1981), the court held in *Estate of Oliva v. New Jersey*, 579 F. Supp. 2d 643, 104 Fair Empl. Prac. Cas. (BNA) 1024 (D.N.J. 2008). A cause of action was brought by the estate of a deceased trooper to recover for the alleged violation of the trooper's civil rights in connection with alleged acts of harassment directed at him for complaining of alleged racial profiling in the department, the defendants moved for summary judgment, and the court, on review, held that to the extent that a Caucasian state trooper had advocated for rights of African-American motorists to have "full and equal benefit of all laws," as specifically guaranteed under the civil rights statute, he engaged in a protected activity under the statute and thus satisfied the first requirement for establishing a retaliation claim, notwithstanding that he was Caucasian, but that the lack of evidence of a causal connection between this protected activity and the allegedly adverse employment actions generally foreclosed the retaliation claims, the court adding that the transfer of the trooper from one police station to another station located only 4.25 miles farther from his home imposed such a trivial harm as not even to constitute "adverse employment action." The plaintiff's evidence included an incident occurring when the trooper, while stationed at a particular station, was retaliated against by a sergeant and lieutenant, who accused him, allegedly in a very confrontational manner, of making anonymous negative comments on the Internet about another trooper. According to the plaintiff, the defendants "interrogated" him for an hour, despite the trooper's denials that he authored the posting, the court indicated. The court, observing that the comments had nothing to do with either the trooper's complaints or racial profiling, stated that it had serious doubts whether such actions could be considered "materially adverse" as a matter of law. However, even assuming that such facts were sufficient, the court stressed, the record did not support an inference of retaliatory motive, for nothing in the record demonstrated that the defendants knew or could have known about any of the trooper's previous complaints, as those complaints all took place at stations other than the subject station.

Comment

In *Estate of Oliva v. New Jersey*, 589 F. Supp. 2d 539 (D.N.J. 2008), the court held that a negative performance evaluation of the trooper constituted an "adverse employment action," as necessary to establish a prima facie case for retaliation under the civil rights statute.

A teacher's posting of an essay criticizing a school district on the Internet and her subsequent termination by

(Publication page references are not available for this document.)

the school board approximately 18 months later were too remote in time to infer that the school board president, school principal, and district superintendent terminated her employment in retaliation for her exercise of her constitutionally protected speech, and as such, the teacher could not maintain a First Amendment retaliation claim against the defendants, the court held in *Horwitz v. Board of Educ. of Avoca School Dist. No. 37*, 260 F.3d 602, 156 Ed. Law Rep. 116, 86 Fair Empl. Prac. Cas. (BNA) 688, 7 Wage & Hour Cas. 2d (BNA) 207, 80 Empl. Prac. Dec. (CCH) ¶; 40645, 143 Lab. Cas. (CCH) ¶; 34319 (7th Cir. 2001). The teacher brought action against the defendants, alleging age discrimination and retaliation in violation of the Age Discrimination in Employment Act, violation of the Family Medical Leave Act, defamation, and a 42 U.S.C.A. § 1983 First Amendment-retaliation claim; the federal district court dismissed the 42 U.S.C.A. § 1983 claim and granted summary judgment to the defendants on the remaining claims, the teacher appealed, and the court, on review, affirmed. In order for the teacher to establish a 42 U.S.C.A. § 1983 claim, the court noted, she would be required to demonstrate that (1) her conduct was constitutionally protected and (2) her conduct was a substantial or motivating factor in the defendants' challenged actions. To determine whether the teacher's speech was constitutionally protected, the court continued, the court would need to ask whether her speech addressed a matter of public concern, and if so, whether the teacher's interest in speaking outweighed the interest of the state in efficiently providing services. The court assumed, without deciding, that the teacher's essay criticizing the school district addressed a matter of public concern and that her interest in speaking outweighed the interest of the state in efficiently providing services. Nonetheless, the court stressed, it could not conclude that the teacher's essay in any way was a substantial or motivating factor in the defendants' ultimate decision that the teacher should be terminated. The essay was posted on October 9, 1997, and the teacher was terminated on April 23, 1999, such that nearly 18 months had passed between the time the teacher had engaged in speech that was constitutionally protected and her termination, the court explained. These two events were simply too remote in time to infer that the school president, principal, or superintendent believed that the teacher's termination was necessary based solely on this material, the court held. The court, rejecting the teacher's First Amendment claim, observed that several other incidents occurred between the teacher and the school between the fall of 1997 and April of 1999 that played a role in the decision to fire her.

The court in *Ranck v. Rundle*, 29 I.E.R. Cas. (BNA) 576, 2009 WL 1684645 (S.D. Fla. 2009), the facts of which are more thoroughly discussed at § 6, a case in which an employee was suspended after publicly posting information on an Internet blog containing, inter alia, purportedly derisive and offensive comments concerning a state attorney and assistant state attorney, held that while the plaintiff's speech, in the form of the blog posting, would be an appropriate exercise of the plaintiff's First Amendment rights meriting protection against adverse employment action by his employer, in light of the overall evidentiary record in the case, the plaintiff failed to establish that he had been deprived of his constitutional rights when he was suspended by his employer, as a result of which the defendants' motion for summary judgment would be granted.

In *Pietrylo v. Hillstone Restaurant Group*, 2008 WL 6085437 (D.N.J. 2008) (applying, in part, New Jersey law) (an unreported decision), the court held that a First Amendment claim by employees who had been fired after making jokes on Myspace.com about their employer would fail, as the expression under inquiry did not reflect a matter of public concern. The plaintiffs were employed by the defendant restaurant group as servers. One of the plaintiffs created a group on Myspace.com called the "Spec-Tator," and he stated in his initial posting that the purpose of the group would be to "vent about any BS we deal with [at] work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation." The plaintiff invited other past and present employees of the restaurant to join the group, including the coplaintiff. Once a member was invited to join and accepted the invitation, the member could access the Spec-Tator whenever they wished to read postings

or add new postings. The posts included sexual remarks about management and customers of the restaurant, jokes about some of the specifications that the restaurant had established for customer service and quality, and references to violence and illegal drug use. A member of management was able to access the plaintiff's Myspace group, saw the postings, and subsequently terminated both plaintiffs. The plaintiffs alleged wrongful termination in violation of a clear mandate of public policy and further argued that the Spec-Tator was a private group where employees could exercise their right to free speech and that commenting and criticizing their employers is protected speech. In general, at-will employees may be terminated at any time with or without cause, the court instructed, but if an at-will employee is terminated for a reason that implicates a "clear mandate of public policy," the employee may have a claim for wrongful discharge. An at-will employee has a heavy burden to prove a clear mandate of public policy that was violated, and New Jersey courts have held that a claim for wrongful termination based on a clear mandate of public policy requires that the termination of an employee must implicate more than just the private interests of the parties, the court elaborated. For issues concerning freedom of speech, the court noted, a public employee must show that the speech involved an issue of public concern and that his or her interest in the speech outweighs the state's countervailing interest as an employer in promoting efficiency of the public service it provides through its employees. Here, the court declared, the plaintiffs failed to adduce facts to support their freedom of speech claim, and even if the defendant were a public employer, the plaintiffs failed to adduce facts from which a reasonable jury could find that the speech on the Spec-Tator implicated a matter of public concern.

§ 9. Employee's posting of information critical of employer, or potentially disparaging or offensive in nature—Employer's adverse action not valid or supportable

The following authority, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, given the particular circumstances presented, held that the employer's action against the employee was not valid or supportable, where the employee posted information which was critical of his or her employer, or information which was potentially disparaging or offensive in nature.

In *Myers v. City of Highland Village, Texas*, 269 F. Supp. 2d 850 (E.D. Tex. 2003), a case in which a former police officer brought a 42 U.S.C.A. § 1983 action against a city and police chief, alleging violations of his free speech rights under the First Amendment, based, in part, upon postings the plaintiff made on an Internet Web site, the defendants brought motions for summary judgment, and the court, on review, denied the motions, the court holding, inter alia, that the officer's conversations were matters of public concern, that genuine issues of material fact precluded summary judgment on the officer's First Amendment retaliation claim, that a manager's ratification of the police officer's demotion, suspension, and termination was imputable to the city, and that the police chief was not entitled to qualified immunity from 42 U.S.C.A. § 1983 liability. The evidence presented indicated that the plaintiff, while off-duty, posted the following message on a community Web site entitled www.highlandvillage.com, anonymously under the pseudonym "Deep Blue": "Ethics violations within the police department are quickly being uncovered. Reports are that [a police chief] and the police auxiliary violated the City's Ethics Code. With the Chief's approval, a large sum of money was funneled through a police auxiliary fund to a police officer as a gift. This money gift was to help the officer with the purchase of a new home. Now the Chief is attempting to cover-up these violations by having the officer take out a loan to reimburse the original donor." Four days later, the chief terminated the plaintiff's employment with the village police department for posting the message on the Web site. The court, reasoning that genuine issues of material fact as to whether the plaintiff police officer's speech regarding possible wrongdoing by the police chief interfered with the efficient functioning of the police department and whether the officer's speech was a substantial or motivating factor in

(Publication page references are not available for this document.)

his termination precluded summary judgment for the city and police chief on the officer's First Amendment retaliation claim, the court concluded.

§ 10. Employee's posting of alleged threats against employer or others

The following authority, in which the courts addressed the validity of an adverse employment personnel action based upon the employee's Internet posting or expression, including social networking, determined whether the employer's action against the employee was valid, where the employee posted alleged threats against the employer or others.

A medically separated city employee failed, in a retaliation claim asserted under federal and state law (42 U.S.C.A. § 12101; Ohio Rev. Code Ann. § 4112.02(I)), to show a causal connection between his filing of a handicap-discrimination charge with the Equal Employment Opportunity Commission (EEOC) and the city's issuance of a "hazard poster" warning members of the fire division of the now-former employee's training as a "bomb tech" and of his disparaging public remarks about the division, the court held in *Pflanz v. Cincinnati*, 149 Ohio App. 3d 743, 2002-Ohio-5492, 778 N.E.2d 1073 (1st Dist. Hamilton County 2002) (applying Ohio and federal law), the court reasoning that while the EEOC investigation was ongoing at the time the poster was issued, 13 months had passed since the filing of the EEOC charge, and evidence showed that the hazard poster was motivated by threats the employee had made on an Internet bulletin board. Prior to his separation, the plaintiff had begun participating in a bulletin board for firefighters on the Internet, and after his separation, the plaintiff continued to participate, using it to vent his frustrations with Fire Division management and the pension board. On June 7, 1996, the plaintiff posted on the bulletin board a message that referred to a recent incident in Mississippi where a firefighter, who had become so distraught over his treatment by the fire chief, went to the firehouse and killed four of his fellow firefighters. The city asserted that its decision to publish the hazard poster was not based on retaliation, the city instead contending that it distributed the hazard poster as a reasonable precaution to help secure the safety of the employees and management personnel in the Fire Division, the court pointed out. The plaintiff, however, argued that the city's reason was pretextual because no one in the Fire Division truly believed that he was a threat. The court stated that it could not see how this created a genuine issue of material fact, and, as for the plaintiff's reliance on affidavits from three former coworkers, each stating that the plaintiff was not a threat, this evidence was insufficient to create a genuine issue of material fact, especially when the plaintiff's Internet threats were not leveled at coworkers but at those in management positions, the court pointed out. Similarly, the plaintiff's reliance on a sentence in a memorandum from a chief of the department, in which the chief stated that he did not live his life in fear of the plaintiff, did not create a genuine issue of material fact, for the memorandum, which was dated over a month after the hazard poster had been distributed, did not rebut the city's argument that the chief and other management personnel viewed the plaintiff's Internet posting on the bulletin board as a threat to the Fire Division, nor did it evidence any retaliatory motive for the city's publication of the hazard poster.

III. School-Related Actions

§ 11. Student's posting of allegedly misleading or false information

In the following cases, in which the courts addressed the validity of an adverse action affecting a student's academic standing based upon the student's Internet posting or expression, including social networking, the courts determined whether the school's action against the student was valid, where the student posted allegedly misleading or false information.

(Publication page references are not available for this document.)

The court in *Doninger v. Niehoff*, 2009 WL 763492 (D. Conn. 2009), the facts of which are more thoroughly discussed at § 12, held that even if it were to assume, contrary to the facts presented, that the plaintiff student had properly asserted a claim against the defendant school district, the court would still deny her motion for reconsideration of a denial of her motion for partial summary judgment and an order granting, in part, the defendant's motion for summary judgment, the court reasoning that there was no reason to change its position that the plaintiff's First Amendment rights were not violated when she was told that she could not run for class secretary because of an Internet blog entry that, inter alia, contained, at best, misleading and, at worse, false information regarding a school music festival.

High school students' fake Internet profiles for a teacher and a school administrator on a public Web site, including sexually suggestive comments about female students, were not protected by the First Amendment as "parodies," reasonably believable and clearly exaggerated to enhance humor, where certain visitors to the Web site believed the fraudulent profiles were authentic, the court held in *Barnett ex rel. Barnett v. Tipton County Bd. of Educ.*, 601 F. Supp. 2d 980, 243 Ed. Law Rep. 269 (W.D. Tenn. 2009). Former high school students sued the county board of education, director, and school principal, alleging violation of the First Amendment and Due Process Clause and asserting state law tort claims regarding disciplinary actions for the students' creation of fake Internet profiles for a teacher and administrator, the defendants moved for summary judgment, and the court, on review, granted the motion. The plaintiffs argued that their Web profiles should be protected as "parodies," the court noted at the outset. However, the court related, parodies are not "reasonably believable" and are clearly exaggerated in order to enhance the humor of the parody. The First Amendment protects parodies that involve speech that cannot reasonably be understood as describing actual facts about the subject of the parody, the court stressed. In the instant case, the court pointed out, the plaintiffs offered no evidence to support their contention that a visitor to the websites would understand them to be parodies and not describing actual facts. Furthermore, the court continued, visitors to the fraudulent Web site believed it was authentic and that, for example, the assistant principal had engaged in inappropriate behavior. Both a news reporter and the parent of one of the high school's students contacted the school believing the Web site to be true, the court elaborated. As there was no genuine issue of material fact on the issue, the court could not find that the plaintiffs' Web sites were protected as parodies under the First Amendment, as a result of which the plaintiffs' First Amendment claim would be dismissed.

See *M.T. v. Central York School Dist.*, 937 A.2d 538, 228 Ed. Law Rep. 342 (Pa. Commw. Ct. 2007), appeal denied, 597 Pa. 723, 951 A.2d 1168 (2008), a case in which the court affirmed a decision of the lower tribunal upholding a school's decision to expel a high school student for the remainder of a semester for violating the school district's computer-use policy, where the court noted that the year preceding the instant matter, the student had received a three-day, in-school suspension after being involved in creating a Web site where persons could create fake identification cards that were virtually identical to those issued by the School District.

§ 12. Student's posting of information critical of school officials, or potentially disparaging or offensive in nature--School's adverse action valid or supportable

In the following cases, in which the courts addressed the validity of an adverse action affecting a student's academic standing based upon the student's Internet posting or expression, including social networking, the courts held that the school's action against the student was valid or supportable, where the student posted information critical of school officials, or information which was potentially disparaging or offensive in nature.

In *Doninger v. Niehoff*, 2009 WL 763492 (D. Conn. 2009), a case in which a plaintiff student and defend-

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ants moved for reconsideration of the court's decision granting in part and denying in part the defendant's motion for summary judgment, and denying the plaintiff's motion for partial summary judgment, the court, denying the motions for reconsideration, held that even if it were to assume, contrary to the facts, that the student had properly asserted a claim against the school district, the court would still deny her motion for reconsideration, the court reasoning that there was no reason to change its position that the plaintiff's First Amendment rights were not violated when she was told that she could not run for class secretary because of an offensive Internet blog entry that was clearly designed to come on to campus and influence fellow students. The court opined that the blog message, inter alia, used a vulgar, slang term to describe school officials, and it called on students and their parents to write the school superintendent in order to "piss her off more." When school officials, who had advised the plaintiff before she made her blog posting about the proper way for student leaders to address issues of concern with the administration, discovered the message, they disqualified the plaintiff from running for class secretary for her senior year, the court elaborated. According to school officials, the court continued, the plaintiff's conduct in posting the blog message failed to display the qualities of civility and citizenship that the school expected of class officers and leaders. That was the plaintiff's only punishment, the court observed, and she was not suspended or removed from school, she did not receive any other written discipline in her permanent school file, and she continued as a member of student council and as a leader of her student music class. Nevertheless, believing, as the plaintiff put it, that the "punishment did not fit the crime," the court elaborated, the plaintiff's mother sued the school on behalf of the plaintiff student for numerous alleged violations of several provisions of the United States Constitution, and a preliminary injunction was sought, asking the court, among other things, to void the election for Senior Class Secretary, remove the student who had been duly elected class secretary, and require a new election in which the plaintiff could run. Of course, the court stressed, whether disqualifying the plaintiff from running for class secretary was a "fitting punishment" in the circumstances, or was overly harsh or even too lenient, was not for this court to determine.

Comment

The factual background of the case is derived from the earlier court opinion at *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 225 Ed. Law Rep. 855 (D. Conn. 2007), judgment aff'd, 527 F.3d 41, 233 Ed. Law Rep. 30, 35 A.L.R.6th 703 (2d Cir. 2008).

A student who was suspended from an online law school program failed to offer sufficient evidence to undermine the program operator's legitimate nondiscriminatory explanations for its actions and to allow the trier of fact to conclude that the actions were pretexts for intentional race discrimination under 42 U.S.C.A. § 1981, where the program operator explained that the student did not receive a schedule for online chats for an evidence course because of his system classification as a second year student, that he failed to receive passing grades in courses totaling the minimum required number of study and preparation hours, and that his electronic communications violated the law school's policy on the responsible use of such communications by students, the court held in *Koger v. Kaplan, Inc.*, 169 Fed. Appx. 682 (3d Cir. 2006). A student who was suspended from the online law school program filed action alleging that his suspension violated his First Amendment rights, denied him due process, constituted race discrimination, and amounted to various forms of tortious conduct under state law, the federal district court dismissed the complaint, the student appealed, and the court, on review, affirmed, the court holding, inter alia, that the student failed to offer sufficient evidence to show that the program operator's legitimate, nondiscriminatory explanations for its actions were pretexts for intentional race discrimination under 42 U.S.C.A. § 1981. Without detail, the court took note of the defendant school's explanation that the plaintiff student's "electronic communications were found to be in violation of the law school's policy on the responsible use of electronic communications by students."

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See *Caudillo ex rel. Caudillo v. Lubbock Independent School Dist.*, 311 F. Supp. 2d 550, 187 Ed. Law Rep. 564 (N.D. Tex. 2004) (rejected on other grounds by, *Gay-Straight Alliance of Yulee High School v. School Bd. of Nassau County*, 602 F. Supp. 2d 1233, 243 Ed. Law Rep. 301 (M.D. Fla. 2009)), a case in which an unincorporated gay-straight student association and individuals brought an action against an independent school district, its acting superintendent, and assistant superintendent for secondary schools, alleging that the denial of requests to post and distribute fliers about the association at the high school, to use the school's public address system for announcements, and to be recognized as a student group with rights to meet on school campus violated the Equal Access Act and First Amendment rights, where the court, on review of cross-motions for summary judgment, granted summary judgment for the defendants, the court holding, inter alia, that Web pages allegedly not written, created, or maintained by the plaintiffs but accessible through links on a Web site maintained by the plaintiff association's Web site were highly relevant and thus admissible in a suit alleging Equal Access Act, First Amendment, and civil rights violations.

§ 13. Student's posting of information critical of school officials, or potentially disparaging or offensive in nature--School's adverse action not valid or supportable

In the following cases, in which the courts addressed the validity of an adverse action affecting a student's academic standing based upon the student's Internet posting or expression, including social networking, the courts, given the particular circumstances presented, held that the school's action against the student was not valid or supportable, where the student posted information critical of school officials, or information which was potentially disparaging or offensive in nature.

No nexus existed between a student's creation of an Internet parody of a principal and a substantial disruption of the school environment, as a result of which the school's suspension of the student violated his free-speech rights, where, inter alia, no widespread disorder occurred, and where actual charges made by the district were directed only at the student's off-campus conduct, the court held in *Layshock v. Hermitage School Dist.*, 496 F. Supp. 2d 587, 223 Ed. Law Rep. 218 (W.D. Pa. 2007), certificate of appealability denied, 2007 WL 3120192 (W.D. Pa. 2007). Parents of a high school student sued the school district, superintendent, principal, and coprincipal, the parties filed cross-motions for summary judgment, and the court, on review, held that the discipline violated the student's speech rights, that the superintendent and coprincipal were qualifiedly immune, and that the school's policies, requiring students to express their ideas in a respectful manner, maintain respect, and refrain from verbal abuse, were not overbroad. While the student was generally an academic success, his out-of-school conduct led to in-school punishment by the defendants. The student created what he characterized as a parody profile of his high school principal on Myspace.com, an Internet site where users can share photos, journals, personal interests, and the like with other users of the Internet. The parody was created by using the Web site's template for profiles, which allows Web site users to fill in background information and include answers to specific questions. The student's answers to the questions centered on the theme of "big." The answers, the court noted, ranged from nonsensical answers to silly questions, on the one hand, to crude juvenile language, on the other. For example, the court observed: in response to the question "in the past month have you smoked?" the Web site states "big blunt." The parody also reflected that the defendant principal was "too drunk to remember" the date of his birthday, the court pointed out. The student created the parody by using his grandmother's computer during nonschool hours, and no school resources were used to create the parody, the court related. In most cases in which a student alleges a free speech violation, it will be a simple and straightforward exercise for a school to establish that it had the authority to punish the student, the court noted at the outset, but in cases involving off-campus speech, the school must demonstrate an appropriate nexus between the speech and a substantial disruption of the school environment, and on this threshold "jurisdictional" question the court will not

defer to the conclusions of school administrators. Here, the court stressed, even construing the evidence in a light most favorable to the defendants, they failed to establish a sufficient nexus between the student's speech and a substantial disruption of the school environment.

Comment

Some of the facts and background of this case are taken from the earlier decision of *Layshock ex rel. Layshock v. Hermitage School Dist.*, 412 F. Supp. 2d 502 (W.D. Pa. 2006).

A high school student demonstrated a likelihood of irreparable harm resulting from disciplinary measures taken by a school following school officials' discovery of his Internet homepage containing material that was derogatory toward the school and school officials, as an element of the test for entitlement to preliminary injunctive relief on his First Amendment claim, the court held in *Beussink ex rel. Beussink v. Woodland R-IV School Dist.*, 30 F. Supp. 2d 1175, 131 Ed. Law Rep. 1000 (E.D. Mo. 1998), where the student was ordered to remove his homepage from the Internet, and where the student's grades were dropped one grade level for each day of unexcused absence resulting from his suspension, jeopardizing the student's timely graduation. The student sued the school district, alleging that discipline imposed on him violated his First Amendment free speech rights, and the court, on review of the student's motion for preliminary injunction, granted the motion. The court pointed out that the school principal testified at the preliminary injunction hearing that he made the determination to discipline the student immediately upon seeing the homepage. He was upset that the Internet message had found its way into his school's classrooms, and the principal's testimony did not indicate that he disciplined the student based on a fear of disruption or interference with school discipline, reasonable or otherwise, the court related. The principal's own testimony indicated that he disciplined the student because he was upset by the content of the homepage, the court commented. There was no evidence that the student used school facilities or school resources to create his homepage, which was highly critical of the administration at the high school, and which purportedly used vulgar language to convey his opinion regarding the teachers, the principal, and the school's own homepage, the court elaborated. Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech, the court instructed, such that the student demonstrated a likelihood of success on the merits of his First Amendment claim. Irreparable harm is established any time a movant's First Amendment rights are violated, and the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury, the court declared. Here, it was likely that the student would be able to prove that his First Amendment rights were violated when he was disciplined by the district, the court related, and the principal directed the student to "clean up" his homepage or remove it from the Internet. The student also faced academic harm, the court stressed, for his grades were dropped one level for each day his number of unexcused absences exceeded 10, and the testimony at trial indicated that this resulted in the student failing four classes that he would not otherwise have failed.

For purposes of his motion for a temporary restraining order (TRO), a high school student had a substantial likelihood of success on the merits of his claim that a school violated his First Amendment rights by disciplining him for creating an Internet Web page from his home without using school resources or time, where the page contained some commentary on the school administration and faculty, mock "obituaries" of friends of the student, and allowed visitors to the site to vote on who would be the subject of the next mock obituary, the court held in *Emmett v. Kent School Dist. No. 415*, 92 F. Supp. 2d 1088, 143 Ed. Law Rep. 828 (W.D. Wash. 2000) (applying Washington law). The student moved for a TRO prohibiting the school from suspending him (Wash. Admin. Code § 180-40-235) for creating a Web page on the Internet from his home, and the court, on review, granted the motion. The evidence presented indicated that the subject student was an 18-year-old senior at the

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high school, that he had a grade point average of 3.95, that he was cocaptain of the basketball team, and that he had no disciplinary history. On February 13, 2000, he posted a Web page on the Internet that was created from his home; the Web page was entitled the "Unofficial Kentlake High Home Page," and included disclaimers warning a visitor that the site was not sponsored by the school and that it was for entertainment purposes only. It contained some commentary on the school administration and faculty and posted mock "obituaries" of at least two of the plaintiff's friends. The obituaries were written tongue-in-cheek, inspired, apparently, by a creative writing class the previous year in which students were assigned to write their own obituary. The mock obituaries became a topic of discussion at the high school among students, faculty, and administrators, and, in addition, the plaintiff allowed visitors to the Web site to vote on who would "die" next, that is, who would be the subject of the next mock obituary. The student was ultimately placed on emergency expulsion by the school for intimidation, harassment, and disruption to the educational process. The court noted at the outset that preliminary injunctive relief may be granted if the moving party demonstrates a combination of likely success on the merits and irreparable harm, and that the First Amendment provides some but not complete protection for students in a school setting. Here, the court related, for purposes of his motion for a TRO, the student had a substantial likelihood of success on the merits of his claim that the school violated his constitutional rights by disciplining him for creating an Internet Web page on his own time. The fact that the student would miss four additional days of school and sporting events was a sufficient showing of "irreparable injury" justifying the TRO prohibiting the school from suspending the student for creating the Internet Web page, the court concluded.

§ 14. Student's posting of alleged threats against school officials or others

The following authority, in which the courts addressed the validity of an adverse action affecting a student's academic standing based upon the student's Internet posting or expression, including social networking, determined whether the school's action against the student was valid, where the student posted alleged threats against school officials or others.


A middle school student's Internet Web site, containing threatening and derogatory comments about a teacher and principal, did not constitute a "true threat," for purposes of the First Amendment, the court held in *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 569 Pa. 638, 807 A.2d 847, 170 Ed. Law Rep. 302 (2002), the court reasoning that even though the Web site asked why the teacher should die, showed a picture of the teacher's head severed from her body, and solicited funds for a hit man, the Web site, taken as a whole, was a sophomoric, crude, highly offensive, and perhaps misguided attempt at humor or parody, and it did not reflect a serious expression of intent to inflict harm, despite the offense taken by the teacher and the fear she experienced after viewing the Web site. The student and his parents sought review of the school district's decision to permanently expel the student, the trial court affirmed, and the court, on review, affirmed, the court holding that the student's Internet Web site did not constitute a "true threat," for purposes of the First Amendment, that the speech expressed by the student on the Web site was "on-campus" speech that implicated unique First Amendment concerns regarding the school environment, and that given the Web site's disruption of the entire school community, expelling the student did not violate his First Amendment rights. The court pointed out that the teacher who was the subject of the Web site suffered severe mental and physical harm from viewing the site and that she was unable to finish the school year and took medical leave the next year. The reaction of some viewers was evidently quite different, the court continued, for the Web site contained comments from viewers, the court noting that the site made one viewer "laugh" and made another viewer "crack up." Administrators from the school also responded to the Web site, and the principal treated the site as a threat, the court indicated. Authorities were called, although no charges were filed, and the School District did not segregate the student from the school population and permitted the student to go on a school-sponsored band trip the court related. The School District did not


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immediately confront or discipline the student, the court continued, nor was he referred for counseling, but rather, it was only after the school year that his parents were notified of the Web site and that suspension and expulsion proceedings were held. The threatening statements were not conditional, the court pointed out, but, instead, the statements regarding the solicitation of a hitman and the questions as to why the teacher should die were stated unconditionally and unequivocally. However, the threatening statements and the Web site itself were not communicated directly to the teacher, but, on the contrary, it appeared that the disclaimer evidenced an intent that school faculty should not view the Web site, the court concluded.

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Section 1. Footnotes:

[FN1] Communications contained in email and text messages are not within the scope of this topic. As to claims for vicarious and individual liability for the infliction of emotional distress derived from the use of the Internet and electronic communications, see the annotation at 30 A.L.R.6th 241. As to individual and corporate liability for libel and slander in electronic communications, including e-mail, the Internet, and Web sites, see the annotation at 3 A.L.R.6th 153. As to the use of an employer's e-mail or Internet system as misconduct precluding unemployment compensation, see the annotation at 106 A.L.R.5th 297. As to the expectation of privacy in Internet communications, see the annotation at 92 A.L.R.5th 15. Lastly, as to the liability of an Internet Service Provider for Internet or e-mail defamation, see the annotation at 84 A.L.R.5th 169.

Section 2. Footnotes:

[FN2] Am. Jur. 2d, Constitutional Law § 450.

[FN3] Am. Jur. 2d, Constitutional Law § 453.

[FN4] Am. Jur. 2d, Constitutional Law § 469.

[FN5] Am. Jur. 2d, Constitutional Law § 472.

[FN6] Am. Jur. 2d, Job Discrimination § 240.

[FN7] Am. Jur. 2d, Job Discrimination § 244.

[FN8] Am. Jur. 2d, Public Officers and Employees § 227.

Section 3. Footnotes:

[FN9] See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 238 Ed. Law Rep. 170, 156 Lab. Cas. (CCH) ¶; 60690, 49 A.L.R.6th 699 (D. Conn. 2008).

[FN10] See, e.g., *Layshock v. Hermitage School Dist.*, 496 F. Supp. 2d 587, 223 Ed. Law Rep. 218 (W.D. Pa. 2007), certificate of appealability denied, 2007 WL 3120192 (W.D. Pa. 2007), where the court held that, in a student's action alleging a free speech violation, it is incumbent upon the school to establish that it had the authority to punish the student, the court adding that in most cases in which a student alleges a free speech viola-

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[FN11] See, e.g., *Corman v. UCG*, 369 F. Supp. 2d 923 (N.D. Ohio 2005) (applying, in part, Maryland law).

[FN12] See, e.g., *Curran v. Cousins*, 509 F.3d 36, 26 I.E.R. Cas. (BNA) 1696, 155 Lab. Cas. (CCH) ¶; 60551 (1st Cir. 2007).

[FN13] See, e.g., *Barnett ex rel. Barnett v. Tipton County Bd. of Educ.*, 601 F. Supp. 2d 980, 243 Ed. Law Rep. 269 (W.D. Tenn. 2009).

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