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What's in a "Like"? Precedent-Setting Case Poses New Risk for Employers

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The ubiquitous thumbs-up icon in Facebook has gained new prominence for private employers. In a case of first impression, the U.S. Court of Appeals for the Fourth Circuit held that an employee fired for "liking" the campaign page of his boss' political adversary engaged in speech protected by the First Amendment of the U.S. Constitution. While this case, *Bland v. Roberts*, Case No. 12-1671 (4th Cir. Sept. 18, 2013), involved only public sector employees, the Fourth Circuit's ruling has important implications for private employers as well.

The Facebook "Like" And The Employee's Firing

In 2009, the incumbent sheriff of the City of Hampton, Virginia, and his political adversary were locked in a heated election campaign. The campaign created divisions within the Sheriff's Office as several deputies and other employees supported the sheriff's adversary. Two of those deputies engaged in activity on Facebook in connection with the campaign. One of them "liked" the adversary's campaign page and posted a message of encouragement. The other posted an entry on the adversary's Facebook page reflecting his support.

Word of the deputies' Facebook activity spread quickly within the Sheriff's Office. When the sheriff learned of the deputies' Facebook activity, he was not pleased. In speeches during shift changes, the sheriff expressed his disapproval with the deputies' decision to support his adversary's campaign on Facebook. The sheriff warned that those who openly supported his adversary would lose their jobs if he were reelected.

True to his word, after he won reelection, the sheriff did not reappoint the two deputies and several other employees who had supported his adversary during the campaign. In response, the two deputies and four others sued the sheriff, alleging, among other things, that he had violated their First Amendment right to freedom of speech given that Facebook activity constituted speech protected by the First Amendment.

The "Like" Constituted Protected Political Activity

At the trial level, the district court granted summary judgment for the sheriff finding that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection." Given this,

the U.S. Court of Appeals for the Fourth Circuit confronted head-on whether the First Amendment protected "liking" a political campaign's Facebook page and concluded that the "like" indisputably constituted speech protected by the First Amendment.

As the court explained, businesses, organizations, political campaigns and other entities can create a Facebook page that can be used for marketing purposes. Individual Facebook users can "like" the organization's page by clicking on a button represented by a thumbs-up icon. When a user "likes" an organization's page, Facebook makes that information available to other Facebook users in four ways. First, a notification will appear on the user's profile page. That profile page typically includes, among other things, the user's name, profile picture, the user's photos, brief biographical information, a list of the user's Facebook friends, and a list of the organizational pages that the user has "liked." Consequently, everyone with access to the user's profile page can learn that the user "liked" the organization's page. Second, the user's Facebook friends will receive an announcement in their "newsfeeds" that the user "liked" the organization's page. The "newsfeed" is the means by which a Facebook user receives updates and information regarding the activities of other users in the user's Facebook network. Third, the user is listed on the organization's page as one of the individuals who "liked" that page. Finally, posts to the organization's page made after the user's "like" appear in the user's news feed.

In light of this functionality, the Fourth Circuit concluded that "liking" a political candidate's campaign page is "the Internet equivalent of displaying a political sign in one's front yard." More to the point, the deputy's "like" made his support for the sheriff's political adversary "unmistakable." The deputy's support for the political adversary was displayed on his campaign's page and on the deputy's profile page and also was broadcast to the newsfeed of each member of the deputy's Facebook network. As a result, the court held that summary judgment for the sheriff on the deputy's free speech claim was improper. The evidence established that the sheriff was aware of the deputy's "like", thereby creating a material issue of fact as to whether the sheriff's decision not to re-appoint the deputy was based on the deputy's protected speech.

Implications For Employers

The implications of the Fourth Circuit's decision for public employers are obvious. In the context of a political campaign, a civil servant's "liking" a candidate's Facebook page almost certainly will constitute protected First Amendment speech that cannot serve as the basis for an adverse employment decision. The implications for private employers are more subtle.

To begin with, this case provides a textbook example of a decision maker's learning, through social media, too much information about an employee's private life. Once the sheriff learned that the deputy had "liked" the Facebook page of the sheriff's political adversary, the sheriff placed himself in the challenging position of having to persuade a court or a jury that despite his knowledge of the deputy's protected activity, he did not rely on it when deciding not to re-appoint the deputy after winning reelection. Similarly, decision makers who learn through social media about, for example, an employee's sexual orientation, disability, or family medical history (*i.e.*, genetic information), can no longer claim lack of knowledge as a defense to a wrongful termination claim.

The Fourth Circuit's decision also may foreshadow a decision by the National Labor Relations Board ("NLRB" or "Board") that an employee's "like" could be protected under Section 7 of the National Labor Relations Act ("NLRA"). Under Section 7, employees, whether unionized or not, have the right to discuss wages, hours and working conditions in a concerted or collective manner. A case currently is pending before the Board in which it may have to decide whether "liking" a comment on Facebook constitutes concerted activity, protected by Section 7.[1] In that case, an employee posted a Facebook status regarding her employer's alleged failure to properly withhold the correct amount of taxes from her paycheck. A co-worker "liked" the status update. The employer fired the two employees for performance issues, but an NLRB administrative law judge ruled in January, 2012, that the employees were unlawfully fired for engaging in protected concerted activity and ordered the employer to reinstate them. The administrative law judge explicitly held that the co-worker's "like" of the Facebook status constituted "participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity" under the NLRA.

While the First Amendment does not protect employees against adverse employment action by a private employer, more than 30 states have some form of protection for employees' lawful off-duty conduct. Four states—California, Colorado, New York, and North Dakota—broadly protect employees from taking adverse action based on any lawful off-duty conduct that does not create a conflict of interest with the employer. Connecticut protects employees against adverse action by a private employer for conduct that would be protected by the First Amendment in

1 *Triple Play Sports Bar and Grille*, case number 34-CA-12926.

the context of public employment. Approximately 20 states specifically prohibit adverse actions against employees for their political activity and/or associations. For example, in Illinois and Michigan, employers are prohibited from gathering or keeping records of employees' political association or activity.[2] In Wyoming, it is a misdemeanor (punishable by up to six months in a county jail, or a fine of up to $1,000) to knowingly and willfully interfere with the political rights of an employee.[3] Employers considering discipline in response to an employee's "like" need to evaluate potential liability under these state laws.

There is one important caveat. In the Fourth Circuit case, the court held that the meaning of the deputy's "like", *i.e.*, support for his boss' political adversary, was "unmistakable." In many situations, the meaning of an employee's "like" could be more ambiguous. An employee might "like" a post that contains several different statements, leaving room for the employer to contend that the discipline was lawful because the employee's "like" did not constitute protected speech.

In light of the Fourth Circuit's decision, employers should consider taking several steps to reduce their exposure from viewing applicants' and employees' "likes" and other social media activity:

- Vet Your Organization's Applicant Screening Procedures: Searching social media platforms during the hiring process can be a powerful tool, but it also can expose employers to information on which they cannot lawfully rely for an employment decision. Consequently, organizations should consider prohibiting decision makers from conducting social media searches of applicants and from reviewing search results until after a non-decision maker has filtered out "unlawful information."
- Beware Of "Friending" Between Managers And Subordinates: When managers connect with subordinates in social media—for example, by becoming Facebook "friends," they potentially expose themselves to information about their subordinates that the managers would not learn in the context of the workplace. Organizations should educate managers and supervisors on the risks of viewing employees' social media activity. As the Fourth Circuit case demonstrates, if a manager or supervisor sees the information, the employer will face challenges arguing that such information did not influence a challenged employment decision. In the context of litigation, the manager's knowledge could preclude an employer from prevailing in summary judgment proceedings, because whether a decision maker relied on such information could become a credibility issue (*i.e.*, factual dispute).
- Limit Access To Social Media Content During Investigations: As the Fourth Circuit demonstrates, the line between off-duty, personal social media conduct and work already has been blurred. When an employer investigates allegations that an employee's personal social media conduct violated company policy, the investigation should focus on those social media posts reflecting the alleged misconduct. Wide ranging reviews of an employee's off-duty social media conduct should be avoided.
- Know The Applicable Laws: Employers should familiarize themselves with their state's laws, if any, protecting employees against adverse action based on lawful off-duty conduct. As discussed above, some states do not have a statute addressing this issue; some generally prohibit decisions based on lawful off-duty conduct; and others protect only specific types of off-duty conduct, such as political activity, use of tobacco products, or the consumption of lawful products more broadly.

Finally, employers should review social media policies and keep up to date with recent court decisions in the changing legal landscape involving social media.

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2 *See* The Illinois Personnel Record Review Act, 820 ILCS 40/9; *see also* Michigan's Bullard-Plawecki Employee Right to Know Act, M.C.L. 423.508.

3 *See* Wyo. Stat. §§ 22-26-112(a)(v), (vi), and 22-26-116.