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Staff Email and Social Networking: Handle With Care

Technology continues to present new legal challenges for school leadership. In the January/February 2011 issue of *Principal*, this column first addressed social networking. More specifically, it identified the initial wave of court decisions extending from teacher-to-student to student-to-student uses of social networking tools on the Internet, such as Facebook and Twitter. This follow-up focuses on court cases arising from teachers' use of communication tools of the electronic age, including social networking channels and email.

The Case

For her twelfth year as an elementary school teacher in Patterson, New Jersey, Jennifer O. was reassigned from kindergarten in one school to a first grade class in another school. The vast majority of students in her new school were African American or Latino. On March 28, 2011, she posted two statements on Facebook: "I'm not a teacher—I'm a warden for future criminals!" and "They had a scared straight program in school—why couldn't [I] bring [first] graders?"

When the principal of the old school tipped off his colleague about the postings, Ms. O's new principal promptly consulted with the district's director of human resources, who obtained a copy of Ms. O's Facebook page. The principal confronted Ms. O, who unrepentantly insisted that she had not intended her comments to be offensive. He suspended her with pay pending the outcome of an investigation.

Meanwhile, news of her Facebook postings spread. Two angry parents came to the principal's office to express their outrage. The school day ended with a protest outside the school, attended by 20 to 25 persons. Reporters and camera crews from major news organizations appeared at the school. That evening, the home-school council meeting attracted a larger than usual attendance, and the topic of the Facebook postings dominated the meeting. The principal reassured the attendees that he had removed Ms. O from the classroom pending investigation.

Two weeks later, the assistant superintendent notified Ms. O of the formal charge of conduct unbecoming a teacher. Within a few weeks, the superintendent suspended Ms. O without pay, pending a hearing. Per New Jersey law, an administrative law judge (ALJ) conducted the hearing.

Ms. O testified that the reference to "future criminals" was based on her students' behaviors, not their race or ethnicity. She further explained that one of her students had struck her the week before the postings, and other students had stolen from her and classmates. She attested to having made several disciplinary referrals to the school administration. The "Scared Straight" program, which the school had hosted earlier on the day of her postings, was aimed at deterring criminal behavior of students. Ms. O explained that she had not really advocated that her first graders participate but was venting her frustration with their behavior that day. She expressed surprise that the school community interpreted her comments as racist.

On October 31, 2011, the ALJ issued her decision, which the state commissioner adopted, ordering Ms. O's termination. The conclusions included that First Amendment expression did not protect her postings and that they constituted conduct unbecoming a teacher, which is grounds for termination under New Jersey law.

The ALJ further concluded that Ms. O's prior unblemished record did not mitigate this consequence in light of the effect on the welfare of her students. Similarly, she concluded that "if this was an aberrational lapse in judgment, a reaction to an unusually bad day, I would have expected to have heard more genuine and passionate contrition in her testimony" and that the relations with the school community was irreparably damaged "not [just] because the community thinks so but because [Ms. O] fails to understand why it does."

Ms. O appealed to state court, contending that the termination decision erred in rejecting her constitutional claim, was not supported by the evidence, and, in any event, represented an excessive sanction.

What do you think was the judicial outcome for each of Ms. O's three bases of appeal?

The court concluded that the First Amendment did not protect Ms. O's postings for two reasons the ALJ had identified. First, Ms. O was expressing her personal concerns rather than raising issues of public concern. Second, even if her postings were public issues, the district's interest in operating the schools efficiently outweighed her interest as a private citizen.

The court similarly agreed with the ALJ that the undisputed posting of such derogatory and demeaning comments about her first grade students met the definition of conduct unbecoming a teacher that New Jersey judicial precedent had established—actions that tend to destroy public respect for governmental employees and confidence in the public schools. The court deferred to the ALJ's selected sanction, concluding that it was not arbitrary or capricious (*In re O'Brien*, 2013).

Is the judicial outcome in Ms. O's case in line with other case law concerning teachers' use of such social networking sites?

Although Ms. O used Facebook for unsuitable postings about students, the outcome of her case is consistent with the court decisions reported in the January/February 2011 issue concerning teachers' use of such sites for inappropriate communications with their students. The limits of First Amendment protection in such cases are consistent and can be generalized. However, the nature and sufficiency of the evidence and their overlap with the appropriate level of discipline depend on the circumstances of the individual case and the contours of the applicable state law.

For example, in a New York case, the district decided, after a hearing, to terminate a tenured teacher who had posted clearly inappropriate comments on a social media website alluding to a tragedy involving an unknown student at a different school. Upon her appeal, the court concluded that termination was an excessive response based on the totality of circumstances, including her small online network, the community's unfamiliarity with the student, her 15-year unblemished record, and her sincere and responsible remorse (*Rubino v. City of New York*, 2013). The court remanded the matter to the school district for imposition of a sanction less than termination.

In what ways has teachers' use of email arisen in K-12 litigation?

Such cases have tested the coverage of First Amendment freedom of expression. For example, in *Baar v. Jefferson County Board of Education* (2009), a male teacher sent various unwelcome communications to a female colleague, resulting in a formal directive from his principal to discontinue verbal and written communication with her. When he subsequently sent her an email indicating that he would attend the next meeting of a professional organization that he had co-founded but had not been involved in for several years, the principal reprimanded him in writing.

He filed a lawsuit claiming that the First Amendment protected his email. The Sixth Circuit disagreed, reasoning that his email was not of public concern and that the school district's interest in effective operations outweighed his interest in communicating with his female colleague. Indeed, the court concluded, "had the school board looked the other way in dealing with [her] complaints, it would have taken on the risk of exposing itself to liability for a hostile work environment."

Litigation has also been filed regarding the scope of Fourth Amendment protection in relation to employee email. In an illustrative case, an elementary school principal had concerns about the superintendent's implementation of the IDEA. When the principal was on medical leave, the superintendent had the interim administrator search the principal's work computer and forward to the superintendent her email, including one to her attorney describing work-related problems she was having with him. The relevant issue in this case was whether the superintendent's action violated the Fourth Amendment search and seizure clause.

The court considered two sub-issues: whether the principal had a reasonable expectation of privacy in her emails and whether the scope of the search was excessively intrusive. Using multiple factors for the first issue, including the content of the district's acceptable use policy, and emphasizing the accessing of the principal's email with her private attorney for the second sub-issue, the court denied the defendant's motion for summary judgment, reasoning that a jury could reasonably find that the superintendent had violated the Fourth Amendment (*Brown-Criscuolo v. Wolfe*, 2009).

In an unpublished decision involving whether the emails that staff write on the district's system are "education records," thus accessible to the parents under the Family Educational Rights and Privacy Act, a federal district court ruled that only those emails that both personally identify the student and are in the student's permanent file qualify as education records (*S.A. v. Tulare County School District*, 2009).

Conclusion

Staff use of social networking sites and email has generated various lines of litigation that demonstrate the importance of special care. Thus, principals need to take an active role in educating and supervising staff in the use of social networking in relation to students and colleagues and to participate in the development of acceptable use policies for the school district's computer system, including email. Electronic communications easily cause unintended effects via their ability to leave an indelible record and spread like viruses. Staff members need to think twice or, even better, thrice before writing to or about students or colleagues via electronic media. P

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