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Best Practices

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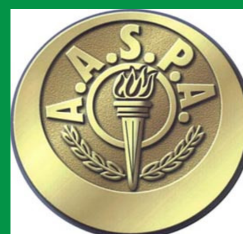

What Every Employer Should Know About Social Media

By Debra L. Weiss & Laura Tushaus

It is nearly impossible for employers to avoid the topic of social media, and just as imprudent to ignore it. Social media has permeated the workforce and impacts employers and employees alike. Even the most conscientious employers can run into legal trouble when faced with the myriad of social media issues in the workplace.

While exploring how social media can add value, employers must also consider the legal risks and adopt smart, well-informed policies to avoid pitfalls and effectively deal with social media-related issues when they do arise.

This article addresses just a few of the legal issues that employers have recently encountered in using social media to screen and hire applicants, as well as the privacy concerns that may arise when employers discipline employees' use of online social networking, and then offers best practices to assist in minimizing employers' potential legal exposure.

Screening Applicants and Hiring Employees:

An increasing number of employers are using social media as a form of a background check to screen applicants. The temptation to peek at a candidate's social media information--such as a Facebook profile--is understandably strong. Be aware, however, that these activities open the door to potential claims of unlawful applicant discrimination and can implicate various privacy issues.

Implications for Discrimination Law:

First, by viewing a candidate's Facebook or Linked-In profile, or reading the candidate's tweets, an employer risks discovering information that could easily give rise to a claim under various federal and state anti-discrimination laws, if the applicant is denied a position. For example, Title VII of the Civil Rights Act of 1964 prohibits an employer from refusing to hire an individual on the basis of race, color, national origin, religion, or gender. Many state laws offer even greater protections by further expanding the classes of protection. For example, the Minnesota Human Rights Act (MHRA) prohibits an employer from discriminating or refusing to hire based on the applicant's marital status, status with regard to public assistance, disability, sexual orientation, or age.

Implications for Privacy Rights:

Second, some employers have adopted the practice of asking applicants for their password to their Facebook account. Such a practice has already been challenged by legal practitioners as violating an individual's right to privacy. This is so because once access has been granted, an employer is likely to uncover answers to questions that they would have never been legal to ask during a job interview. For example, a Facebook search can reveal an applicant's religious, political and sexual orientations. Facebook executives have already warned that they will initiate legal action against any employers who inappropriately access Facebook profiles. And, recently, U.S. Senators Richard Blumenthal and Charles Schumer have asked the Department of Justice and the Equal Employment Opportunity Commission to investigate whether certain federal laws, such as the Computer Fraud and Abuse Act and the Stored Communication Act, are violated by such actions.

Implications for the Fair Credit Reporting Act:

Third, even when a company asks a third party to conduct social media background checks, the employer still retains obligations under the Fair Credit Reporting Act (FCRA). In a recent case, the Federal Trade Commission treated a company that conducts background checks as a "consumer reporting agency," finding that the company was only permitted to conduct such checks if the search complied with the FCRA. The FCRA mandates, among other things, that the employer must first obtain the candidate's written authorization before conducting a background check. Further, before notifying a candidate of a decision not to hire based on information revealed from the search, the employer must provide the candidate with written copies of the report and the candidate's rights under the FCRA. An employer may be found to violate the FCRA if it fails to follow these requirements or conducts a check without proper authorization.

The following is a non-exhaustive list of best practices to consider when using social media to screen applicants:

• Use social media tools only after an offer of contingent employment is extended.

• Separate the screener from the hirer.

• Avoid making judgment calls based on erroneous or incomplete information by independently verifying the

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information with the applicant.

• Have, and document, a solid rationale for hiring one candidate over another that is job-specific and defensible.
• Inform the applicant that you will be doing the search and seek written authorization in advance.

• Limit the search to publicly-available information: do not ask for social media account passwords and do not allow "friending" on false pretenses.

• If a third party conducts the background check, ensure that their practices comport with FCRA requirements.

Disciplining Employees Because of Social Media:

Employers must also proceed with caution in disciplining employees for posting disparaging remarks about the company via a social media outlet. Such disciplinary actions may violate an employee's right to organize under the National Labor Relations Act (NLRA). Specifically, the Act makes it illegal for an employer to prohibit an employee from engaging in "concerted activity" which impacts the employees' terms and conditions of employment, such as discussing working conditions and compensation via social media.

Section 8 of the NLRA also protects employee rights by broadly prohibiting all conduct that interferes with, restrains, or coerces employees in the exercise of their rights. Because it is a strict-liability statute, any adverse employment action is automatically considered an unfair labor practice even if the employer does not know that the employee's conduct qualifies as protected activity. Notably, the NLRA protects all employees whether or not they are unionized.

Recently, the National Labor Relations Board (NLRB) settled a matter with American Medical Response of Connecticut (AMR). The NLRB had issued an unfair labor practice complaint against AMR, accusing the company of unlawfully discharging the employee for posting critical remarks about her supervisor on her personal Facebook page. Because several co-workers had responded with comments expressing their agreement and support, the NLRB considered the conduct to be "concerted activity." (Notably, an employee's individual complaints or grievances about their employment is not concerted activity, and is not protected).

Improper Internet Use Policies:

The NLRB also provided guidance on the type of Internet use policies that may be considered unlawfully overbroad. For example, it has found policies to be overly broad that prohibit employees from "making disparaging, discriminatory, or defamatory comments when discussing the Company," as well as policies that prevent employees from posting picture of themselves in the media, depicting the Company in any way, unless the employee receives written approval from the company in advance. When in doubt about whether an employer can discipline certain employee comments, it is always advisable to consult an attorney for guidance. The following list of best practices is intended to provide some strategies that can (and should) be implemented in approaching this issue:

• Create a clear and specific social media use policy that does not "chill" an employee's rights.

• Enforce the policy consistently.

• Include NLRB disclaimer language.

• Don't forget that the right to organize applies to union and non-union employees alike, even if there is no union at the company whatsoever.

• Remember that the same employment laws apply whether the conduct occurs on the worksite or the website and consider whether you would discipline the employee if the same comment was posted on an office bulletin board.

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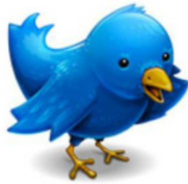

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The Americans with Disabilities Act Amendments of 2008: Broad Protections for Employees with Disabilities

By Howard Fulfrost

In 1990, the United States Congress passed the Americans with Disabilities Act (ADA). The ADA, among other things, prohibits state and local governments from discriminating against prospective employees and current employees on the basis of disability.

Since the ADA was first enacted, the courts have narrowly construed its protections. Consequently, only 39.5 percent of working-age, non-institutionalized people with disabilities were employed. This figure represented about half of the employment rate for people without disabilities (79.9 percent).

Based on these sorts of figures, the United States Congress reconsidered the ADA and the court cases interpreting its provisions. As a result, Congress passed the ADA Amendments Act of 2008 (ADAAA). The ADAAA is intended to make it easier for people with disabilities to obtain ADA protections. In this regard, Congress has declared its intent "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

Definition of Disability: Under the ADAAA, the definition of who is considered "disabled" did not change; however, its interpretation and application was altered. The ADAAA makes clear that the ADA definition of disability must be construed broadly in support of "expansive coverage to the maximum extent permitted" by the ADA's terms. Under the ADA and ADAAA, an individual continues to be considered "disabled" for purposes of ADA discrimination protections if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment. (Title 42 United States Code § 12102.)

Based on Congressional intent behind the ADAAA, it is not surprising that the ADAAA:

• Amends the definition of "**physical or mental impairment**" to extend beyond the activities of daily living to include dysfunctions of major bodily systems like neurological, respiratory, circulatory systems;

• Requires "**substantially limits**" to be construed broadly in favor of expansive coverage;

• Mandates that an impairment that is **episodic or in remission** is a disability if it would substantially limit a major life activity when active;

• Reaffirms that **only one major life activity** need be substantially limited by the physical or mental impairment (i.e., "major life activity" construed broadly so that it need not be of "central importance to daily life");

• **Prohibits considering mitigating measures** (excluding eye glasses and contact lenses) when determining whether a major life activity is substantially limited (i.e., an individual is considered disabled under the ADA if he or she has a physical or mental impairment that substantially limits a major life activity without mitigating measures like medication, medical supplies, hearing aids, oxygen therapy, assistive technology, and reasonable accommodations);

• Allows individuals with an "actual disability" or a "record of a disability" to seek reasonable accommodations; and

• Does not require individuals "regarded as" disabled to show an "actual" disability to be protected from disability discrimination.

Further, the ADAAA states that all of its changes apply to Section 504 of the Rehabilitation Act of 1973.

Federal Regulations: The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing the ADA and the ADAAA in the employment context. On March 25, 2011, the EEOC promulgated regulations implementing the terms of the ADAAA. The EEOC regulations mirror the ADAAA in most respects adding detail to ADAAA interpretation and requirements; and confirming that ADA requirements should be construed broadly comparing the individual with most people in the population.

The EEOC regulations specify the areas in which disability discrimination is prohibited. These include, but are not limited to: (1) recruitment, advertising, and job application procedures; (2) hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rates of pay or any other form of compensation, and changes in compensation; (4) job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists; (5) leaves of absence, sick leave, or any other leave; (6) fringe benefits available by virtue of employment; (7) selection and financial support for training including apprenticeships, professional meetings, conferences, and selection for leaves of absence to pursue training; (8) activities including social and recreational programs; and (9) any other term, condition, or privilege of employment.

The EEOC regulations also clarify that individuals with an actual disability or a history of a disability may receive reasonable accommodations; but that individuals regarded as disabled are not actually disabled, are not entitled to reasonable accommodations. A reasonable accommodation is any change in the work environment (or in the way things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

The EEOC regulations now refer to "individual with a disability" and "qualified individual" as separate terms. They also now prohibit discrimination on the basis of a disability rather than against a qualified individual with a disability because of the disability of such individual. These changes reflect changes made by the ADAAA that are intended to make the primary focus of an ADA inquiry whether discrimination occurred, not whether the individual meets the definition of "disability." Nevertheless, an individual must still establish that he or she is qualified for the job with or without reasonable accommodations.

Employment Implications: The ADAAA does not alter the process by which individuals with disabilities apply for jobs and/or the determination that an individual with a disability requires a reasonable accommodation to perform the essential functions of his or her position.

An employer is only required to accommodate a "known" disability. In general, an employer may not ask questions on a job application or in an interview about whether an applicant will need reasonable accommodation for a job. This is because these questions are likely to elicit a response that informs the employer about whether the applicant has a disability. However, when an employer could reasonably believe that an applicant will need reasonable accommodation to perform the functions of the job, the employer may ask that applicant certain limited questions – whether he or she needs a reasonable accommodation and what type of reasonable accommodation would be needed to perform the functions of the job. This may occur, for example, when the applicant has an obvious disability. Further, an employer may ask an applicant for reasonable documentation of his/her disability if the applicant requests reasonable accommodation in the hiring process.

An employer may invite applicants to voluntarily self-identify only if the employer uses the information to benefit individuals with disabilities. In such cases, the employer must state clearly that the information is being requested: (1) solely in connection with its affirmative action obligations or efforts; and (2) on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

The information voluntarily elicited must be on a form that is kept separate from the application in order to ensure that the self-identification information is kept confidential.

An employer must engage in an interactive process to determine an appropriate reasonable accommodation. This obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process. This obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process.

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The EEOC regulations outline the nature of the interactive process:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

The interactive process requires that employers analyze job functions to establish the essential and nonessential job tasks. Employers should 'meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered [the] employee's request, and offer and discuss available alternatives when the request is too burdensome."

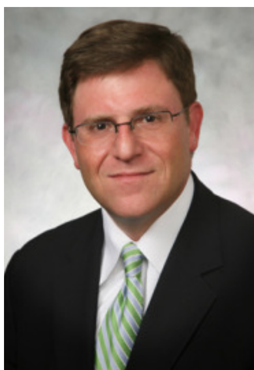
Determining whether reasonable accommodations are appropriate requires an individualized, case-by-case inquiry. A reasonable accommodation may not be required if the employer can show that the individual: (1) is not qualified for the job with or without reasonable accommodations; (2) providing an accommodation would pose an undue hardship; (3) requires reasonable accommodations that would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations; and/or (4) the individual poses a direct threat.

An employer is not required to reallocate essential functions of a job as a reasonable accommodation. Further, an accommodation is considered an "undue hardship" if it requires an action that poses significant difficulty or expense considering the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

The ADA and ADAAA do not require accommodations that would fundamentally alter the nature of the services provided by the employer. For example, a school district can refuse to accommodate an individual with a disability who holds an inappropriate credential by assigning that teacher to a class he or she is not credentialed to teach. Likewise, the ADA and ADAAA permits employers to establish qualification standards that will exclude individuals who pose a "direct threat" (i.e., significant risk of substantial harm) to the health and safety of the individual or of others if that risk cannot be eliminated or reduced below the level of a direct threat by reasonable accommodation.

In determining whether an applicant or employee is disabled, the employer may not consider the use of mitigating measures (e.g., medication) when making its determination. For example, an employee with bipolar disorder may be disabled under the ADA if he or she meets the definition when not taking his or her medication. However, the employee's current state may be considered in determining whether reasonable accommodations are appropriate and exactly what reasonable accommodations are necessary - whether the mitigating measures ameliorate the disability or exacerbate its symptoms.

Final Words: The ADA now clearly requires employers to err on the side of caution when fulfilling its requirements. Based on the ADAAA and its implementing regulations, the cautious approach would be to presume that individuals with disabilities are protected under the ADA; and to focus attention on addressing whether the individual reasonable accommodations and what accommodations are reasonable.



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The Double-Whammy of Increasing Retaliation Claims: What Every Principal (and School Supervisor) Needs to Know

By Dan Murphy

Since 2006, the Supreme Court has systematically broadened the scope of potential retaliation claims filed against employers in general and which, in some cases, may be even more pernicious for the typical public school district. Almost all modern federal employment laws include anti-retaliation provisions as well. In sum, these anti-retaliation provisions are paired with the statute's principal purpose (for example, prohibiting discrimination in employment on the basis of an individual's age-over 40 in the case of the Age Discrimination in Employment Act)-with an additional substantive protection and bar against retaliating against an individual for raising such a claim or participating in the investigation of any complaint. These developments at the Supreme Court level are of particular interest since EEOC's own data reveals a startling increase in the sheer number and frequency of retaliation complaints. The Commission received 18,198 complaints of retaliation in 1997 (out of a total of 80,680 charges), while statistics for the most year available show the Commission received 37,334 retaliation complaints out of a total number of 99,947 charges in 2011. In other words, while total EEOC complaints have increased some 24% since 1997, retaliation complaints have increased by more than 105% during this same period. No other leading category of employment discrimination complaints received by the EEOC even comes close to such increased activity. In light of this evolving legal landscape and virtual epidemic of retaliation claims, it is little wonder that many school leaders and administrators are unprepared to successfully avoid these complaints and eventual litigation.

Burlington Northern and Santa Fe Railway v. Sheila White (Title VII). The oldest of the cases in this recent generation is the Supreme Court's 2006 Burlington Northern opinion. Sheila White was the lone female employee in the Maintanence of Way department at Burlington's Tennessee yard. Though hired as a general "track laborer," Ms. White was primarily assigned the duties of forklift operator which, while among the duties of the track laborer position, was perceived as a less physically demanding aspect of the job. After Ms. White complained that her immediate supervisor made a number of critical remarks as to the presence of females in the MoW department, (thus raising a Title VII complaint of sex discrimination) her supervisor was disciplined, but Ms. White was removed from the forklift duties and reassigned to the more standard duties of a "track laborer." Ms. White filed a charge of retaliation with the EEOC and, while that charge was pending, she was suspended without pay for 37 days after she was accused of insubordination by another supervisor. Importantly, the company's internal investigation concluded that Ms. White had not been insubordinate and her pay was restored. However, Ms. White had already filed a second retaliation complaint with the EEOC at this point.

In their decision, the Justices identified two separate issues for their determination. One question was how harmful ("injury or harm") any allegedly retaliatory action had to be in order to constitute retaliation in the first instance. On this point, Justice Breyer articulated a fairly functional test:

> In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'

While explaining again that Title VII is not a "general civility code for the American workplace," and that filing a claim of discrimination "cannot immunize that employee from those petty slights and minor annoyances that often take place at work and that all employees experience." Justice Breyer went on to state that "context matters" and "the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." Both aspects of Ms. White's retaliation complaint (reassignment of work duties and her unpaid suspension which was later overturned) were determined to meet the Court's standard of "material adversity" articulated above. By way of example, Justice Breyer noted that a work schedule change that "may matter enormously to a young mother with school age children" or exclusion from a "weekly training lunch" significantly tied to advancement with the employer may both deter a reasonable employee from filing an initial complaint.

In our school settings, how many times have we seen that regular lunch with the Superintendent or Department head is a well-known path to career advancement? And in the case of the employee who no longer receives such invitations after they "participate" in an EEOC investigation and is subsequently passed over for a number of promotions, does the District now have some exposure under Burlington?

The second major issue addressed by the Court in Burlington, which has not received nearly the attention of that discussed above, is that Justice Breyer also wrote that the challenged action by the employer need not be employment or workplace related in order to amount to an act of retaliation. By way of explanation, Breyer's opinion on this point cites two examples-one case involving an employer's refusal to investigate death threats made against an employee and his wife, and a second case where an employer filed false criminal charges against an employee who had complained about discrimination. In the educational setting, proximate parallels immediately spring to mind-a young teacher who complains of harassment by co-worker's and who then alleges that hostile conduct by the parent of one of her students has been intentionally ignored by the elementary school Principal in retaliation for her prior complaint. Or perhaps even more obviously, the certificated or licensed employee who claims that a report of a possible violation to the State Ethics Commission is purely retaliatory for a previously submitted discrimination complaint.

Thompson v. North American Stainless (Title VII). Five years after the Burlington decision, the Supreme Court had the opportunity to decide another issue directly related to scope of Title VII's anti-retaliation protections. In Thompson, Ms. Miriam Regalado was the original EEOC complainant where she alleged sex discrimination in violation of Title VII. Three weeks after filing her complaint, North American fired Eric Thompson, who was Ms. Regalado's fiancé but who was not otherwise involved in her initial complaint. Thompson filed his complaint and lawsuit alleging that his termination was in direct response to Ms. Regalado's sex discrimination complaint. In his opinion, Justice Scalia noted that based upon the allegations in the case, "we have little difficulty concluding…NAS's firing of Thompson violated Title VII." While recognizing that enforcement of cases alleging third-party reprisals will involve difficult line-drawing problems, Justice Scalia wrote:

> We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.

The Court went to find that since Thompson fell within the "zone of interests" intended to be protected by Title VII, he was entitled to bring suit to enforce the anti-retaliatory provisions of the Act. Given that the public school systems are the largest single employer in the vast majority of counties and districts across the country, many Districts are especially vulnerable to this expanded notion of third-party reprisals. Many District employee spouses, parents, children and siblings in different capacities, and the potential for retaliation claims from this third-party set can be daunting.

Kasten v. St. Gobain (FLSA). The Kasten decision (also in 2011) pivots away from the expanding jurisprudence of Title VII retaliation complaints back toward more traditional "labor law" issues to address the question of what exactly constitutes a complaint alleging a violation of the Fair Labor Standards Act in the first place.

In Kasten, the plaintiff claimed he was fired in retaliation for having repeatedly complained about the location of his employer's time clocks, but he admitted that he had never made any of his complaints in writing. The employer (St. Gobain) apparently acknowledged that Mr. Kasten had complained about the time clocks but contended that this was unrelated to the reason he was terminated. The legal question for the Court to decide then was whether admittedly oral complaints of an FLSA violation constituted "complaints" in the first place, and which would therefore be entitled to protection pursuant to the anti-retaliation provision of the FLSA.

Justice Breyer engaged in a fascinating examination of the meaning of the word "complaint," the history and purpose of the Fair Labor Standards Act, as well as the interpretations of the Department of Labor and the EEOC, to ultimately hold that oral complaints may, in fact, satisfy the standard and fall within the scope of the phrase having "filed any complaint" for purposes of being protected activity protected from retaliation under the FLSA.

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Importantly, the Court did not decide in Kasten the next and closely related question of whether (or not) Kasten's internal complaints to his employer (there was no claim that Kasten contacted the EEOC or the DoL prior to filing his retaliation complaint) were protected activity.

On this last point (whether internal complaints may constitute "protected activity" for purposes of the anti-retaliation provisions of federal employment laws), many school personnel administrators will already be familiar with the EEOC Compliance Manual. In the Manual, Chapter 8 "Retaliation," the Commission makes clear their view that complaints to a respondent employer as well as formal charges filed with the Commission are both considered protected activity, and that the Commission's view of protected activity includes written as well as verbal communications, and even non-verbal conduct in the example of picketing specifically cited by the Commission.

Final Words: Complaints of retaliation by individuals arguably engaged in some form of protected activity have been the most rapidly growing area of discrimination charges for over a decade. When we consider the impact of recent Supreme Court decisions which certainly appear to expand the ability of individuals to successfully bring and pursue these claims, the wise school personnel administrator will appreciate the need and beneficial effect of training principals and school supervisors in general as to the perils and pitfalls in this particular area of federal employment law.

Dan Murphy is a partner in the education law firm of McLocklin & Murphy, L.L.P., and serves as General Counsel to the Georgia Association of School Business Officials (GASBO) and a frequent presenter at national school law conferences, including the American Association of School Personnel Administrators (AASPA). For the past decade, Dan's practice has consisted almost exclusively of the representation of public school districts in Georgia. Dan is the recent co-author of The Fair Labor Standards Act in American Schools: A Guide for School Officials (Rowman & Littlefield, 2007), as well as the American Association of School Personnel Administrators' Family & Medical Leave Act Compliance Manual (AASPA, 2007), the 2009 FMLA Supplement (AASPA, 2009), the Guide to the Family Educational Rights & Privacy Act (Rowman & Littlefield, 2009) as well as the forthcoming Discipline and the Disabled Student (Rowman & Littlefield, 2012).

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Using Social Media Employment Decisions: Risks & Rewards

By Natalie Wyatt-Brown

On March 23, 2012, Facebook issued a written statement objecting to employers asking applicants or employees for their Facebook passwords. This likely stemmed from, at least in part, the Maryland Department of Corrections' practice of asking job applicants for their Facebook passwords so that the Department could check whether the applicant's wall or stored e-mail revealed any connection to criminal activity. This practice came to light in January 2011 when the ACLU publicized its letter to the Department complaining that it violated applicants' privacy rights and the Stored Communications Act.

But despite the recent public attention on this issue, it remains unusual for employers to ask applicants for their Facebook or Twitter passwords during a job interview. This is because such a practice may be legal, but not wise. Accessing an applicant's restricted Facebook page increases the likelihood that an employer will obtain information about the applicant's membership in a protected class. Employers also need to consider whether and to what extent information obtained from a medium the very purpose of which is to socialize (rather than to build one's resume) bears any relevance to the hiring decision. Finally, the employer could gain a bad reputation among potential applicants (or taxpayers) who — however wrongly — believe the employer is acting unlawfully.

Nevertheless, it has become popular for employers to examine applicants' social media profiles as part of the screening process. It is understandable why employers wish to do so—they gain access to information that may not come up on an application or during an interview. But the use of information gleaned from social media profiles also presents a real legal risk. To help avoid these risks, schools should remember the following when using social profiles as a part of the basis for any employment decisions:

Avoid Discrimination

Federal laws prohibit employment discrimination on the basis of race, sex, national origin, religion, genetic information, age, and disability. Many states and cities prohibit discrimination in other areas, such as sexual orientation, marital status and appearance. Employers also may not retaliate against employees for complaining about discrimination.

Potential employees may disclose information on their social media profiles that may not be lawfully used as a basis for decision making, such as marital status, national origin, religious affiliation, sexual orientation, age, or other protected statuses. Employers who view such information during the initial screening will have a difficult time claiming it was not a factor in making an employment decision.

To help avoid running afoul of discrimination laws, school administrators should wait to search an applicant's social media profile until after a conditional job offer is made. More importantly, treat all applicants equally; that is, review every applicant's profile in the same manner and evaluate all profiles under a definite set of non-discriminatory criteria.

While it is acceptable to use social profiles to get a clearer picture of applicants, do not use social media profiles as the sole basis for final decisions regarding employment. These sites are used for socializing, not job searching, and as such, may not be reliable sources of information.

First Amendment Issues

Public employees, such as teachers in public schools, may have First Amendment rights that are implicated by their use of social media. This can come up both in the hiring process, as well as during employment. Thus, for example, if a school fails to hire an applicant after reviewing her Facebook page which expresses views on a controversial topic, the applicant could sue the school for infringing on her first amendment rights. This is an ongoing concern in the education field. The University of Iowa Law School is currently being sued by an applicant who claims she was denied a full-time position because of her well-known conservative activism and views. The case is set for trial in October of this year.

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Just because a public employee is using a public forum to express concerns, however, does not automatically mean he or she is entitled to protection. Determining a public employee's free speech rights is a difficult task. "Courts must analyze the balance between the interests of the [public employee], 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." Pickering v. Board of Education, 391 U.S. 563, 568 (1968)). Further, critical to determining if a public employee's speech is entitled to protection, is whether the speech is made primarily in the employee's role as a citizen or primarily in his or her role as an employee. In Connick v. Myers, 461 U.S. 138, 147 (1983), the Supreme Court explained this distinction:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

Whether an employee's speech addresses a matter of public concern is a fact-specific inquiry. When in doubt, seek legal guidance before taking action. Further, schools should draft social media policies to avoid running into first amendment issues. Social media policies should prohibit clearly unlawful conduct (i.e., harassment of co-workers, threats of violence, etc.), and the disclosure of confidential student data and other private information, but policies should be crafted to avoid conflicting with protected activity or even to have a "chilling effect" on an employee's ability to participate in protected activity. Broad restrictions such as prohibiting an employee from "making disparaging comments about the school and/or district through any media…" are likely unenforceable because of the chilling effect they might have on protected speech. Accordingly, carefully draft your social media policy to give clear guidelines and avoid conflict.

Fourth Amendment Issues

Public employers also have to be concerned about privacy issues when it comes to social media due to fourth amendment concerns. In addition, many states recognize claims for invasion of privacy against private employers. So long as the employer has the applicant's or employee's permission to view the content, or it is publicly available, privacy issues are not implicated. However, the moment an employer goes beyond that limit, matters become more complex.

The U.S. Supreme Court has deliberately refused to issue broad rulings on public employees' expectations of privacy using employer-provided devices. In 2010, the Court was confronted with just such an issue in City of Ontario v. Quon. That case involved a police officer, Quon, who was using his city-issued pager to send text messages to his mistress. His use exceeded the city's contract with the provider, and so the city reviewed the texts to determine if they were sent for personal reasons. After he was disciplined for sending personal messages during working hours, Quon sued, claiming invasion of privacy in violation of the fourth amendment. When deciding the case, the Court limited its decision to the facts of the case. The Court warned that "[p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices." Fearing that a "broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted," the Court decided the case on narrower grounds by assuming that Quon had a reasonable expectation of privacy in his text messages before finding the city's search of them to be reasonable. The Court stated that it "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."

Thus, employers should be cautious when accessing employee texts, e-mails, Facebook accounts and other material in which the employee may have a reasonable expectation of privacy.

Stored Communications Act and Privacy Concerns

The Stored Communications Act prohibits unauthorized access to electronic communications stored at an electronic communications service provider. Whether the Act applies to social media sites such as Facebook, Twitter or LinkedIn is far from settled. Some decisions, however, suggest that it not only applies to social media, but that it even prohibits an employer from gaining access to password-protected pages or accounts from coworkers due to the difference in bargaining power between an employer and an at-will employee.

In Pietrylo v. Hillstone Restaurant Group, a 2009 decision from New Jersey, an employee gave her password to a restricted MySpace page, which contained disparaging comments about the employer, to management. After reviewing the page, the managers terminated the two employees who created it. The terminated employees sued, alleging violations of the federal Stored Communications Act. The employee who provided the password testified that she subjectively feared "something bad might happen to her" if she did not disclose her password. The court found this testimony was sufficient to support the jury's finding that the employee's authorization was invalid, even though there was no evidence that the managers had threatened the employee in any way whatsoever. Notably, the court did not cite a single case or any other authority in support of its holding, nor have other courts issued similar rulings.

The question remains wide open whether the purportedly "disparate bargaining power of the employer and employee" does, in fact, convert any employee's apparently voluntary disclosure of a Facebook password into "forced authorization." Of course, the bargaining power between a tenured teacher and a school administrator is far more equal than in the private sector. Nevertheless, such a disparity may arise during the application process or with other, non-tenured employees.

Until the question has been definitively answered, employers have a simple workaround: ask the employee to print out or e-mail screen shots of the material in question. It is remarkable how many "friends" who are offended by a co-worker's posts on a restricted Facebook page will voluntarily print that information and turn it over to administration. Because the federal Stored Communications Act makes it unlawful only to gain unauthorized access to an electronic communication stored at an electronic communications service provider, reading a printed version of a restricted wall post does not implicate the Act.

Conclusion

The world of technology is moving almost faster than meets the eye. The Pietrylo case is a good example—it was decided only three years ago, yet today, no one would even consider looking at MySpace. Under these circumstances, it is understandable why the Supreme Court was reluctant to address the legal implications of how employers and employees may use such technology. Nevertheless, school administrators must effectively use and properly deal with social media as it currently exists, as well as deal with any future changes. Short of consulting with legal counsel, the best practice is to use common sense—would you be offended if the policy or practice were applied to you?

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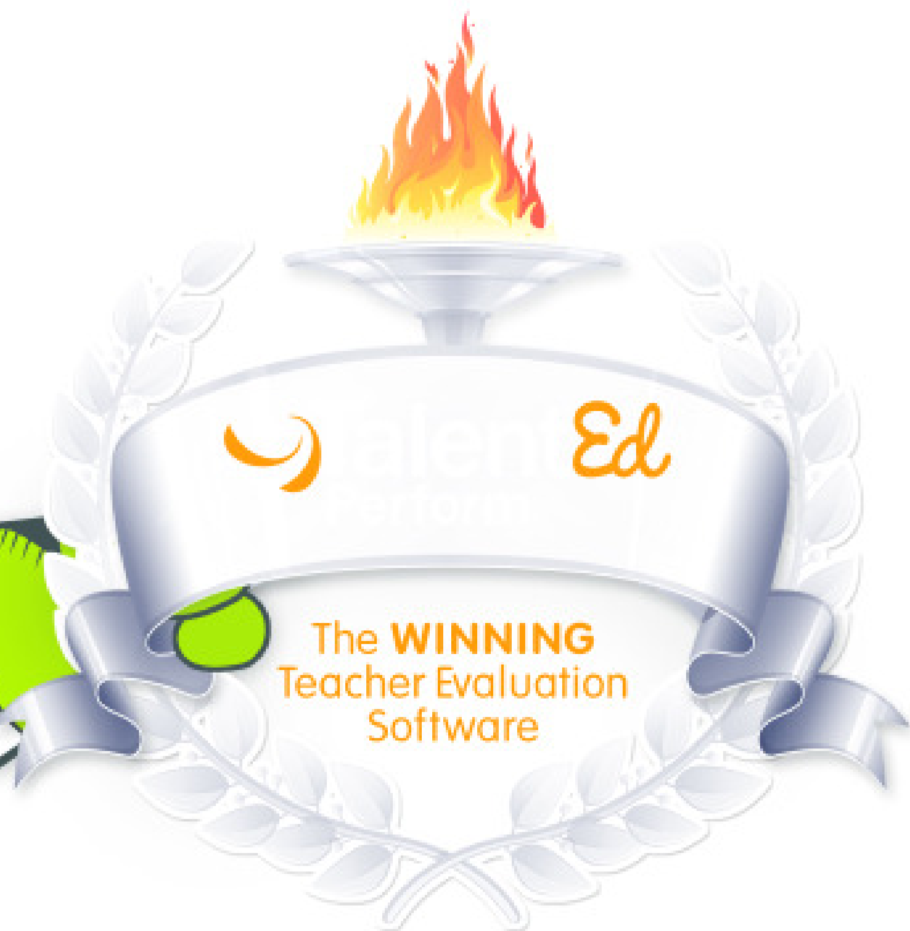

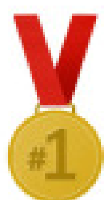

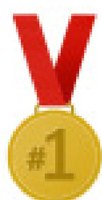

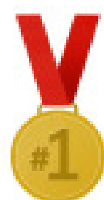

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Harassment is Not a LOL Matter

By Emily Douglas

In today's high-tech world, it is easier than ever for people to stay connected. Any time, any place, we can share information instantly with friends, family, and coworkers living in the next city or across the globe. However, while this enhanced connectivity has transformed business and education, made communication faster and easier, and helped promote sharing and learning, it can also be a human resource professional's worst nightmare. The more opportunities colleagues have to communicate, the greater chance there is of someone (accidentally or purposefully) crossing the line.

According to the U.S. Equal Employment Opportunity Commission (EEOC), harassment is any form of discrimination or unwanted conduct based on race or color, religion, sex (which includes pregnancy), national origin, age (40 or older), disability, or genetic information. Harassment can not only occur in person, but through email, social media, texting, and other communications, making it more difficult for HR departments in schools and other organizations to monitor and address the problem. Following are six facts about harassment as well as some recommended solutions that every HR professional should know.

Fact 1: Textual harassment is harassment, via text.
There are many terms used today to classify harassment, bullying, and stalking. These include cyberstalking, cyberbullying, and sexting (sending sexual messages via text). Another is textual harassment, or harassment via texting.

Fact 2: The EEOC does not keep specific track of textual harassment.
According to the National Law Journal, "textual harassment" cases are becoming more prevalent in the court system. So why doesn't the EEOC keep records of this type of harassment? According to Dianna Johnston, assistant legal counsel for the EEOC, "Harassment is harassment, regardless of how it's communicated. Anything in the environment that makes the workplace hostile can contribute to liability. The test is the same whether you're talking about written or verbal harassment. The bottom line is the same at any time."

Fact 3: Harassment can transcend boundaries.
A common misconception is that harassment can only occur between two employees or a manager and his or her subordinate. According to the EEOC, "The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee." This means educators and other school district employees could be harassed by vendors, parents, or students.

Fact 4: Harassment knows no gender.
Many believe sexual harassment occurs only when a male makes unwanted advances toward a female. Harassment can occur between two males, two females, a female and a male, or a male and a female. The following chart displays sexual harassment charges filed with state and local Fair Employment Practice Agencies as well as the EEOC from fiscal year 2005–2011. This chart covers all industries, including education. As you can see, approximately 16 percent of charges filed between 2007 and 2011 were by males.

	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Total # of Charge Receipts Filed Under Title VII Alleging Sexual Harassment Discrimination	12,679	12,025	12,510	13,867	12,696	11,717	11,364
% of Charges Filed By Males	14.3%	15.4%	16.0%	15.9%	16.0%	16.4%	16.3%
Monetary Benefits (in Millions) -Does Not Include Funds Obtained Through Litigation	$47.90	$48.80	$49.90	$47.40	$51.50	$48.40	$52.30

Fact 5: The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
As an example, this means that if an administrative assistant witnesses a teacher sexually harassing a principal in the teachers' lounge, they too can claim distress and receive monetary benefit. A "victim" does not have to be directly involved in the harassment discrimination interaction.

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Fact 6: Bullying and harassment are different.
While some think of bullying and harassment as synonymous, there are actually some key differences. In education we frequently speak about children as bullies, but this shows that adults can also be bullies. Specifically, actions are considered "harassment" when they call out an individual's protected class such as race or gender. In addition, harassment is handled by the EEOC, while bullying is not.

A 2010 survey conducted by the Workplace Bullying Institute found that 35 percent of workers have experienced bullying firsthand. The survey also found that bullying is four times more prevalent than illegal harassment.

What is the Solution?
Should school districts bar their employees from using Facebook, Twitter, internal instant messaging, and other communication platforms to help lessen the risk of harassment? Some do. Yet, most innovative organizations and highly trained human resource departments let people use these technologies, but work to create an understanding around proper use. Decisions must be made on an organization-by-organization basis, but we suggest that all HR departments:

1. Be proactive and continuously revisit harassment and bullying policies. Communicate to staff that harassment or bullying of any kind is not tolerated. School districts should ensure that all teachers, school leaders, and non-instructional personnel confirm receipt of the district's handbook containing rules, procedures, and other information about the issue.
2. Provide a way for employees to safely and anonymously report incidents of harassment, bullying, or retaliation.
3. Remind staff about appropriate usage of district-owned computers, phones, email addresses, work social media accounts, etc. as well as the data storage and recall features available.
4. Document and address all cases of harassment immediately. Employers get in trouble when they do not take timely action to prevent or correct the behavior.
5. Stay up to date. Visit the EEOC website, read articles, and network with members of groups like the Society of Human Resource Managers or the American Association of School Personnel Administrators about harassment policies and procedures. Your organization's attorney also should be able to assist with questions about harassment, bullying, or retaliation issues.

Textual harassment is not an LOL matter. School district HR professionals should work with their organization's leadership to develop policies for monitoring, reporting, and alleviating cases of harassment and bullying. They must also ensure staff members are aware of these rules and procedures. Harassment can be difficult to discuss, but addressing the issue is critical to ensuring a safe, comfortable, fair, and enjoyable work environment as well as a culture of success for educators and students.

Emily Douglas is a Director of Human Capital at Battelle for Kids, a not-for-profit organization that works with states and school districts across the country to improve educator effectiveness and accelerate student growth. She also writes for the Education Week blog, K-12 Talent Manager where she explores issues, trends, and promising practices for human capital in education. She can be reached at edouglas@BattelleforKids.org.

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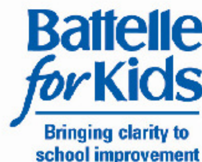

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Beginning A Successful, Thorough Investigation

By Rita Beyers

We've all gotten that SOS call from an administrator, be it a principal or department director, asking for help because a student, parent, or employee has complained about a district employee. A successful, thorough investigation begins with the work you do during the initial phone call. As you listen, remember to evaluate the information, think about next steps and prepare for your investigation.

During that first phone call, be sure to ask for details including:

• The name of the complainant and his/her contact information

• If the complainant is a student, his/her age, grade level, and parent contact information

• The name and contact information of the employee being accused of misconduct

• The date(s) and time(s) on which the alleged issue(s) occurred

• Specifics of the complaint such as who was involved and what specifically occurred

• Names of witnesses

• What, if any, steps the administrator has taken prior to talking to you

This is also the time to begin asking about documentation. Is the complaint oral or written? Did the administrator document his/her receipt of a written complaint and/or any conversation with the complainant? What information does the administrator have that is not included in the complaint but may be pertinent to the situation? This could include information such as: the parent is the school's PTA president, the employee is a chronic complainer, or the student is receiving a failing grade in the teacher's class.

After the initial phone call, take some time to analyze the situation and determine whether an investigation is advisable or required. Remember, even a short, informal investigation often resolves problems before they become big issues. In general, these types of situations warrant investigation:

• A questionable situation is reported between students and/or teachers

• An incident, such as leaving students unsupervised, exposes the District to potential liability

• A formal complaint, including complaints of sexual harassment or discrimination

• An incident for which disciplinary action is being considered

You will also need to consider the following:

• Are the pertinent board policies and regulations to be followed?

• Are there internal district guidelines to be followed?

• Are there relevant state or federal guidelines or codes?

• Is there pertinent language in the collective bargaining agreements?

Once you decide to initiate an investigation, review the information you have received from the administrator and determine:

• The general scope of the investigation (This includes an analysis of the seriousness of the allegations, options for formal or informal resolutions, and potential for legal proceedings.)

• The likely timeframe for the investigation (Be sure your timeframe is in compliance with Board regulations, collective bargaining agreements, and, state/federal regulations.)

• Who needs to be notified that the complaint has been received (i.e. the superintendent, the Board of Trustees, and/or legal counsel)

• The necessity of notifying law enforcement or child protective services

Next, take some action to preserve the evidence that has been generated thus far. With so much of our business being conducted electronically, it is likely you will have to ensure that electronic communications, Internet history, and electronic work products are preserved for review. Work with your technology department on both the analysis and preservation of all electronic data.If some of the electronic evidence, like voice or text messages, is on cell phones, ask the complainant to provide copies or send the information to your phone or computer. If the complainant is a student, ask his/her parent to do this or to have the information downloaded for your review. Work fast – students in particular, are likely to erase or delete messages they don't want anyone, including their parents, to find. These messages can be recovered but it may be time-consuming to do so after they have been deleted from a cell phone.

Sometimes, the electronic information is of a sensitive or sexual nature which may be offensive or upsetting to the employees who must preserve the data. Work carefully, and discuss with your technology department how to access the data without upsetting or offending your employees – you don't want another complaint coming your way!

Make sure you take notes and you get copies of all notes taken by the administrator who received the complaint. If there is written correspondence, pictures, or any other hard data, make sure you have copies. If necessary, take pictures of the employees' workspaces or classroom. Memories fade and things have a tendency to disappear as time goes on. Written communication can help jog yours and others memories if, months or years from now, the issue results in a legal proceeding.

As you consider what you have learned, determine if a thorough investigation will be possible if the accused employee remains at the worksite. Some factors to consider are:

• Does the potential for violence exist?

• Does the accused employee have the potential to intimidate witnesses?

• If the accused employee remains on site will s/he have the opportunity to destroy evidence?

• How has the District handled similar complaints?

If you allow the accused employee to remain at the worksite while the investigation takes place, determine whether the employee needs computer access and if so, how you will provide an alternate computer during the investigation. Be sure that the complainant is aware that the accused employee will be at his/her usual worksite. Discuss with the complainant, the accused employee, and their supervisor(s) how to best conduct the District's business during the investigation.

If, in the best interests of a thorough investigation or because of the seriousness of the complaint, you decide to remove the accused employee from the site, decide if the employee will work temporarily at another location or if the situation is serious enough to warrant having the employee out on administrative leave. Consult your collective bargaining agreements, state codes, and legal counsel to determine if the leave should be paid or unpaid. Keep in mind what your district has done in the past and be as consistent as possible. People will check!

Regardless of whether the accused employee is placed on paid or unpaid leave, remember to:

• Provide written information to the employee regarding his/her administrative leave. Include any guidelines you wish the employee to follow. The guidelines should include: when and how the employee may have access to district property; who the employee will report to while on administrative leave and contact information for that person.

• Decide if the employee will have access to district email or other district programs. If you decide it is unwise to continue his/her access, be sure to have your technology department block the access.

• Ask the employee for all district property in his/her possession. This includes things like keys, gate keys or automatic openers, laptop computers, cell phones, and other electronic devices. Inventory the items you take from the employee.

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• If you allow the employee to return to his/her workstation to gather personal items before starting his/her leave, go with him/her. Inventory the items which are taken. Both you and the employee should sign the inventory list, then provide the employee with a copy and keep one for your files.

• Check the employee's work schedule for the estimated time of the investigation. Is s/he, for example, scheduled to attend a conference? If so, make clear to the employee, in writing, that s/he is not to attend and that the district will cancel all reservations, cash advances, etc. You do not want an employee on leave representing the district at any work-related function.

• Begin computer and email access for the employee who will be doing the accused employee's work while s/he is out on leave. Remember, either someone will need to monitor the accused employee's email or his/her email will need to be redirected to another employee so the district's business can be conducted during his/her absence.

Now that you have started the investigation process, it's time to plan your next steps. With this solid beginning, your investigation should produce factual and reliable documentation which clarifies the issues, may be used to resolve the situation, and provides a basis for any necessary disciplinary action. Keep in mind that your job as an investigator is to be impartial and follow the facts to a logical conclusion. The complainant and the accused employee are counting on you.

Rita Sierra Beyers has over 30 years of service in public education within both California & Texas. Ms. Beyers has over ten years of experience in human resources management within public school districts including service as assistant superintendent of human resources for a district serving over 38,000 students. Ms. Beyers has also served as an elementary school teacher, high school assistant principal, and elementary school principal. Ms. Beyers currently specializes in human resources consulting for public school districts.

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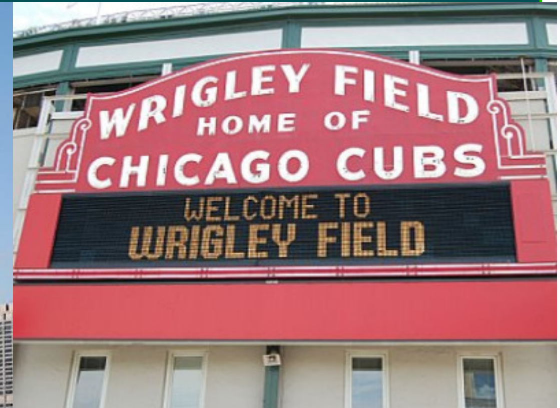

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