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Municipal Law News

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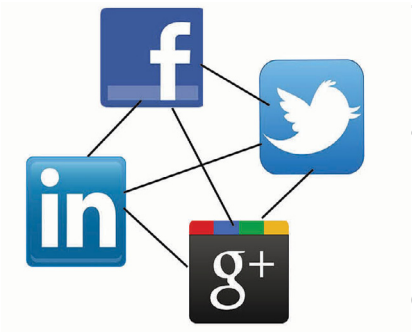
SOCIAL MEDIA PERILS FOR PUBLIC EMPLOYERS

- Michael R. Blum



Social media is proliferating in the workplace. Social networking sites such as Facebook, Twitter, LinkedIn, Google Plus+, Pinterest, Tumblr and Flickr have become commonplace on employee smartphones and computers. This phenomenon is beneficial to employers in many respects but is also fraught with peril for the unwary. This article focuses on the impact of constitutional and statutory doctrines concerning the use of social media in public employment.

SOCIAL NETWORKING AS STATUTORILY PROTECTED LABOR ACTIVITY

In the private sector, labor relations is regulated by the National Labor Relations Act (NLRA). Section seven of the NLRA provides employees the right, among others, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The National Labor Relations Board (NLRB), a federal agency responsible for enforcing the NLRA, has been very active in addressing social media policies in the private sector. In several recent decisions, the NLRB found that policies it determined to be overly broad, or that did not clearly define what employees were permitted to include in social media postings, unlawfully chilled the exercise of rights guaranteed by section seven. Similarly, the NLRB has found unlawful discipline taken against employees in enforcing overly broad policies or based on comments made in social media concerning workplace conditions.

Like the NLRA, Section 423.209 of the Michigan Public Employment Relations Act (PERA) states: "It shall be lawful for public employees to … engage in lawful concerted activities for … mutual aid and protection …." Thus, NLRB precedent likely will be followed by the Michigan Employment Relations Commission (MERC), which enforces PERA. For example, MERC recently held that an employer violated PERA when it suspended a police officer for operating an off-duty website utilized by the officer, his fellow officers and the public to discuss police department affairs. In another case, MERC determined that even rude, insulting, or offensive employee comments are protected under PERA, unless the conduct is so flagrant or extreme as to seriously impair the maintenance of discipline or render that individual unfit for further service.

INTERNET PRIVACY PROTECTION ACT

Employers who use social media when researching applicants or when deciding to implement employment decisions must also consider Michigan's Internet Privacy Protection Act (IPPA). The IPPA prohibits both public and private sector employers from (1) requesting that an employee or an applicant "grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal Internet account" and (2) discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant

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for failing to disclose or provide access to a personal Internet account.

The IPPA does include some exceptions, which permit an employer to:

- Request or require an employee to disclose log-in information for an electronic communication device paid for in whole or in part by the employer.
- Request or require an employee to disclose log-in information for "an account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes."
- Discipline or discharge an employee for transferring proprietary or confidential employer information to an employee's personal Internet account without authorization.
- Conduct an investigation or require an employee to cooperate in an investigation under certain limited circumstances.
- Implement or enforce a workplace Internet usage and/or monitoring policy.

FREEDOM OF SPEECH IN PUBLIC SECTOR EMPLOYMENT

Over the years, courts have made a clear distinction between the rights entitled to a private citizen, and a public sector employee. Social media has blurred the lines between professional and personal life. In order to challenge an employment-related decision under the First Amendment, a public sector employee must (1) show their speech addresses a matter of public concern, and (2) show free-speech interests outweigh the employer's efficiency interests.

If an employee can show that comments made through social media involve a matter of public concern, courts will evaluate whether the speech:

- Impairs discipline or harmony among co-workers.
- Has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary.
- Interferes with the normal operation of the employer's business.

CONCLUSION

Social media is now pervasive in our society and presents significant challenges in determining legal protections afforded to public sector employees. Employers should recognize that social media can be useful but is also fraught with peril for the unwary.

Given the government's review of these policies it would be prudent to have your social media policy reviewed by experienced labor counsel prior to implementation. If you have an existing social media policy, periodic review by your labor attorney to take into account recent policy interpretations and court decisions is advised.

For more information on social media for public employers please contact Mike Blum at mblum@fosterswift.com or 248.785.4722. Mike is an experienced Michigan labor and employment lawyer.

WATCH WEBINAR RECORDINGS

Did you miss some of the Foster Swift webinar series for new officials? If so, don't worry. We've got you covered. Each webinar was recorded and is posted on fosterswift.com.

Watch all 6 webinars on-demand. Just follow this link http://bit.ly/19Pmprn.

BOND COUNSEL CORNER

- John M. Kamins

Did you know Foster Swift is a nationally recognized bond counsel firm? We serve Michigan townships and other governmental units and school districts in all aspects of issuing bonds and municipal finance. Our Lansing, Grand Rapids and Oakland County offices are listed in *The Bond Buyer's Municipal Marketplace* (known as the "Red Book"), the national directory of recognized bond attorneys.

The Firm's Public Finance practice has earned a reputation for excellence, efficiency and responsiveness to our clients' needs. Beginning with a client's earliest consideration of how to finance any governmental or economic development project or how to refinance its outstanding bonds, through every step of structuring, authorizing, selling and issuing general obligation or revenue bonds, or other bonds, notes and installment purchase agreements, our public finance attorneys advise and lead issuers throughout their municipal finance transactions.

Our bond-financed projects run the gamut from municipal and school buildings and equipment, street improvements, water and sewage disposal systems, drainage districts, libraries, museums, stadiums, charter schools, hospitals and 501(c)(3) facilities to manufacturing and solid waste disposal facilities.

We advise municipal clients on state laws and federal tax and securities laws and regulations. We draft their ballot proposals, bond authorizing ordinances and resolutions, notices of intent, intergovernmental contracts, official statements, continuing disclosure agreements, applications for Michigan Department of Treasury approval (when needed) and other essential resolutions, contracts, legal opinions, certificates and proceedings.

Foster Swift has also served in recent years as bond counsel to the State of Michigan, the Michigan Finance Authority and the Michigan Strategic Fund, and to four school districts with Emergency Managers or a consent agreement in lieu of an Emergency Manager. When we are not an issuer's bond counsel, we sometimes are the underwriter's counsel, placement agent's counsel or trustee's counsel in diverse bond or note issues. We can also counsel clients on defaulted and troubled bond issues.

The leader of our Public Finance practice, John Kamins, has exceptional experience helping local governments to finance unfunded accrued actuarial liabilities for pension and retiree medical benefits. Under current Michigan law, bonds can be issued for those purposes only by AA-rated issuers and only until Dec. 31, 2014, so time is growing short for initiating those potential bond issues.

If you have questions regarding bonds, please contact John Kamins at jkamins@fosterswift.com or 248.785.4727. His bond financing clients have included state and local governments, underwriters, trustees and conduit borrowers. He also has served as corporate and disclosure counsel to publicly traded and privately held companies and 501(c)(3) entities for financings, securities offerings, private placements, SEC reporting, mergers and acquisitions, joint ventures, and governance issues.

AT THE PODIUM

Anne M. Seurynck will present "Top 10 Open Meetings Act and Freedom of Information Act Mistakes" at the 2014 Loleta Fyan Rural Libraries Conference Wednesday, April 30 through Friday, May 2.

SIGN, SIGN, EVERYWHERE A SIGN

- Lisa J. Hamameh

Sign, sign, everywhere a sign
Blockin' out the scenery, breakin' my mind
Do this, don't do that, can't you read the sign?

"Congress shall make no law … abridging the freedom of speech."[1] That's straightforward and uncomplicated, right? Wrong! How straightforward can it be when speech, in the form of signs, causes traffic hazards, diminishes property values, or becomes a nuisance riddled with graffiti? For these, and many more reasons, the courts have upheld municipal ordinances that regulate the size, type and placement of signs, citing the legitimate governmental concerns of aesthetic, blight and traffic safety.

COMMERCIAL SPEECH

Although commercial speech was once excluded from the coverage of the First Amendment, it now enjoys constitutional protection and is protected from "unwarranted governmental regulation."[2] However, "… state and local governments have freer rein to regulate commercial speech than political or expressive speech."[3] Because of this distinction, the court in *Central Hudson Gas and Electric Corp. v Public Service Commission of New York* developed a four-part test to determine if a regulation on commercial speech is constitutional. It provides: (1) the speech must concern lawful activity and must not be misleading; (2) the regulation must seek to implement a substantial government interest; (3) the regulation must directly advance the asserted governmental interest; and (4) the regulation must reach no farther than necessary to accomplish the given objective. *The Central Hudson Court* considered a regulation that completely banned an electric utility from advertisements that promoted the use of electricity. Applying its own four-part test, it held that the regulation violated the First Amendment.

NON-COMMERCIAL OR EXPRESSIVE SPEECH

When regulating non-commercial or expressive speech, the courts' primary determination is whether the regulated speech is *content-based* or *content-neutral*. The Michigan Court of Appeals explained:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.[4]

There have been a number of Michigan cases over the years that analyzed the distinction between *content-based* or *content-neutral* sign regulations. For example, in *Gannett Outdoor Co of Michigan v Troy*,[5] the court held

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[1]US Const Amend I
[2]*Central Hudson Gas and Electric Corp. v Public Service Commission of New York*, 447 US 557, 561; 100 S Ct 2343; 65 L Ed 2d 341 (1980).
[3]*Risner v City of Wyoming*, 147 Mich App 430, 433; 383 NW2d 226 (1985)
[4]*Outdoor Systems, Inc. v City of Clawson*, 262 Mich App at 722 (2004) (citations omitted).
[5]Gannett Outdoor Company of Michigan v City of Troy, 156 Mich App 126; 409 NW 2d 719 (1986)

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that the City of Troy's sign ordinance regulating billboards without regard to their content was content-neutral and lawful. The Michigan Court of Appeals explained that the ordinance "reflects no bias, censorship or preference for a particular viewpoint over another. Sign regulation in Troy is not based on the city's assessment of the desirability of the ideas expressed on proposed signs."[6] It is well settled in Michigan that if regulation of non-commercial or expressive speech signs is content-neutral, then some time, place and manner restrictions will be permitted.

If, however, a non-commercial or expressive speech sign regulation is found to be content-based (i.e. dependent on the content of the speech itself, such as political signs or election signs), it will be reviewed under a strict scrutiny standard, which means the regulations must be found necessary to further compelling governmental interests and must be the least restrictive means to advance those interests.[7]

Historically, no sign regulation that treats political signs in a more restrictive manner than other temporary signs has been upheld. Thus, for example, ordinances that place limitations on political signs but not for other temporary signs such as "for sale," "for lease," or "garage sale" signs have routinely been invalidated as unconstitutional. A U.S. District Court found invalid a political sign regulation limiting the number of days the sign can be erected before an election to thirty days, limiting the number of days the sign can remain after an election to ten days, and limiting the number of signs on any parcel to two.[8] The Court explained that the regulations were "clearly content-based because they only applied to signs containing content which was political,"[9] and concluded that the "two sign limit and the 30 day limit were not narrowly tailored to the degree required of strict scrutiny."[10] Although the Court did not specifically invalidate the regulation that limited the number of days the sign can remain after an election, such a regulation would likely also be held invalid for the same reasons. Additionally, limiting the number of signs to one "per candidate, per issue, and per opinion" on a piece of property has been found unconstitutional.[11]

CONCLUSION

In summary, there are no clear guidelines for municipalities to follow to ensure sign regulations are upheld. Municipalities have consistently struggled combating the "everywhere a sign" notion and, in the end, may be forced to pay a price for it. With political signs, for example, if a regulation is held to unconstitutionally deprive citizens of their civil rights, the municipality could be assessed the complainant's attorney fees and costs incurred in challenging the regulation. Therefore, some municipalities have begun amending their sign ordinances and regulations to become more content-neutral, meaning applying the same regulations to the same types of signs, thereby making it more likely to withstand constitutional scrutiny.

Do you have questions regarding your municipality's signage? Contact Lisa Hamameh at 248.539.9906 or lhamameh@fosterswift.com. Lisa primarily practices municipal law, zoning and land use, liquor licensing law and condominium and homeowners' association law.

[6] *Id.*
[7] *Burson v Freeman*, 504 US 191; 112 S Ct 1846; 119 L Ed 2d 5 (1992).
[8] *Fehribach v City of Troy*, supra.
[9] *Id* at 645
[10] *Id* at 646
[11] *Id* (see also *Dimas v City of Warren*, 939 F Supp 554, 557 (E.D. Mich 1996)

FCC: ORDINANCES THAT PREFER CELLULAR FACILITIES BE LOCATED ON MUNICIPAL PROPERTY MAY BE ILLEGAL

- Ronald D. Richards, Jr.

Municipalities that have a location for wireless telecommunications equipment are in an enviable position. Wireless Internet demand caused the number of cell sites to increase in 2011 alone by 12 percent – many of those sites were on municipal-owned property, such as a water tower or municipal-owned cell tower. Having such property means a municipality can lease space to others wanting to locate wireless equipment. This provides valuable income to many municipalities. To help take advantage of that potential revenue stream, or to pursue other related goals, many municipalities have adopted an ordinance that sets preferences for where wireless facilities have to be located. Some do this through a so-called, preferred siting ordinance: an ordinance that sets out allowed locations by a list of preferred locations – such as requiring the facilities be located based on a list of locations (with the first listed being the highest priority): (a) on municipal-owned properties first; or (b) if none, then on existing towers or structures on municipal-owned properties; or (c) if none, on any other non-municipal-owned property. These "preferred siting ordinances" are at great risk after a recent declaration from the Federal Communications Commission (FCC).

Just recently, the FCC issued another notice (the Notice) directed at speeding-up companies' deployment of wireless broadband facilities. The FCC's Notice focuses on removing perceived road blocks, hurdles, and delays in that approval process. It also is seeking to remove potentially unreasonable or discriminatory handling of wireless equipment siting applications – in a way that municipalities may not like.

To promote increased deployment of wireless broadband facilities, the FCC's Notice seeks comment on various changes it proposes, some of which are summarized below. Comments on the FCC's proposals are due 60 days after the Notice is published in the federal register, and reply comments are due 90 days after the Notice is published in the federal register. As of this newsletter's printing, that publication had not yet occurred.

THE NOTICE DIRECTLY QUESTIONS PREFERRED SITING ORDINANCES

The FCC's Notice seeks comment on many issues. One issue it expressly seeks comment on relates to preferred siting ordinances. Specifically, the Notice seeks comment on the following:

- Whether local laws that establish preferences for placing wireless facilities on municipal property are unreasonably discriminatory and therefore illegal under federal law. The Notice expressly noted, for example, that some municipalities have local ordinances that set preferences for putting wireless facilities on municipal property. The FCC seeks comment on whether those preferences violate Section 332(c).

Though hard to tell at this point because the time to comment has not expired, an objective reading of the Notice – along with the FCC's other recent actions – suggests that, reading between the lines, the FCC may very well take a position soon that such preferred siting ordinances are invalid.

If you have questions about handling a telecommunications equipment request, cell site leases, or ordinances regulating cellular equipment, please contact Ron Richards at rrichards@fosterswift.com or 517.371.8154.

ATTORNEY FEES AWARDED EVEN FOR TECHNICAL VIOLATIONS OF THE OPEN MEETINGS ACT

- Anne M. Seurynck

Suppose that a township changed its regular meeting schedule but forgot to post notice of the change within three days as required by the Open Meetings Act (OMA). The township later discovers the mistake and posts the notice late. You may be thinking that this is not a "big deal" -- that it is just a technical violation. However, with a nearly identical set of facts, the court recently found a township violated the OMA and awarded the plaintiff attorney fees for the violation.

Earlier last year, in *Speicher v Columbia Twp Bd of Trustees*, an unpublished Court of Appeals decision, the Court found that the township violated the Michigan Open Meetings Act. The township changed its regular meeting schedule but failed to post notice of the change within three days after the meeting at which the change was made, as required by the OMA. The Court of Appeals determined that the township violated the OMA so it upheld the declaratory relief. However, the court did not believe injunctive relief was required. As a result, the Court of Appeals refused to award attorney fees, reasoning that attorney fees were not warranted because the plaintiff was not given injunctive relief, an order requiring or prohibiting certain future conduct, only declaratory relief, a declaration that the law was violated. Although the plaintiff did not ask for attorney fees in his complaint or in his initial appeal, he decided to pursue the attorney fees issue when the Court of Appeals denied them.

On reconsideration, in its Dec. 19, 2013 decision, the Court determined that it was required to award attorney fees based on existing Michigan court precedent. The current standard for awarding attorney fees is as follows: (1) a public body must not be complying with the OMA, (2) a person must commence a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act, and (3) the person must succeed in obtaining relief in the action. To satisfy the third part, prior case law suggested that a person must only be successful in obtaining any relief, not just injunctive relief.

After acknowledging the precedent, the *Speicher* Court believed the prior decisions were incorrect. In a footnote, the *Speicher* Court provided its statutory interpretation -- the award of costs and attorney fees is only permitted when the plaintiff has obtained injunctive relief, not just any relief. Thus, the Court noted its disagreement with the prior cases and called for the convening of a special panel of this Court pursuant to address the attorney fees issue.

In April 2013, another panel of the Court of Appeals dealt with the same issue in *Davis v Wayne County Airport Auth.* As in *Speicher,* the trial court in *Davis* refused to award attorney fees even though it found the Wayne County Airport Authority Board violated the OMA. However, on appeal, the Court determined that it was required by existing precedent to award attorney fees, even if there were only "technical violations" of the OMA.

In *Davis*, the plaintiff filed a lawsuit seeking both declaratory and injunctive relief against the WCAA Board in connection with the hiring of its CEO. The plaintiff also sought court costs and attorney fees. At trial, the Court found the WCAA Board violated the OMA by holding two closed sessions without having two-thirds of the board members vote, and for not making certain committee minutes available for public inspection within the time required by the OMA. The Court stated that the violations "were technical violations over a period of time." So, the trial court granted

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relief but not injunctive relief. However, the trial court declined to award plaintiff court costs and attorney fees because "the plaintiff did not prevail on the most significant issues and did prevail on the least significant issues. So, . . . it's a wash . . . because if you look at the whole case really on the most significant issues, the defendants prevailed."

On appeal, the Court of Appeals applied the three part test noted above to determine whether attorney fees were warranted. Because the Court found that WCAA violated the OMA and because they asked for injunctive relief the first two elements of the test were satisfied. However, contrary to the trial court's determination in *Davis*, the Court of Appeals followed existing precedent holding that declaratory relief is considered "relief" under the OMA. Thus, the third element was met. As a result, the Court of Appeals remanded the case to the trial court to determine what fees were appropriate.

Both of these cases illustrate how important it is that townships follow the strict requirements of the OMA. Even technical violations have resulted in lawsuits against the township and an award of attorney fees. So, not only is the township paying its own attorneys to defend the township, but townships are also paying plaintiff's attorneys. Thus, township officials should obtain the proper training so that even unintentional mistakes are not made.

For more information on the Open Meetings Act and how to avoid violations, please contact Anne Seurynck at 616.726.2240 or aseurynck@fosterswift.com. Anne is the practice group leader for Foster Swift's Administrative and Municipal practice group. She has extensive experience in drafting and reviewing ordinances, Freedom of Information Act (FOIA) and Open Meetings Act issues.

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