



# Navigating the Impact of the First Amendment on Employee and Student Expression and the Use of Social Media

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SCSBA SCHOOL LAW CONFERENCE  
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## Student Expression

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## Key U.S. Supreme Court Cases on Student Expression

❖ *Tinker v. Des Moines, Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969)

- *Tinker* held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- *Tinker* held that students’ First Amendment rights must be “applied in light of the special characteristics of the school environment.”
- Student speech may be disciplined when it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” or if educators reasonably anticipate that such disruption will occur.

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## Key U.S. Supreme Court Cases on Student Expression

*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)

- The court upheld the discipline of a student who delivered a high school assembly speech using “an elaborate graphic and explicit sexual metaphor.”

*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)

- The court held that a high school paper that was published by students in a journalism class did not qualify as a “public forum,” so school officials retained the right to impose reasonable restrictions on student speech within the paper.

*Morse v. Frederick*, 551 U.S. 393 (2007)

- The court concluded that the student’s display of a “BONG HiTS 4 JESUS” banner during an off-campus “school sanctioned activity” qualified as “school speech.”
- The court held that because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials did not violate the First Amendment by confiscating the pro-drug banner and suspending the student.

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# Student Expression through Off-Campus Conduct / Social Media



## ❖ *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011)

- KK, a senior at Musselman High School in West Virginia, posted a MySpace webpage labeled “S.A.S.H.” (Students Against Shay’s Herpes) which ridiculed another student, SN.
- KK created the webpage using her home computer and invited approximately 100 individuals, including high school students, to join the chat group and post comments and other items.
- Several members of the chat group posted extremely vulgar and defamatory comments about SN; another member of the group posted an altered photograph of SN which depicted red dots on her face to simulate herpes and other inappropriate photographs.

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## Student Expression through Off-Campus Conduct / Social Media

- ❖ When SN’s parents learned of the chat groups and postings, they filed a harassment complaint.
- ❖ School administrators determined that KK had violated the school’s policy against harassment, bullying, and intimidation.
- ❖ KK was suspended for five days and was issued a 90 day “social suspension” which prevented her from attending school events in which she was not a direct participant, and she was not allowed to participate on the cheerleading squad for the remainder of the school year.

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# Student Expression through Off-Campus Conduct / Social Media

- ❖ The Fourth Circuit concluded that the school district's imposition of sanctions was permissible. Particularly, the panel recognized that the analysis in the Tinker case supported the conclusion that **"public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."** (emphasis added)
- ❖ The Fourth Circuit reasoned that even though KK was not physically present at school when she created the webpage, given the nature of internet activity and the members of the S.A.S.H. group, it was foreseeable that her conduct would reach and impact the school environment.
- ❖ Further, the Fourth Circuit noted that KK's conduct had disrupted the work and discipline of the school because the creation of the page forced SN to miss school to avoid abuse and because the harassment had the potential to continue and expand absent school intervention.



# South Carolina Safe School Climate Act

## S.C. Code § 59-63-130 provides, in part:

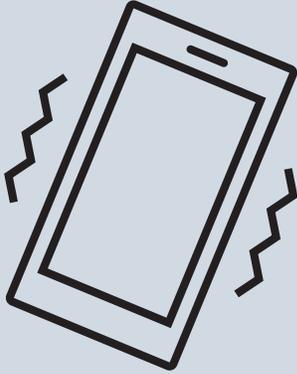
- (A) A person may not engage in:
  - (1) harassment, intimidation, or bullying:...

## S.C. Code § 59-63-120 provides, in part:

- (1) "Harassment, intimidation, or bullying" means a gesture, an electronic communication, or a written, verbal, physical, or sexual act that is reasonably perceived to have the effect of:
  - (a) harming a student physically or emotionally or damaging a student's property, or placing a student in reasonable fear of personal harm or property damage; or
  - (b) insulting or demeaning a student or group of students causing substantial disruption in, or substantial interference with, the orderly operation of the school.
- (2) "School" means in a classroom, on school premises, on a school bus or other school-related vehicle, at an official school bus stop, at a school-sponsored activity or event whether or not it is held on school premises, or at another program or function where the school is responsible for the child.

## U.S. Supreme Court Case *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021)

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- ❖ *Mahanoy* concerns a student who posted a Snapchat message after not being placed on her school's varsity cheerleading squad.
- ❖ Cheerleaders at Mahanoy Area High School were required to sign an agreement that prohibited cheerleaders from posting "negative information" regarding "cheerleading, cheerleaders or coaches" online.
- ❖ After being denied promotion to varsity, B.L. and a friend posted a picture on Snapchat, to her 250+ friends on the platform, with their middle fingers raised with the caption "f\*\*\* school f\*\*\* softball f\*\*\* cheer f\*\*\* everything."
- ❖ This message self-deleted, but one of B.L.'s teammates took a screenshot. The screenshot was shown to the coaches, and subsequently B.L. was suspended from cheerleading for the next year.

## U.S. Supreme Court Case *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021)

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- ❖ The Supreme Court held that School Districts may have an interest in regulating some off-campus student speech but those interests were not present in this case.
- ❖ The Court referenced several types of off-campus behavior that may call for school regulation, and may include:
  - Speech which includes serious or severe bullying or harassment targeting particular individuals;
  - Threats aimed at teachers or other students;
  - Failure to follow school rules regarding lessons, writing papers, use of the computers or participation in other online school activities (cheating); and
  - Breaches of school security devices (hacking).

# U.S. Supreme Court Case *Mahanoy Area School District v. B.L.,* 141 S.Ct. 2038 (2021)

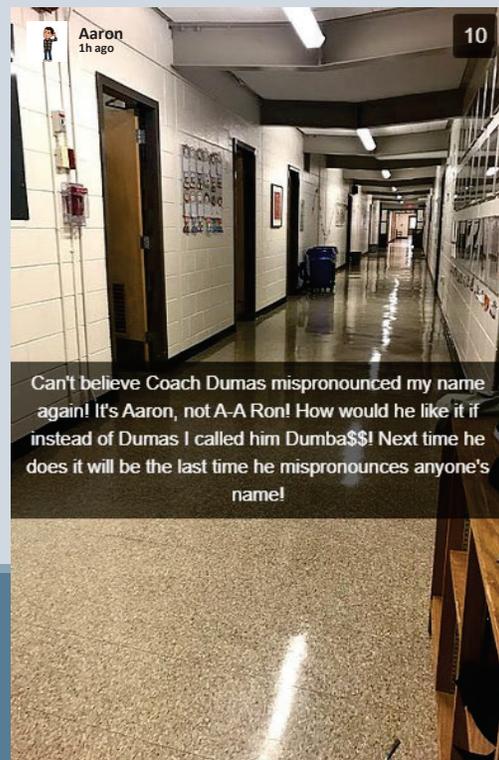
❖ The Court considered the following factors as features of B.L.'s speech which diminished the school's ability to punish B.L.'s speech:

- B.L.'s post, while crude, did not amount to fighting words.
- While B.L. used vulgarity, her speech was not obscene.
- B.L.'s speech occurred off-campus and outside of school hours.
- B.L. did not identify the school in her post or target any member of the school community with vulgar or abusive language.
- The school could not show a "substantial disruption" to the school environment – it was discussed for 5-10 minutes in a class a couple of days and although some teammates were upset, this was not enough to show a substantial disruption.

\*The Court did not specifically define a list of exceptions because the court recognized that the analysis could vary depending on the age of the students, the nature of the off-campus activity and the impact on the school environment.

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## Scenario

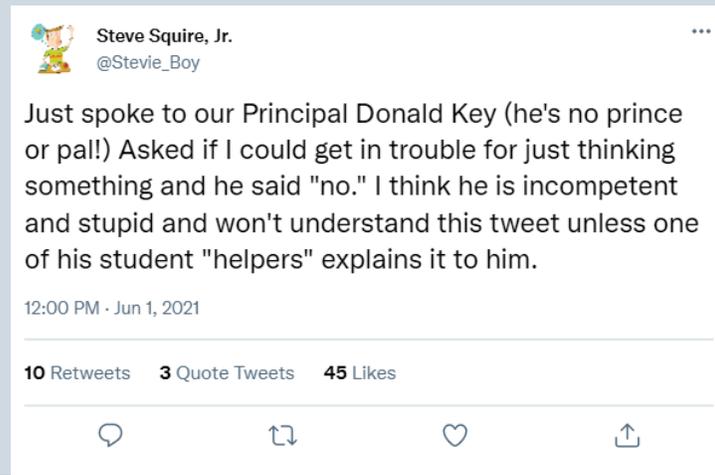


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# Scenario

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A tweet from a student:



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# Employee Expression

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## Staff Conduct Policy

- ❖ Review and update the Board's Staff Conduct policy, as needed, to address social media issues.
- ❖ Avoid policy language that could be found to be unconstitutionally overbroad.
- ❖ Recommend including language such as:
  - Employee social media use has the potential to result in disruption of the school/work environment or impair the efficiency of the school/workplace. As such, the board expects employees to ensure all their conduct and communications, including those associated with their social media, do not disrupt the school/work environment, create a reasonable apprehension of disruption in the school/work environment, or impair the efficiency of the school/workplace. Employees will be held to the same professional standards in their use of social media as they are for any other conduct. If an employee has a question regarding the appropriate use of social media, he/she should consult his/her direct supervisor or building principal for guidance.

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## Key U.S. Supreme Court Cases on Employee Expression

### ❖ *Pickering v. Board of Education / Connick v. Myers*

- The Connick-Pickering three-part test to determine whether a public employee has sustained a First Amendment challenge to an adverse employment action.
- First, determine whether the employee spoke as a citizen on a matter of public concern.
- Second, evaluate whether the employee's interest in First Amendment expression outweighs the employer's interest in the efficient operation of the workplace.
- Third, decide whether the protected speech was a substantial factor in the employer's decision to take adverse employment action.

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## *Pickering v. Board of Education*, 391 U.S. 563 (1968) U.S. Supreme Court



- ❖ A teacher was terminated for sending a letter to a local newspaper in connection with a recently proposed tax increase criticizing the board's allocation of funds between educational and athletic programs. It was critical of the way in which the board and the district's superintendent had handled past proposals to raise new revenue for the schools.
- ❖ The U.S. Supreme Court held that in the case of *Pickering*, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

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## *Pickering v. Board of Education*, 391 U.S. 563 (1968) U.S. Supreme Court

- ❖ The court stated "because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interest should run."
  - The court found the statements in Pickering's letter consisted essentially of criticism of the board's allocation of school funds between educational and athletic programs and were in no way directed towards any person with whom Pickering would normally be in contact in the course of his daily work as a teacher. Thus, no question of maintaining either discipline by immediate superiors or harmony among coworkers was presented.
  - The court concluded that the teacher's statements were critical of his ultimate employer, "but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."

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## Fourth Circuit Cases on Employee Social Media Use

- ❖ *Liverman v. City of Petersburg*, 844 F.3d 400 (4<sup>th</sup> Cir. 2016)
- ❖ Officers, while off duty, posted remarks to a Facebook page discussing promotion policies referencing rookie cops becoming instructors and discussed concerns with elevating inexperienced police officers to supervisory roles.
- ❖ The City of Petersburg police department social networking policy had what was referred to as a “negative comments provision” which stated:
  - 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, in accordance with established case law.
- ❖ The court held that the department’s social networking policy was unconstitutionally overbroad and that the disciplinary measures taken against the officers pursuant to the policy were likewise impermissible.
- ❖ In applying the Connick-Pickering three-part test, the Fourth Circuit held that the interaction between the two officers was a single expression of speech on a matter of “public concern.” The court further found the police department failed to establish a reasonable apprehension that the officers’ social media comments would meaningfully impair the efficiency of the workplace.



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## Fourth Circuit Cases on Employee Social Media Use

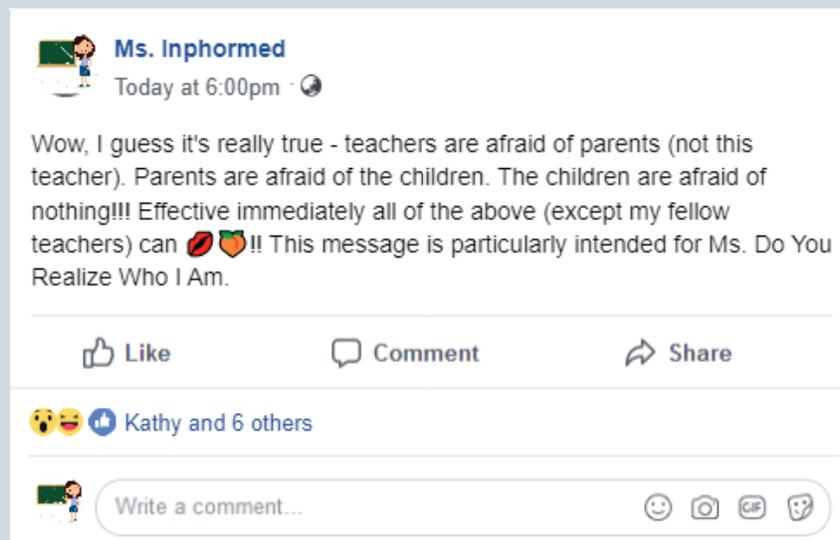
- ❖ *Grutzmacher v. Howard County*, 851 F.3d 332 (4<sup>th</sup> Cir. 2017)
- ❖ The Fourth Circuit addressed the use of social media by employees of a fire department. In its decision, the Court noted in a footnote the following:
  - We observe that the act of “liking” a Facebook post makes the post attributable to the “liker,” even if he or she did not author the original post. See *Bland v. Roberts*, 730 F.3d 368, 386 (4<sup>th</sup> Cir. 2013), as amended (Sept. 23, 2013)(“Clicking on the ‘like’ button literally causes to be published the statement that the User ‘likes’ something, which is itself a substantive statement... that a user may use a single mouse click to produce that message... instead of typing the same message several individual key strokes is of no constitutional significance.”)
- ❖ Accordingly, for ease of reference, we refer to Plaintiff’s various Facebook posts, comment replies, and “likes,” collectively, as Plaintiff’s “Facebook activity” or “speech.”

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## Fourth Circuit Cases on Employee Social Media Use

- ❖ The Plaintiff was a Battalion Chief with the Howard County Department of Fire and Rescue Services who posted comments that advocated violence to certain classes of people and “liked” comments that could be interpreted as supporting racism or bias.
- ❖ The court determined that some of Plaintiff’s Facebook activity implicated matters of public concern so it had to determine whether Plaintiff’s interests in speaking on a matter of public concern outweighed the department’s interest in providing effective and efficient services to the public.
- ❖ The court found the department’s interests in workplace efficiency and preventing disruption outweighed the commentary contained in Plaintiff’s Facebook activity, and noted:
  - Plaintiff’s Facebook activity interfered with and impaired department operations and discipline as well as working relationships within the department.
  - Plaintiff’s speech frustrated the department’s public safety mission and threatened “community trust” in the department, which is vitally important to its function.

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## Scenario

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**Ms. Phedupp (4th Grade Teacher at Students Second Elementary School)**

Today at 9:40pm · 🌐

Went to the Board, or is it "Bored," meeting last night. Does our state allow recall elections? (not asking for a friend!)



Ms. Michelob and 12 others



**Ms. Michelob (3rd Grade Teacher at Students Second Elementary School)** Tell me about it! Today is going to be rough 😞 During our monthly Board meeting watch party last night we took a drink every time a Board member said "I saw on social media..." and we were all drunk before public participation began 😂👉

undefined · undefined · 5 mins



Write a comment...



# Scenario