

**PUBLIC AGENCY RISK MANAGERS
ASSOCIATION (PARMA) ANNUAL
CONFERENCE**

**I've Said Too Much! Social
Media Policies and Free
Speech**

2/28/2022

PRESENTED BY:

Mark Meyerhoff

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented by:
Mark Meyerhoff

Our Political Times and Public Scrutiny of Social Media

LCW

Our Political Times

- Black Lives Matter
- #MeToo
- Critical Race Theory
- 2024 Presidential Election
- Middle East Conflict
- Immigration

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Public Scrutiny

- How does Agency find out about a public employee's social media activity?
 - Co-workers
 - Members of the public
 - Media
 - Watchdog groups

LCW LIEBERT CASSIDY WHITMORE

The Plain View Project

- "The Plain View Project" (plainviewproject.org) – Watchdog group has monitored social media accounts of peace officers since 2017
- Revealed thousands of social media posts that are now publicly available
- Examples of released posts/comments from The Plain View Project:
 - "It's a good day for a chokehold"
 - Reply to a video post of how the individual "[c]an't wait to plow through" the anti-Trump protestors shown in the video
 - Comments about how apprehended suspects "should be dead" or "should have more lumps in the head"

LCW LIEBERT CASSIDY WHITMORE

The Plain View Project

Training – Can we build in a link that will take us to the website – plainviewproject.org?

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

The Plain View Project

The Plain View Project, established in the fall of 2017, obtained published rosters of police officers employed by eight jurisdictions across the United States. PVP then searched Facebook for the officers' names and made a list profiles that appeared to belong to them. Then, they searched within each profile for verification that the user was in fact the officer named on the rosters.



LCW LIEBERT CASSIDY WHITMORE

The Plain View Project

The database available on this website includes images of more than 5000 posts and comments that we believe meet this criterion. On this site, visitors can find posts and comments through a searchable database organized by officer name, rank, badge number, and jurisdiction.

LCW LIEBERT CASSIDY WHITMORE

The Plain View Project



LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

The Plain View Project

The slide displays two social media posts. The first post features a large sombrero with a man's face inside, with the text 'HOW WILL TRUMP DEPORT ALL THE ILLEGAL ALIENS?' and 'JUAN BY JUAN'. The second post shows a group of people in military-style uniforms with the text 'Whoever these people in military uniforms are...' and 'They should be executed by those people in military uniforms...'. A comment from 'Lori M Jackson' is visible below the second post.

LCW LIEBERT CASSIDY WHITMORE

Social Media

- If public employee were to post content like that on previous two slides, could your agency discipline?
 - What are the considerations?
 - What laws may protect the employee?
 - What factors does the agency look at?

LCW LIEBERT CASSIDY WHITMORE

Legal Considerations

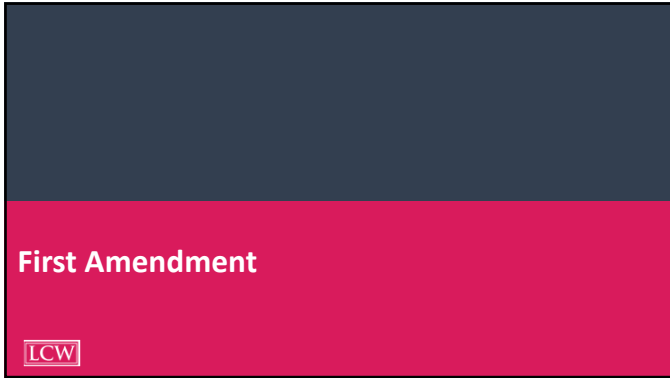
- First Amendment
- Social Media Policies
- Meyers-Milias Brown Act
- Labor Code Section 980

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff



First Amendment

LCW

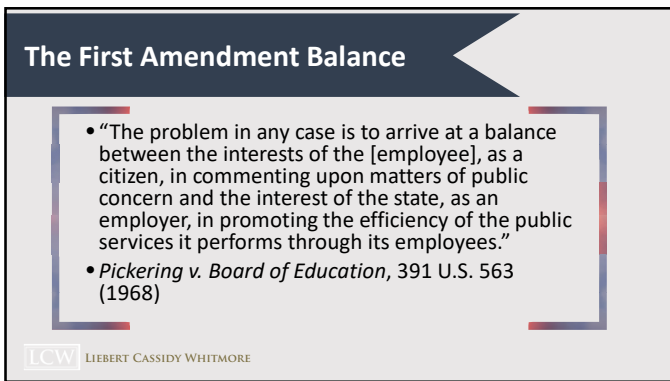


Free Speech vs. Social Media

- Social Media is:
 - The “modern public square”
 - Represents a space for public discourse
 - Provides “the principal sources for ... Current events ... and otherwise exploring the vast realms of human thought and knowledge.”

Packingham v. North Carolina (2017) 137 S.Ct. 1730

LCW LIEBERT CASSIDY WHITMORE



The First Amendment Balance

- “The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.”
- *Pickering v. Board of Education*, 391 U.S. 563 (1968)

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

The Parameters of First Amendment Speech

- How do Courts “strike the balance”?
 - Is the speech on a matter of public concern? (*Connick v. Myers*)
 - Did the employee speak as a private citizen or a public employee (i.e., pursuant to “official duties”)? (*Garcetti v. Ceballos*)
 - If yes, is the employee’s First Amendment right outweighed by injury the speech can cause to the government agency? (*Pickering v. Board of Education*)

LCW LIEBERT CASSIDY WHITMORE

Element # 1: Speech Must be on a Matter of Public Concern

- A matter of public concern is one upon which “free and open debate is vital to informed decision-making by the electorate.”


Connick v. Myers, 461 U.S. 138 (1983)
- However, simply because a topic may be of “general interest” to the public, does not, in and of itself, raise it to a level of constitutional public concern.

LCW LIEBERT CASSIDY WHITMORE

Moser v. Las Vegas Metropolitan Police Department, No. 19-16511 (9th Cir. 2021)

Facebook Post:
“we caught that asshole...It’s a shame he didn’t have a few holes in him...”

Is this speech a matter of public concern?



LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Speech Must be on a Matter of Public Concern

- Speech is NOT a matter of public concern when:
 - The speech deals with individual personnel disputes and grievances; and
 - When that information would be of no relevance to the public's evaluation of the performance of governmental agencies.

LCW LIEBERT CASSIDY WHITMORE

Question: Matter of Public Concern?

- Officer files a grievance against his supervisor asserting the supervisor should get interpersonal skills training, is a bully and is incompetent. The officer then claims retaliation after he is given "undesirable" assignments and low level discipline.
- **Matter of public concern?**

LCW LIEBERT CASSIDY WHITMORE

Element #2: Speech Must Be Made in Employee's Role as a Private Citizen

- To be protected by the First Amendment, speech must be made in the employee's role as a **private** citizen; not as part of the officer's **official** capacity.
- If the speech is made in an official capacity, such as comments as part of official duties, the speech is not protected by the First Amendment.

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006)

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Speech as Private Citizen?

- Look to "official duties"
- Formal job descriptions are helpful but not dispositive
- Scope of the employee's job duties requires a case-by-case evaluation
- Speech often outside "official duties"
 - To elected officials and outside agencies
 - To media
 - On behalf of a union
 - Testifying in court or at a deposition

LCW LIEBERT CASSIDY WHITMORE

Speech as Private Citizen?

- John Ellins, a police officer for the City, led a no-confidence vote of the police officers' union against the Chief of Police. The Chief subsequently delayed signing an application for a certification that would entitle Ellins to a five percent salary increase.

Is this speech part of the officer's official duties?

Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2012)

LCW LIEBERT CASSIDY WHITMORE

Element #3: Does the Government's Interest Outweigh the Employee's First Amendment Rights?

The Balancing Test:

1. Must weigh the interest of the employee in free expression versus the need of the government to run efficiently and to provide harassment-free workplace.
2. If the balancing test weighs in favor of the employee or if the government cannot justify treating the employee differently than a private citizen, then the speech will be protected.
3. If the balancing test weighs in favor of the employer, then the speech will not be protected.

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Disruption Factors

1. Whether the employee's speech disrupted harmony among co-workers;
2. Whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful;
3. Whether the employee's speech interfered with performance of his duties

LCW LIEBERT CASSIDY WHITMORE

Disruption Factors

4. Whether the employee's speech was directed to the public or the media or to a governmental colleague; and
5. Whether the employee's statements were ultimately determined to be false.

F.3d 839 *Gilbrook v. City of Westminster* (9th Cir. 1999) 177

LCW LIEBERT CASSIDY WHITMORE

Other Disruption Factors

- Reasonable predictions of disruption may be sufficient.
- Speech by management vs. by rank and file.
- How broadly was speech disseminated?

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Evidence of Disruption

- Media coverage
- Statements from members of public
- Statements from fellow employees/supervisors
- Statements from DA regarding impact of speech
- Actual disruption not necessarily required (but predictions of disruption are hard to prove)
- Violation of rules or policies

LCW LIEBERT CASSIDY WHITMORE

Hernandez v. City of Phoenix 43 F.4th 966 (9th Cir. 2022)

In 2013 and 2014, a Police Sergeant in the City of Phoenix Police Department posted news articles and memes on his Facebook page that denigrated Muslims and Islam.

The posts generated no controversy or disruption in the Department until they were identified by the Plain View Project and disclosed publicly in 2019.

The Department investigated and disciplined

LCW LIEBERT CASSIDY WHITMORE

Hernandez v. City of Phoenix 43 F.4th 966 (9th Cir. 2022)

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Hernandez v. City of Phoenix
43 F.4th 966 (9th Cir. 2022)

LCW LIEBERT CASSIDY WHITMORE

Question

Is this speech on a matter of public concern?

Was Hernandez speaking as a “private citizen” when he posted on Facebook?

Did they Department violate Hernandez’s First Amendment rights by disciplining him?

LCW LIEBERT CASSIDY WHITMORE

Case Study – Disruption Analysis

A police officer posts sexual explicit videos of himself and his wife onto the internet.

Do the police officer’s posts disrupt departmental functions?

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Case Study – Disruption Analysis

Employee's interest in free expression vs. the need of the government to run efficiently: Weighs in favor of employer.

- As we see in *Dible*, morale in the Department hit rock bottom. This disrupted harmony among co-workers
- The *Dible* Court stated that Dible "cause[d] disrespect to the police department...."
- As soon as Dible's indecent public activities became widely known, officers in the department began suffering denigration from members of the public → Interference with Dible's performance of his duties
- Dible's "speech" was directed towards the public
- The public knew that the video indeed was of Dible.

LCW LIEBERT CASSIDY WHITMORE

Social Media Policies

LCW

Can a Public Entity Restrict Speech Through Implementation of a Policy?

- Two officers disciplined under the City of Petersburg policy for saying:
 - "There used to be a time when you had to earn a promotion or a spot in a specialty unit . . . but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been 'devalued.'"

Liverman v. City of Petersburg (4th Cir. 2016)

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Policies Must Not Overreach

- Policy from Petersburg, Virginia
 - “Negative comments on the internal operations of the bureau, or specific conduct of supervisors or peers that impacts the public’s perception of the department is not protected by the First Amendment free speech clause.”
 - Problem?

LCW LIEBERT CASSIDY WHITMORE

Policy Must Not Overreach

- Policy prohibited right to speak on matters of public concern.
- “the restraint is a virtual blanket prohibition on all speech critical of the government employer.”
- While social media may “amplify” expressions of “rancor and vitriol” such sites “have emerged as a hub for sharing information and opinions with one’s larger community.”

LCW LIEBERT CASSIDY WHITMORE

Hernandez v. City of Phoenix
43 F.4th 966 (9th Cir. 2022)

- The Court found that the City’s social media policy was overbroad and/or vague by prohibiting social media posts that:
 - Are “detrimental to the mission and functions of the Department,”
 - “[U]ndermine the goals and mission of the Department or City,” or
 - “[U]ndermine respect or public confidence in the Department.”
- The Court, however, found that the following provisions were *potentially invalid* as overbroad:
 - “Employees are prohibited from using social media in a manner that would cause embarrassment to or discredit the Department in any way.”

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Common Policy Restrictions

- Common restrictions set forth in social media policies:
 - Do not post images of crime scenes.
 - Do not engage with victims, witnesses or defense attorneys.
 - Do not "friend" or follow minors encountered on the job.
 - Do not post pictures "in uniform" except for ceremonial activities.
 - Do not post pictures of other employees, or "tag" other employees in pictures.
 - Do not post offensive or harassing pictures or content.
 - Do not post or allude to confidential information.

LCW LIEBERT CASSIDY WHITMORE

Social Media Do's and Don'ts

- A good social media policy may prohibit employees from:
 1. Disclosing the name of the agency or otherwise identifying themselves as employees of the agency on personal or social media websites (an exception may be made for professional networking sites like LinkedIn)
 2. Revealing the name of the agency on a website with sexually suggestive, violent, or otherwise offensive content
 3. Using social media sites or blogs for any unlawful purpose
 4. Publishing content on any website that disparages or defames any person, business, product or organization
 5. Disclosing confidential or proprietary information
 6. Publishing or commenting on content that would constitute a violation of any of the agency's policies applicable to employees

LCW LIEBERT CASSIDY WHITMORE

Common Policy Restrictions

- Outside the workplace – can warn employees:
 - Use of internet generally private if usage not made public.
 - If using a social media site that is not private then communications not private.
 - Agencies can typically discipline employees for Internet usage that creates liability for the agency.

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Meyers-Milias-Brown Act

LCW

Meyers-Milias-Brown Act (MMBA)

Meyers-Milias-Brown Act (MMBA)

- A public agency shall not impose or threaten to impose reprisals on employees, discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by the Meyers-Milias-Brown Act

LCW LIEBERT CASSIDY WHITMORE

Concerted Activity and Social Media

NLRB has a multi-step inquiry to determine whether a rule interferes with protected activity:

- (1) Does the rule explicitly restrict protected activities?
- (2) If not:
 - (a) When reasonably interpreted, does it potentially interfere with protected activity? If so, **balance the potential impact of the rule with employer's legitimate justifications.**
 - (b) **Was the rule promulgated in response to union activity?**
 - (c) Has the rule been applied to restrict protected activity?

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Concerted Activity and Social Media: Tips

NLRB Precedent – Employers **Cannot**:

- Use overbroad rules
- Prohibit employees from talking about management employees or the employer
- Require an employee to self-identify when participating in protected activity
- Prohibit employees from speaking to the media as individuals
- Prohibit the use of personal devices to photograph or videotape at work

LCW LIEBERT CASSIDY WHITMORE

Concerted Activity and Social Media

Protected or Not Protected?

- *Butler Medical Transport*: Employee Terminated for Posting on Facebook That *Another* Terminated Employee Should Contact the Labor Board.
- *Hispanics United of Buffalo*: Employees Terminated for Posting on Facebook About Another Employee.
- *Arizona Daily Star*: Reporter Fired for Twitter Comments.
- *Knaus BMW*: Car Dealership Employee Terminated for Comments About Employer. NLRB Upheld Termination.

LCW LIEBERT CASSIDY WHITMORE

Employee Discipline

- Situations where an employee's social media conduct may result in discipline:
 - Productivity/disruption
 - Harassment claims
 - Cyber-bullying/stalking
 - Improper or illegal use (e.g., release of confidential information)
 - Conduct that reflects badly on the agency
 - Safety/liability
 - Mandated reporting/action required by law

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Employee Discipline

- There must be a “job nexus”
- Factors to consider:
 - Type of off-duty conduct
 - Type of job duties
 - Effect on the employer, including reputation
 - Harm to public service

LCW LIEBERT CASSIDY WHITMORE

Labor Code Section 980

LCW

Labor Code § 980

- Departments are Prohibited From Requiring Employees/Applicants From Doing the Following:
 - Requiring Disclose of a Username or Password for the Purpose of Accessing Personal Social Media;
 - Accessing Personal Social Media in the Presence of the Employer; **OR**
 - Divulging Any Personal Social Media Content, BUT...

LCW LIEBERT CASSIDY WHITMORE

I've Said Too Much! Social Media Policies and Free Speech

Public Agency Risk Managers Association (PARMA) Annual Conference | February 22, 2024

Presented By: Mark Meyerhoff

Labor Code § 980

- Section 980 does not affect a Department's "existing rights and obligations" to request an employee to divulge personal social media when "reasonably believed" to be relevant to an investigation into employee misconduct.
- Employer is not precluded from asking employee for a username or password to access employer-issued electronic equipment.

LCW LIEBERT CASSIDY WHITMORE

Best Practices for Employers

- Have a social media policy that prohibits employees from using social media to violate policies or laws
- Annually update your social networking policy
- Do not be overbroad or vague
- Train employees on your social media policy
- Enforce violations of policies against employees in a consistent manner
- Maintain firewalls to prohibit access to certain websites

LCW LIEBERT CASSIDY WHITMORE

Thank You!

Mark Meyerhoff
Managing Partner | San Diego
310.981.2000 | mmeyerhoff@lcwlegal.com
www.lcwlegal.com/people/mark-meyerhoff/

LCW LIEBERT CASSIDY WHITMORE
