Insights, News & Events

DIGITAL DISRUPTIONS: HANDLING SOCIAL MEDIA MISUSE BY STUDENTS AND EDUCATORS

Publication
Jun 30, 2017

Beginning with the launch of Myspace and Facebook in the early part of the last decade, social media communication has taken the world by storm. Today, social media networking is the primary means of communicating about one's personal achievements, political views, life-changing moments – or even simply what's for dinner. In the context of education, the social media phenomenon can be a double-edged sword.

Effective use of social media in the classroom offers the opportunity for teaching and learning on a global scale. It provides educators with the unique opportunity to expand the student experience well beyond the local brick-and-mortar environment, and allows students to connect with one another in a manner unthinkable just a generation ago. However, use of social media by students and educators outside the classroom can have a profoundly negative impact on the learning environment.

Where do school administrators draw the line separating social media content that is productive and engaging from that which is detrimental to the educational mission? What should administrators consider when formulating policies designed to protect the learning institution while still respecting the rights of students and employees?

SCHOOL SCRUTINY OF APPLICANT AND STUDENT SOCIAL MEDIA USE: WHERE TO DRAW THE LINE

Related People

Melody L. Rayl
Partner
816.460.0201

Industry Focus

Education

Higher Education

Just last month, Harvard University rescinded admission offers to at least 10 prospective students after discovering they had engaged in offensive behavior on Facebook. The school learned that dozens of members of the Class of 2021 participated in a private messaging group that included messages and images insulting people based on their national origin, contained sexually explicit material, and mocked the Holocaust, among other things. The high-profile incident serves as a wake-up call to educational institutions about social media's role in dealing with students, even when the messages are carried out in a (seemingly) private setting.

If, like Harvard, you operate a private institution, you are afforded greater latitude in resolving such issues. The key is having in place an effective social media policy that prohibits applicants and students from engaging in offensive online conduct and defines terms broadly enough to capture emails, text messages, blog posts, videos, and posts on social networking sites such as Facebook, Twitter, Snapchat, and Instagram.

Public schools, however, need to further ensure that any student discipline does not run afoul of First Amendment free speech rights. Under longstanding constitutional law, a student receives protection if the offending speech addresses a matter of public concern and is not sufficiently disruptive to the learning atmosphere of the school. Sometimes student (or applicant) conduct is so offensive that it clearly falls outside of First Amendment protection – speech similar to the Facebook posts in the Harvard situation, for example. But other cases might be tougher to call. In those instances, it is best to seek out legal advice from an experienced education attorney before proceeding.

WHEN TEACHERS BEHAVE BADLY ONLINE: HOW SCHOOLS SHOULD RESPOND

You face a similar balancing test when dealing with the social media conduct of your employees. Any social media policy you develop and enforce must be clearly worded, consistently applied, and, if you operate in a public school environment, must not infringe on educators' free speech rights under the First Amendment. Private institutions face the additional hurdle of ensuring your policy does not constrain the ability of educators to engage in activity

protected by Section 7 of the National Labor Relations Act (NLRA).

In the private school environment, employees are protected when engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" regardless of whether they are unionized. These actions have been broadly interpreted to prohibit schools from inhibiting employees from discussing terms and conditions of employment (such as wages, hours, benefits, and supervisory actions) with each other, even if the discussion occurs online. In fact, school policies that require "respect" or "courtesy," or prohibit statements that would "damage the school's reputation," may be viewed as unlawful under Section 7.

Instead of focusing on the delivery method, your social media policy should focus on the nature and effect of the expression by prohibiting specific conduct that would likely violate your ethics, harassment, or other applicable policies. Make sure you allow for an individualized assessment of the circumstances, considering factors such as the educator's work history, the intended audience of the post, whether the posting was accidental or intentional, and – most importantly – whether the content of the post violates any ethical obligations or is likely to disrupt effective performance of teaching responsibilities.

For public schools, a long history of legal decisions provides contours for potential educator discipline. The landmark 1968 Supreme Court case of *Pickering v. Board of Education* provides the cornerstone for any decision you make. In that case, a high school teacher was fired after writing a letter to the local newspaper criticizing the school board and superintendent for prioritizing high school athletics over academics. In finding his termination unlawful, the Supreme Court stated that government employers must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Over a decade later, in the 1983 case of *Connick v. Myers*, the Supreme Court clarified the First Amendment standard when it found a teacher's workplace survey soliciting views on the way administrators were managing the school to be unprotected by the Constitution due to the significant

disruption it caused to the operation and efficiency of the office.

Courts have applied these same standards to 21st-century matters, including social media controversies. For example, a federal district court in Pennsylvania found in 2014 that a teacher's blog postings – in which she referred to students as "jerk," "rat-like," "dunderhead," and "frightfully dim" – were rightfully prohibited and the teacher's termination was proper. The court found the posts "contained gratuitously demeaning and insulting language inextricably intertwined with her occasional discussions of public issues ... and attracted considerable negative attention, from concerned parents and from the public at large" (*Munroe v. Central Bucks School District*).

Courts have also examined the circumstances under which social media content was posted to determine whether it justified termination of employment. Accidental or unauthorized postings should not be considered in the same light as those intentionally directed to students, parents, or coworkers. For example, a Michigan court of appeals reversed the termination of a teacher in 2010 after a friend posted sexually suggestive photographs of her taken at a bachelorette party (*Land v. L'Anse Creuse Public School Board of Education*). The court found that her off-duty, lawful conduct, which was not publicized by the teacher herself and did not involve students or school activities, could not constitute just cause for discipline.

FINAL TEST: WRAPPING UP

As noted above, an effective social media policy is essential to ensure you are best protected should an online issue arise involving an applicant, student, or educator. You should consult counsel to draft a policy that is broad enough to capture potential offending communication, but not so broad that it violates your employees' NLRA rights.

Any time you feel you need to impose discipline on someone because of their online activity, whether you are in the public or private sphere, you should consider retaining counsel for advice. The law is continually evolving with respect to both constitutional and Section 7 rights, and you will want to ensure your policy and practice is both enforceable and lawful before proceeding.

For more information, contact the author at MRayl@fisherphillips.com or 816.460.0201.