

WATO A

washington association of telecommunications officers and advisors



INSIDE

PAGE 1 SOCIAL MEDIA AND THE WORKPLACE

Social media and first amendment rights in the workplace.

PAGE 3 FROM THE PRESIDENT

The community needs assessment in your franchise renewal process.

PAGE 5 THE SEATTLE CHANNEL

How did they choose an automated playback device?

PAGE 8 MEET YOUR WATO A BOARD MEMBERS

Chris Jaramillo & Jon Funfar

PAGE 9 WASHINGTON WINNERS

WATO A congratulates all the government award winners from three important venues.

“You Can’t Fire Me For That!” Employee Discipline and Social Media



contributed by *Nancy Cornish Rodgers and Ken Fellman*
Kissinger & Fellman, P.C.

An employee makes a comment on the city’s Facebook page criticizing a parks project. A supervisor surreptitiously gains access to a private blog created by two employees to complain about the workplace. A supervisor sends sexually harassing messages from her personal Twitter account to a subordinate’s personal Twitter account after work hours. Can a public entity discipline or terminate these employees?

As organizations address how to embrace social media in a productive, cost-effective manner, they must also consider how to treat employee use of social media. The same basic employee-management concerns that have always been faced are applicable to social media, but in a more complex environment. Employers need to understand this new layer of complexity and modify their policies and procedures appropriately. Through social media, an employee can partake in almost

all forms of inappropriate workplace behavior from sexual harassment to insubordination to breaching confidentiality. From a public employer perspective, controlling employee use of social media adds the additional challenge of addressing free speech, privacy, and open records issues.

Free Speech

The right to free speech includes electronic speech such as comments on a social media site. While public employees have a right to free speech in the workplace, there are limits to those rights. Speech related to an employee’s job duties is not protected under the First Amendment and an employer can take disciplinary action because of the speech. If the speech at issue is not related to the employee’s job duties, then the employer’s next step is to determine if the topic is a matter of public concern. If the topic is not a matter of public concern, then there is no First Amendment protection. If the topic is a matter of public concern, then the speech likely has protection under the First Amendment and the employer should refrain from taking disciplinary action because of the speech. The ‘public concern’ test is only triggered when the speech is *not* related to an employee’s job duties. Policies should put the public employees on notice that, as with other forms of speech, they can be disciplined for social media comments made pursuant to their job

“You Can’t Fire Me For That!” – Employee Discipline and Social Media...continued

duties or for comments that are not matters of public concern.

Consider the employee who makes a comment on the city’s Facebook page criticizing a parks project. If the employee is a police officer with no connection to parks projects, the employee likely has First Amendment protection because the comment is not related to her job duties and is a matter of public concern. If, however, the employee is the parks director, then the speech is related to his job duties and he would not have First Amendment protection for the comment.

Privacy

Public employees also have a constitutional right to privacy at the workplace. However, an employee’s reasonable expectation of privacy can be limited by a written policy. It is important for your policy to inform employees that there should be no expectation of privacy when it comes to their business-related use of social media, or their non-business related use of social media that occurs during work hours or on the local government’s equipment. A local government may monitor social media use pursuant to the policy. Public entities should also avoid secretly gaining access to an employee’s social media pages. Unauthorized access could violate the Stored Communications Act, Title II of the Electronic Communications Privacy Act of 1986, which restricts unauthorized or excessive access of computers and digital content.

Consider the supervisor who secretly gains access to the *private* blog created by two employees to complain about favoritism of one department employee. The director terminates the two employees for their comments. The monitoring of a public blog would not violate the employees’ privacy rights, but they may have a viable claim under the Stored Communications Act because

the supervisor was not authorized to view the private blog.

Harassment

Employers are not necessarily relieved of their duty to protect employees from harassment just because the harassment takes place after hours and outside the traditional workplace. Actionable harassment can occur when employees are working outside the workplace and after hours. This could include business meetings, conferences, and field work. In addition, actionable harassment can occur when employees’ after hours interactions manifest themselves at the workplace or affect job performance. In these circumstances, an employer, once it becomes aware of the behavior, must exercise reasonable care to prevent and promptly correct the harassing behavior. Policies should advise employees that actionable harassment can occur through social media and will be addressed like all other forms of harassment.

Consider the supervisor who sends sexually harassing messages via a personal Twitter account to a subordinate. Employers are strictly liable for harassment committed by supervisors in the work context. Depending on the particular facts, the supervisor’s inappropriate Tweets can be “in the work context.” If the supervisor uses her Twitter account for professional matters, if the supervisor and employee are at a city-sponsored event at the time, or if the supervisor’s comments affect the subordinate’s job performance, the employer has a duty to address and correct the behavior.

Open Records

Under Washington’s Public Records Act, public records are available for public inspection, unless the record meets a specific exception. “Public record” is defined broadly and includes “any writing containing

information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency *regardless of physical form or characteristics.*” As a result, comments and posts on a local government’s social media site, including sites of divisions and departments, are subject to public records requests. Further, comments on employees’ personal social media sites may also be subject to public records requests, if the government employees use their personal sites to promote their professional endeavors.

Consider the community development director who frequently posts on his Facebook page about community development events in his jurisdiction. Arguably, his personal Facebook page contains records that relate to the conduct or function of government and is on a site used by the local government, albeit through one employee. As a result, his personal Facebook records could be the subject of a public records request.

Conclusion

Even if your community does not use social media, it is likely that many of your employees do. Employment and social media intersect in many more areas than the four addressed in this article. Now is a good time to review your employee policies and edit, as needed, to ensure employee policies address social media use. Further, it is important to remind employees that you may monitor their use of your computers and other equipment, and that employees have no expectation of privacy on such equipment. Finally, employees should be aware that information that they post on a publicly available site may be viewable by you, regardless of when, where, or how the employee made the posting, and may be subject to a public records request.