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TITLE: Personnel Pitfalls in Cyberworld
SOURCE: School Administrator ***64*** no9 22-4 O ***2007***

Do school leaders have a duty to monitor the online actions of school staff and candidates for teaching vacancies? An education attorney sees a need for diligence.

In May 2006 administrators in the Austin, Texas, Independent School District learned that Tamara Hoover, an art teacher at Austin High School, was the subject of several explicit photographs that had been posted on Flickr, a public photograph-sharing website. The photos, taken by Hoover's partner, an amateur photographer, depicted Hoover in the shower, lifting weights, getting dressed, in bed and doing other routine activities while nude or partially clad. Purportedly these photographs were posted on Flickr by the teacher's partner without her knowledge or permission.

According to Hoover's explanation, which she had posted on her website, her Internet activities were discovered when "a fellow teacher was complaining about me in front of her students. A student in her class said, if you don't like msh you should check out 'this' website."

The fellow teacher instructed the student to access the site, which she did in front of the class. When the student saw nude images of the art teacher, she complained to the administration. "Within 30 minutes, the administration escorted me off campus and rendered me ineffective and placed me on administrative leave," Hoover reported on her website.

Last August she agreed to resign in exchange for a payment of $14,850. The case garnered national attention and generated a heated debate about the privacy rights of educators and the role of the Internet in the employment process.

Regulating Conduct

The Hoover case demonstrates the personnel pitfalls that arise in cyberspace. As the Internet becomes ubiquitous, situations involving school personnel like Hoover will surely multiply. Unfortunately, much like students, school district employees sometimes demonstrate lapses in judgment that force administrators to regulate Internet conduct.

Complicating the matter is the fact these situations are not limited to current employees. It is becoming a fairly common practice for human resources professionals to conduct "Google" searches on job candidates to determine whetlier anything in cyberspace might shed light on an individual's fitness for employment.

While this pre-screening process may be useful in avoiding problems like those posed by the art teacher, the process itself presents several potential problems. Our law firm has had a client who learned through personal blogging that a prospective employee had HIV. The school then declined to hire that individual based upon information regarding his health status.

Obviously the school could not have asked the prospective employee about the HIV virus during the interview process nor could it, in most situations, make an employment decision based on that information alone under the Americans with Disabilities Act Yet because the prospective employee had blogged about it, the school felt free to act on that voluntary disclosure. Even so, the disclosure should have been treated as if it had been made during an employment interview and should not have been the basis for a hiring decision. By doing otherwise the school subjected itself to some liability.

One can imagine any number of other disclosures that present similar problems. For example, our firm is involved in litigation in the Supreme Court with a teacher, Deborah Mayer, who contends she was discharged from her job due to in-class speech protesting the Iraq War. A fairly standard Internet search on Mayer reveals not only the federal court case, Mayer v. Monroe County School Corpartition, but also the fact she has been a frequent participant in anti-war rallies and a partner with Cindy Sheehan, the anti-war activist whose son Casey Sheehan was killed in Iraq in 2004

Assume Mayer applies for a teaching position in your district. Before the common use of keyword searches on the Web, a school probably would have received limited information regarding her discharge from the Monroe County School Corp., but probably would not have received any information relating to her lawsuit or anti-war activities. If you declined to hire her based on that information alone it would probably be well within your rights to do so.

However, in this Internet age, what if you perform a Google search showing her litigation and anti-war activities. Assume you take the exact same action, declining to hire her based on her prior discharge. Unfortunately, given the knowledge of her anti-war activities and lawsuit, your school district may very well be subject to legal action by Mayer alleging you violated her First Amendment rights by refusing to hire her based upon her anti-war protests.

Off-Campus Speech

Turning to these legal issues, what right did the Austin Independent School District have to place Hoover on administrative leave and why did it eventually buy her out versus simply terminating her employment for her conduct? More importantly, what can and should you do when you discover via the Internet that one of your employees has engaged in inappropriate behavior?

No one disputes that teachers (and other school employees) possess First Amendment rights notwithstanding their public employment. The Supreme Court put it this way in Tinker v. Des Moines Independent Community School District: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." Since the high water mark in Tinker, the court has significantly reduced the rights of school employees

(and students) in connection with on-campus speech. However, there has been no similar retrenchment regarding off-campus speech.

In Hoover's case, she contended the photos were intended as art and she did not publish them or have any control over how and when they were seen. Thus to discipline her for that expression violated her First Amendment rights. As a general matter, off-campus speech by teachers is protected by the First Amendment. However, that fact alone does not mean schools cannot regulate off-campus speech through the disciplinary process if they can demonstrate the off-campus speech has some adverse on-campus impact.

In the student context, the Pennsylvania Supreme Court found a school did not violate a student's free speech rights for disciplining him for an off-campus website soliciting funds for a hitman to kill his math teacher when the school was able to show that as a result of stress over the website the teacher went on disability leave and the class was therefore disrupted.

With respect to Hoover, even assuming her Internet speech was protected by the First Amendment, the school district still could have disciplined her for that speech if it could have demonstrated the off-campus speech caused significant disruption at school. This can be done in a variety of ways. For example, the inadvertent display of the website and its contents in the other teacher's class likely caused a significant disruption in that class, as did subsequent events to the school as a whole. We also have had some success arguing the popularity of certain websites or blogs has caused increased Internet use by teachers and students, disrupting the school's computer network by requiring increased bandwidth and reducing productivity.

Presumably teachers would argue that the school should simply block those websites from the school computers, but even this action has led to litigation. In a suit filed recently in federal court (Rice v. M.S.D. of Perry Township), a teachers' union has argued that a school's actions in blocking teacher access to websites critical of the school board in its dispute with an outgoing superintendent violated the teachers' First Amendment rights.

Unwieldy Punishment

Whether with teachers or students, the disciplinary process is actually a cumbersome and unwieldy method of addressing Internet-based behavior. Other methods exist for removing this speech. The first place to look is to the Internet service provider, or ISP, hosting the speech. Unfortunately for schools, the Communications Decency Act provides a broad immunity for an ISP when republishing content posted by a user and thus little legal incentive exists for the ISP to remove inappropriate postings.

However, as this type of speech has proliferated, the ISPs have engaged in some voluntary self-policing. While not a cure-all, these rules and regulations should be a first stop for administrators when faced with inappropriate web-based speech. For example, Google, which operates Blogger.com and blogspot.com, provides terms and conditions for users at www.blogger.com/terms.g and www.google.com/accounts/TOS. These conditions purport to ban speech that involves "Illegal Purposes, Spam, Identity Theft and Privacy, Hate Content, or Defamation/Libel." However, these protections are largely toothless. Google states that "if we have reason to believe that a particular statement is defamatory (a court order, for example), we will remove that statement." Hate content will generally not be removed, but will just be "flagged."

Unlike the blogging sites, the social networking sites have proven to be more accommodating about self-regulating speech. Administrators with concerns in this area who have not yet obtained a copy of the "MySpace.Com Administrators' Guide" are encouraged to do so. (It is available on the AASA website's members-only section.)

Unfortunately for administrators, schools not only have liability for what they may have seen and responded to but also for what they never saw. A core problem with the Internet is that if something is out there in cyberspace, the public assumes school administrators knew or should have known about it.

For example, Pamela Rogers Turner, a phys-ed teacher in Tennessee, was found guilty of having repeated sexual encounters with a 13-year-old boy. In a plea agreement she was sentenced to nine months in prison. Turner and the boy began their relationship online in a chat room. Following her release from prison and while still on probation, she was arrested again, this time for allegedly sending sexy videos and nude photos to the boy as well as contacting him indirectly through a MySpace website. As a consequence, her probation was revoked and she was ordered to serve out the remainder of her seven-year prison sentence. Because much of this was freely available over the Internet (indeed the video can be found on YouTube), the logical question for administrators is how could this have happened?

Situations like these present a difficult problem for schools. Is there an obligation to monitor staff e-mails, text messaging and web use to ferret out inappropriate electronic communication with students? Certainly plaintiffs' attorneys in cases like Turner's have argued that a school's failure to catch such electronic communications between teachers and students subjects schools to liability as part of a claim for negligent supervision!'In Doe v. Lafayette School Corp., a school was held liable for a 13-year-old being molested by a teacher because the relationship began on the school's e-mail system.

Should prudent schools ask staff about MySpace accounts and then monitor those accounts? What about Flickr, YouTube, Facebook, etc.? Doing so certainly presents significant privacy concerns, not to mention the sheer logistics of such an undertaking. There are no easy answers. Indeed, monitoring web usage might lead to more liability rather than less should something be missed.

Unfortunately, while the Internet provides unlimited opportunities to enhance the capacity of school administrators to perform their jobs, it also creates many personnel pitfalls that have no easy solutions. The advancement of technology will likely answer some of the questions posed above, but it also will open whole new areas of concern for educational leaders.

ADDED MATERIAL

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