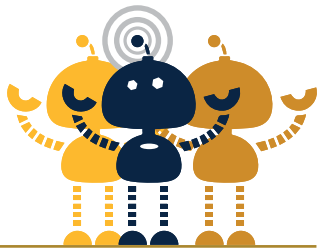
Legal Developments in Social Media, Municipalities, #feelincute, and the First Amendment



By Michael G. Crotty, Esq., Siana Bellwoar

While Facebook and other forms of social media can be great vehicles for municipalities to communicate with residents, they also create a legal minefield ripe with First Amendment traps.

Depending on how they are structured, social media can either be the one-way communication vehicle that municipalities expect or, with open public commenting/postings, can be the new "modern public square" with broad First Amendment protection. On the other hand, social media usage by officials and employees – either on- or off-duty – raises its own host of personnel challenges.

A recent decision out of the U.S. Fourth Circuit Court of Appeals and, separately, the #feelincute challenges highlight some of the difficulties that municipalities face in both areas.

Official Facebook Pages

First, in the Fourth Circuit decision in *Davison v. Randall*, the court held that the Facebook page of an individual elected official was a "public forum." The court concluded that the official violated the First Amendment by deleting a post containing negative comments by a resident and temporarily banning that resident.

One of the controlling factors in the court's decision was how the Facebook page was set up.

It is important to note that the page was *not* administered by the local government (the Loudoun County Board of Supervisors). Instead, Chairman Phyllis J. Randall created and used the Facebook page to update constituents on issues, including upcoming meetings, public safety threats, and community events.

Public comment was allowed including those from Brian Davison, a Virginia resident, who was a frequent critic and managed his own Facebook page.

After Davison complained in person about alleged unethical actions by the public officials at a public meeting, he took to Randall's Facebook page to continue to air his criticisms. Specifically, in response to Randall posting a general summary of the meeting, Davison posted allegations that school board members had conflicts of interest and acted unethically.

Randall apparently took offense and deleted the entire post, including all comments. She also blocked Davison from posting further on the page. The court noted that the next morning, Randall reconsidered and lifted the ban on Davison.

After a legal challenge that made its way before the trial court and the Fourth Circuit Court of Appeals, the appellate court held that Randall's actions violated Davison's First Amendment rights.

Among other findings, the court held that the actions constituted viewpoint discrimination, and rejected the arguments that Randall's page was a public forum because it was not an official municipal page. The court explained that in clothing the page in the trappings of her public office and allowing public comment, Randall's action in curtailing some of that comment constituted a First Amendment violation.

The takeaway from the court's decision is that even "unofficial" pages of local officials can be bound by the First Amendment, so there needs to be careful consideration of both the setup and the monitoring of social media.

Employees Behaving Badly

On the other side of the social media universe, the #feelincute trend highlights the potential pitfalls with municipal employees use social media – whether on their own time or on duty.

In the #feelincute "challenge," police, corrections, and other officers took to social media to post pictures of themselves about to do their job, accompanied by snarky, sarcastic commentary. While some posts might have been innocuous, things quickly got out of hand.

Examples included: a photo of a parked police vehicle with the tagline "#feeling cute … might stop someone later, idk"; a water authority employee posting "#feeling cute, might just cut off your water later … idk"; a correctional officer saying "feeling cute, might just gas some inmates today, IDK"; and more ill-advised police posts said, "feeling cute, might get suspended for justifiable use of force …idk" and "feeling cute, might shoot your baby daddy today …idk."

The result in many cases was discipline and/or termination, irrespective of any protests that the postings might have been "off the clock."

The courts are generally well-settled that municipalities with policies in place governing social media usage can discipline employees for off-hours conduct. Among many factors to consider are whether the conduct impairs harmony among co-workers, interferes with the operation of the agency, and/or undermines the mission of the institution.

Certainly, an argument can be made that the posts eroded the public's trust in those agencies, irrespective of whether they were made in jest.

It is doubtful, for example, that a department would be able to effectively use the "I was joking" defense to an excessive force claim by the officer who posted: "feeling cute, might get suspended for justifiable use of force … idk." Other statements included above played into stereotypes, impairing a department's efforts to maintain public trust in its policing.

Critical to navigating the landmines associated with these issues are established municipal social media policies that guide official municipal social media posts, that educate individual officials about maintaining their own pages, and that govern and advise employees that their social media usage can be the subject of discipline, up to and including termination.

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