Legal Aspects of the Use of Social Media in Higher Education

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Abstract

The use of social media in higher education has accelerated over the past years. Social media has been integrated into the academic classroom, campus, and everyday life. Along with increased social media usage in the university environment comes an increasing legal vulnerability. Higher educational institutions must be constantly vigilant of legal changes in the social media arena where both students and educational institutions have taken up legal action relating to online behavior. From an institutional perspective, universities need to be constantly developing policies in response to the changing legal environment as it relates to social media usage. This paper will address the major issues that will impact higher institutions by first examining the numerous laws at both the national and state level. Then, we will examine the best practices that relate to institutional polices which should be developed to govern social media usages on campuses around the country.

Keywords: Social Media Free Speech University College First Amendment Professionalism Higher Education Policies Social Networks Institutional Policies Student Life Issues Educational Law Internet Behavior

1 Introduction

The use of social media in higher education has accelerated over the past years. Social media has been integrated into the academic classroom, campus life, as well as all elements of student life on and off campus. Along with increased social media usage in the university environment comes an increased legal vulnerability. Higher educational institutions must be constantly vigilant of legal changes in the social media arena where both students and institutions have taken legal action because of online behavior. This paper will address the numerous laws and issues that will impacts institution of higher learning. It will then look at various stakeholders, such as, students, employees, and administrators, and social media's influence on those groups. Finally, this paper will examine the best practices concerning social media use for college and university campuses around the country. Social media provides more ways to "speak" than ever before. Students can tweet. Administrators can post pictures on Instagram. Professors can post assignments on Facebook. The university community can and do get their news on social media. The following chart shows the top 15 social media sites as of February 2017 and the number of site visits each month.

Social Network	Monthly Visitors
Facebook	1,860,000,000
YouTube	1,000,000,000
Instagram	600,000,000
Twitter	313,000,000
Reddit	234,000,000
Vine (January 2017, Vine became the Vine Camera)	200,000,000
Pinterest	150,000,000
Ask.fm	160,000,000
Tumblr	115,000,000
Flickr	112,000,000
Google+	111,000,000
LinkedIn	106,000,000
VK	90,000,000
ClassMates	57,000,000
Meetup	30,020,000(Kallas, 2017)

Social media is the new purveyor of speech. While social media is important to the free flow of speech, results from a recent Gallup survey (sponsored by the Newseum Institute and John S. and James L. Knight Foundation) that questioned college students about their views on First Amendment rights show some interesting results. "While the vast majority of students surveyed indicated their support for free speech, a significant minority (22 percent) said that colleges and universities should prohibit biased or offensive speech to preserve a positive learning environment, and more than half (54 percent) said the climate on campus prevents some students from saying what they believe because others may find it offensive."(Castellano, 2016)So, some students want an absolute environment of free speech but some of those students are still concerned with offending someone. While other students want offensive speech prohibited all together.

Is there any hard and fast rule on what a university or college can do? To some extent, yes. Not all speech is protected speech. The United States' Constitution does not protect certain types of speech; therefore, a university or college can regulate and punish the use of such speech. Unprotected speech includes:

- Fighting words
- Clear and present danger speech
- True Threats
- Obscenity
- Child pornography
- Defamation
- False and deceptive commercial speech

A college, university, professor, or administrator could stop or discipline a student for engaging in any of the above types of unprotected speech. All other types or speech will be protected speech. However, even protected speech is not fully protected because an entity can place a proper time, place, and manner restriction on protected speech. In addition to the above, we have case law that makes the law of speech somewhat more difficult to understand.

2. First Amendment Free Speech

2.1Tinker v. Des Moines Independent Community School District

The clash between students, schools, and speech is an old one. It begins not on social media but with a case involving symbolic speech, which is often present on social media. The law begins with the case *Tinker v. Des Moines Independent Community School District.*(Tinker v. Des Moines Independant Comm. School District, 1969)In the *Tinker* case, Mary Beth and John Tinker and Christopher Eckhardt wore black armbands to school to protest the Vietnam War. It was December, 1965. The school principal asked the students to remove their armbands. The 13 to 16 year olds refused and were sent home. They remained on suspension until January 1, 1966. The children and their parents sued the school district for violating the students' right to freedom of expression under the First Amendment. The students lost at trial and on appeal to the 8th Circuit.

However, the US Supreme Court reversed by holding that a prohibition against the wearing of armbands in public school, as a form of symbolic protest, violated the students' freedom of speech protections guaranteed by the First Amendment. The court reasoned that a student does not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."(Tinker v. Des Moines Independant Comm. School District, 1969) In order to justify the suppression of speech by making the students remove the armband, the school officials must be able to prove that the conduct in question would "materially and substantially interfere" with
the operation of the school. (Oyez, 2017)

2.2 Morse v. Frederick

Morse v. Frederick(Morse v. Frederick, 2007), is another student free speech case. Although it is not about social media, it does help to explain student free speech in social media. In Morse, Joseph Frederick, a student, held up a banner with the message "Bong Hits 4 Jesus" on it. Apparently, the phrase is a reference to marijuana smoking. Because Frederick displayed the banner at a school-sponsored event, Principal Deborah Morse took the banner away from Frederick and suspended him for 10 days.(Morse v. Frederick, 2007) Frederick then sued alleging that the principal and the school had violated his First Amendment right to free speech.

After hearing the case, the US Supreme Court held that "a school official can prohibit students from displaying messages that promote illegal drug use."(Morse v. Frederick, 2007) The court recognized that while students do have a limited right to political speech while in school, this right does not extend to advocating for the use of illegal drugs. Such messages would undermine the school's important mission to discourage drug use among its students and faculty.(Morse v. Frederick, 2007) It is important to note that the court also recognized the right of students outlined in the *Tinker* decision. However, the court pointed out that the free speech rights of students would never be as extensive as those enjoyed by adults.(Morse v. Frederick, 2007)

The *Tinker* and *Morse* cases clearly show that students have First Amendment free speech rights. However, those rights may be limited when the speech materially and substantially disrupts the discipline and work of the school. It is also important to remember that the two cases deal with secondary school and not institutions of higher education. The following cases look at cases in colleges and universities.

2.3 Healy v. James

In *Healy v. James*,(Healy v. James, 1972), Central Connecticut State College would not recognize Students for a Democratic Society (SDS) as a student organization. As a result, the organization could not meet on campus, use campus bulletin boards, and could not make announcements in the student newspaper. The president of the university felt that the group was too closely affiliated with the National Students for a Democratic Society, a militant anti-establishment organization that promoted civil disobedience and violent disruption of higher education. After the president denied SDS's petition for recognition, the group sued claiming their right to associate has been infringed. The US Supreme Court held a college might prohibit student activities that would infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of students to obtain an education (Healy v. James, 1972). However, universities and colleges have less leeway in regulating or disciplining such speech than secondary schools. The university is, traditionally, the hotbed of debate and learning. As such, regulation of speech at a university is more closely scrutinized that regulation of speech at an elementary or secondary school. In finding for the students and the SDS the court said, "First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."(Healy v. James, 1972)

2.4 McCauley v. University of the Virgin Islands

In the case, *McCauley v. University of the Virgin Islands*(McCauley v. University of the Virgin Islands, 3rd Cir. 2010),UVI student Stephen McCauley approached, talked to, and allegedly harassed a rape victim. McCauley's friend was the alleged perpetrator of the rape. McCauley was charged with a violation of UVI's Student Conduct Code, which prohibited "offensive or unauthorized" signs, and conduct causing "emotional distress." It also forbade causing "mental harm" or demeaning or disgracing any person.(Creeley, August 18, 2010) McCauley sued the university claiming that UVI's policy violated his First Amendment rights of Free Speech. The 3rd Circuit Court of Appeals ruled in McCauley's favor by stating, "a desire to protect the listener cannot be convincingly trumpeted as a basis for censoring speech for university students…[e]very time a student speaks.

She risks causing another student emotional distress...that this heavy weight does substantial damage to free speech on campus.(McCauley v. University of the Virgin Islands, 3rd Cir. 2010)" The court went on to make clear that college and high school students are different and each are inured of different rights. The 3rd Circuit recognized "the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students…the fact that many university students reside on campus and thus are subject to university rules at almost all times…[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools."(McCauley v. University of the Virgin Islands, 3rd Cir. 2010)

As one commentator stated, "With today's decision, the Third Circuit has made clear that the First Amendment rights of college students are distinct from their high school counterparts and require special protection. In light of the university's unique role as a true marketplace of ideas in our nation's liberal democracy, adult college students must be granted the freedom to engage in debate without fear of unconstitutional punishment. The Third Circuit has demonstrated once again that efforts to infantilize college students violate the Constitution and will not stand in court."(Creeley, August 18, 2010)

2.5 Esfeller v. O'Keefe

In Esfeller v. O'Keefe, we see the first of the true social media cases. Esfeller, a Louisiana State University student, was charged with a violation of LSU's Code of Student Conduct for persistently harassing and threatening his ex-girlfriend, also a student, through e-mail and the social networking sites Facebook and MySpace.(Esfeller v. O'Keefe, 2010)An LSU hearing panel found Esfeller responsible for violating its Code of Student Conduct. Esfeller appealed the ruling by claiming a violation of his First Amendment free speech rights. In analyzing the case, the 5th Circuit Court of Appeals stated: "A school need not tolerate student speech that is inconsistent with its `basic educational mission,' even though the government could not censor similar speech outside the school." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)). The highest level of scrutiny — applied to school regulations that are viewpoint-specific — requires the school to show that the expression would "substantially interfere with the work of the school or impinge upon the rights of other students." Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Thus, for Esfeller's facial challenge to succeed, the over breadth must be "substantial in relation to the [provision's] legitimate reach." Hersh, 553 F.3d at 762.(Esfeller v. O'Keefe, 2010)

LSU prohibits speech that creates a hostile, intimidating, or offensive environment. But because theLSU Code requires that the expression be persistent, extreme, or outrageous and "reasonably likely" to cause harassment or intimidation,"(Esfeller v. O'Keefe, 2010) the LSU rule is not overly broad. In previous cases, courts have struck down codes that prohibit speech that merely offends. LSU's code is directed "at speech that "intrudes upon . . . the rights of other students" and is legitimately subject to regulation under Tinker."(Esfeller v. O'Keefe, 2010)The speech impinges upon the rights of another student. The traditionally conservative 5th Circuit said, "A school need not tolerate student speech that is inconsistent with its `basic educational mission,' even though the government could not censor similar speech outside the school."(Esfeller v. O'Keefe, 2010)

2.6 Tatro v. University of Minnesota

Amanda Beth Tatro was a junior in the Mortuary Science Program at the University of Minnesota. As part of her program, she was required to take and pass several laboratory classes in human anatomy. The laboratory course was one of several that used human cadavers from the University's Anatomy Bequest Program. The Program relied on individuals to donate their bodies after death to the University for teaching and research.(Tatro v. University of Minnesota, 2012)

Tatro received training and a syllabus, which she signed, on laboratory policy. One of the lab rules stated that students were to be respectful and discreet regarding cadaver dissection.(Tatro v. University of Minnesota, 2012) Another rule stated that there was to be no blogging, Facebook posting, or tweeting about lab or cadaver dissection.(Tatro v. University of Minnesota, 2012)

Unfortunately, Tatro made several Facebook posts to her hundreds of "friends" and "friends of friends" that were of concern to the University and the Mortuary Science Program.(Tatro v. University of Minnesota, 2012)The posts included the following:

- Amanda Beth Tatro Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve... [November 12, 2009]
- Amanda Beth Tatro Is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar (scaple). [December 6, 2009]
- Amanda Beth Tatro Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm... perhaps I will spend the evening updating my "Death List # 5" and making friends with the crematory guy. I do know the code ... [December 7, 2009]
- Amanda Beth Tatro Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. [Undated.](Tatro v. University of Minnesota, 2012)

The posts caused fear and anger on campus. When the posts got into the news media and on television, they caused extreme concern among the general public and families who donated to the Anatomy Bequest Program. Their comments included expressions of concern about "Tatro's lack of professionalism, poor judgment, and immaturity."(Tatro v. University of Minnesota, 2012)Tatro said the posts were simply, "satirical commentary and violent fantasy about her school experience."(Tatro v. University of Minnesota, 2012)

The University and its Campus Committee on Student Behavior felt the posts violated their Student Conduct Code and Academic Program Rules and imposed a grade of F for the anatomy course among other sanctions. Tatro appealed the decision to the Provost of the University and the Minnesota courts. All entities upheld the disciplinary sanctions. However, the Minnesota Supreme Court took the appeal on Free Speech.

The Minnesota court held that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.(Tatro v. University of Minnesota, 2012) In its analysis the Minnesota Supreme Court rejected the Tinker "substantial disruption' standard because it was designed for Kindergarten through 12th grade students and in-school expression. *Tinker*'s rule did not seem to fit with a professional university program and out of class Facebook postings. Such a standard would have resulted in an overbroad application of a university's restraint on student's speech.

Similarly, the court rejected another rule.

In this case, because the public would not reasonably perceive Tatro's Facebook posts to bear the imprimatur of the University, the Facebook posts cannot be characterized as "school-sponsored speech." Applying the legitimate pedagogical concerns standard to a professional student's Facebook posts would give universities wide-ranging authority to constrain offensive or controversial Internet activity by requiring only that a school's actions be "reasonably related" to "legitimate pedagogical concerns." Hazelwood, 484 U.S. at 272–73. Further, the universe of "legitimate pedagogical concerns" has been broadly construed, at least in the high school setting, to cover values like "discipline, courtesy, and respect for authority." Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (observing that "[t]he universe of legitimate pedagogical concerns is by no means confined to the academic"); see also Brody v. Spang, 957 F.2d 1108, 1122 (3d Cir. 1992) (stating that avoidance of controversy is a valid pedagogical concern in a nonpublic school forum). Accordingly, we decline to extend the legitimate pedagogical concerns standard to a university's imposition of disciplinary sanctions for a student's Facebook posts.(Tatro v. University of Minnesota, 2012)

The standard adopted by the Minnesota court was one that included an idea that both Tatro and the University agreed on. A university may regulated a student's speech on social media if that speech violated established professional conduct standards.(Tatro v. University of Minnesota, 2012) The court furthered refined the standard by stating, "This is the legal standard we adopt here, with the qualification that any restrictions on a student's Facebook posts must be narrowly tailored and directly related to established professional conduct standards."(Tatro v. University of Minnesota, 2012) Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards.(Tatro v. University of Minnesota, 2012) And by requiring that the restrictions be narrowly tailored and directly related to established professional conduct standards, the court limited the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the program.

(Tatro v. University of Minnesota, 2012) Accordingly, the court found that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for social media posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.(Tatro v. University of Minnesota, 2012)

It must be remembered that the *Tatro* case is a Minnesota state case heard by the Minnesota Supreme Court. It is only binding on the state of Minnesota. However, the case is a good example of how other courts could rule on a university student social media case. Tatro seems a long way from the ruling in the 5th Circuit's Esfeller case.

2.7 Murakowski v. University of Delaware

In another social media case, *Murakowski v. University of Delaware*,(Murakowski v. University of Delaware, 2008) a student posted some disturbing material on his website. Maciej Murakowski, a nineteen year-old student at the University of Delaware, created the website on the university's servers. Murakowski's postings included violent and sexually graphic material. One particularly alarming post included the following description:

The Sociopath . . . On a Friday night, leave her a trail of rose petals leading to a hot bath. Wash her gently, using oils and scented soaps where appropriate. Dry her, then take her into the bedroom for a sensual massage (be careful, you are not kneading dough!) Kiss her and tell her she is beautiful. Slowly let your hands explore her body. Kiss her some more. Then make sweet gentle love to her for hours. After you both climax, hold her and let her fall asleep in your arms. Then set her on fire," and "The John F. Kennedy . . . Position your partner halfway on the bed, facing up, so that her legs are hanging off the edge. You stand facing her, lift her legs, put her ankles on your shoulders, and lean forward as far as you can. Then you kill the President." The piece ends with referring to disposing of the dead body of a sex partner.(Murakowski v. University of Delaware, 2008)

The university received several complaints about Murakowski's website. His website included not only the above and other sexual posts but also racist, sexist, anti-Semitic, and homophobic statements. The university charged Murakowski with violating the university's conduct policy and brought him before the conduct board. At a disciplinary hearing, the university suspended Murakowski and prohibited him from attending classes or visiting his dorm room. Following a required psychiatric evaluation, where he was deemed not to be a threat to himself or others, Murakowski was allowed, after [being suspended for a semester], to attend classes, but he remained unable to access his dormitory.(Staff, 2007)

Shortly after, Murakowski filed suit in federal district court alleging that the university violated his First Amendment rights. He also stated that his postings never contained any "true threats." The court found for Murakowski and granted summary judgment. The United States District Court for Delaware stated institutions might restrict speech in some cases in order to protect the educational environment and the wellbeing of its students. However, the court found that the university had not presented evidence sufficient to show that Murakowski's postings caused such a disruption and posed such a threat that the First Amendment would allow restriction. There was no "material disruption" to the campus or to the learning environment. The court further stated that "[a]lthough complete chaos is not required, something more than distraction or discomfiture created by the speech is needed."(Murakowski v. University of Delaware, 2008)

2.8 Yeasin v. University of Kansas

Yeasin v. University of Kansas (Yeasin v. University of Kansas, 2015)is about a romantic relationship gone bad. NavidYeasin and "W" were both University of Kansas students. They had been dating on and off. In June 2013, Yeasin found Facebook messages and texts that W had sent to another man. Reacting inappropriately, Yeasin held W in his car, refused to return her personal property, and treated her miserably. The court called Yeasin's behavior, "reprehensible, demeaning, and criminal."(Yeasin v. University of Kansas, 2015)

Navid Yeasin was charged with multiple criminal violations in the state of Kansas. The Kansas court also issued a protective order prohibiting Yeasin from contacting or going near W for one year. But, that was not the end of the story. W, also, filed a complaint with University of Kansas stating that she was afraid to be on campus because of Yeasin's threatening and abusive behavior. After the university investigated, they also issued a protective order in favor of W.

Because Yeasin could not approach or contact W, he retaliated in another way, on social media. He used Twitter to conduct a campaign of abuse and harassment against W. The tweets included the following:

- "Jesus Navid, how is it that you always end up dating the psychobitches?' # butreallyguys."
- "Oh right, negative boob job. I remember her."
- "If I could say one thing to you it would probably be "Go fuck yourself you piece of shit." # but seriously go fuck yourself # crazyassex."
- "Lol, she goes up to my friends and hugs them and then unfriends them on Facebook. # psycho # lolwhat."
- "Lol you're so obsessed with me you gotta creep on me using your friends accounts # crazybitch."
- "30 Reasons to Love Natural Breasts totalfratmove.com/30–reasons–to . via@totalfratmove # doublenegativeboobjob."(Yeasin v. University of Kansas, 2015)

After warning Yeasin to stop, the University decided that, even though the tweets had occurred off campus, the speech nonetheless violated the school's sexual harassment policy and implicated Title IX(Education Amendment of 1972, 1972) because it affected W's on-campus environment. Consequently, it permanently expelled Yeasin and banned him from campus until W graduated.(Yeasin v. University of Kansas, 2015)

After his expulsion, Yeasin sued the University. The Kansas Court of Appeals quickly addressed the obvious problem. The University's code of conduct did not address off-campus speech. The court stated, "The university may not institute disciplinary proceedings unless the alleged violation(s) giving rise to the disciplinary action occurs on university premises or at university-sponsored or -supervised events, or as otherwise required by federal, state or local law."(Yeasin v. University of Kansas, 2015) The court further expounded, "Faced with a serious complaint of sexual harassment involving two students, the university took prompt action. It investigated the circumstances, separated as best it could the antagonists and removed the cause of the conflict through expulsion. The trouble is the student code did not give the university authority to act when the misconduct occurred somewhere other than its campus or at university-sponsored or -supervised events. There is no proof in the record that Yeasin posted the tweets while he was on campus."(Yeasin v. University of Kansas, 2015)

The Kansas Court of Appeals recognized that the Department of Education requires colleges and universities to consider whether off campus activities and speech may create a hostile environment on campus and, thus, implicate Title IX. If it does, universities might be mandated to stop the harassment and prevent it from occurring in the future. However, in the present case, the University of Kansas expelled Yeasin under a provision of its code of conduct referencing behavior on campus or at school sponsored functions that did not occur. This is not within the purview of the University.

Finally, the court noted, "Other authorities can prosecute violations of those laws that occur elsewhere [off campus activities or speech]. The "other" authority here, of course, was the Johnson County District Attorney filing charges against Yeasin for his deplorable treatment of W."(Yeasin v. University of Kansas, 2015) The court alluded to the fact that the University of Kansas may be able to alter its code of conduct to give the University the right to discipline off campus harassing conduct and speech that affects a student's on campus environment if it is closely connected to a state, federal or local law. The University of Kansas has done so. In light of these changes, a case similar to Yeasin's may have a different outcome in the future.

2.9 Keefe v. Adams

In another Facebook case, the 8th Circuit Court of Appeals addressed posts by a nursing student enrolled in a professional nursing program. In the spring of 2017, the U.S. Supreme Court declined to hear the case.(Keefe v. Adams, (Apr. 3 2017)) As a result, the 8th Circuit's ruling stands.

Craig Keefe was enrolled in the Central Lakes College Associate Degree Nursing Program seeking to become a Registered Nurse.(Keefe v. Adams , 2016) In late 2012, instructors in the program began to receive complaints about Facebook posts Keefe made about the program and about students in the program. Students also reported feeling uncomfortable and scared around Keefe because of the posts. The posts included the following:

- Can someone, anyone tell me wtf I need to continue to do a competency and be evaluated on it. If I do a competency such as write a care plan and get signed off on it that it is thorough and I have a great understanding about them than why must I continue or better yet what is the incentive to get it signed off. Controlling freaks. I cant wait for this shit to be done.
- Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven last night and resubmitting. Not enough whiskey to control that anger.

- Very interesting. Apparently even if a male student has his Dr. Send letters to the instructors and director of the nursing program for test taking considerations they dont get them. But if your a female you can go talk to the instructors and get a special table in the very back of the class with your back facing everyone and get to wear ear plugs. And behind me at bat. And you really shouldn't go around telling everyone that you beat the system and didnt need to follow the school policy and get a medical diagnosis to get special considerations. I think its just one more confirmafion of the prejudice in the program. Im taking notes thou....
- Doesnt anyone know or have heard of mechanical pencils. Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to long. I might need some anger management.
- LMAO, you keep reporting my post and get me banded. I don't really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch.... And quite creeping on my page. Your not a friend of mine for a reason. If you don't like what I have to say than dont come and ask me, thats basically what creeping is isn't it. Stay off my page....
- So ... are you saying that you have never said Laura likes me I will make it, or She will let me do it for the test. Just wondering why and for what reason you were creeping on my page. Its really not your fault that the whole sexism thing happens in the nursing program.

But its really bull shit that you say the door distracts you on your test and there was four other seats in the classroom that was in normal position not to mention that you choose to sit where you sit. I moved, but not that I still sit like the rest of the class, and I followed the guidelines of the college and still wasn't able to do what you did. Which is fine. I am way better than that. I don't need to grasp for straws. Without your faithful sidekick you aint shit. You tried coming up to me when your sidekick wasnt there on your clinical and asking me how to give your solu-medrol WTF read your MAR. How can you give it is the first thing I would have asked myself, but of course you didnt even know the drug existed. Its a very common drug. Im going to tell you one more time. Dont come on my page and try to justify your shit. I was kind enough to not put names in and ID individuals, but you ID yourself. You creeped my page. Spend your spare time studying, you could use it. Don't make me go where I don't need to or want to cuz I will. Leave it alone.(mis-spellings and grammatical errors are Keefe's)(Keefe v. Adams, 2013)

Because of Keefe's posts, his lack of remorse and concern when confronted with the posts, and his unwillingness to change, "he was removed from the Associate Degree Nursing Program for behavior unbecoming of the profession and transgression of professional boundaries. Keefe filed suit against several CLC administrators, alleging violations of his First Amendment and due process rights."(Keefe v. Adams , 2016)

The 8th Circuit Court of Appeals first recognized that "nobody argues that [Keefe's Facebook postings are] a category of unprotected speech. . . . [T]he First Amendment fully applies to [that] speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here."(Keefe v. Adams , 2016) In addition, the court rejected Keefe's argument that a college cannot punish students for off-campus speech unless that speech is speech that is unprotected by the First Amendment, such as child pornography or obscenity. Then, the court brought up the subject of professionalism by stating that students may demonstrate an unacceptable lack of professionalism both on and off campus, in speech as well as conduct. "Therefore, college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, "so long as their actions are reasonably related to legitimate pedagogical concerns.""(Keefe v. Adams , 2016) Therefore, the university may regulate the speech at issue in the present case.

Keefe's Facebook postings were related to course assignments and requirements. They were directed at his classmates, involved his and his classmates' conduct in the nursing program, and included threats directly related to their medical studies.(Keefe v. Adams , 2016) The court recognized that "Keefe's disrespectful and threatening statements toward his colleagues had a direct impact on the students' educational experience."(Keefe v. Adams , 2016)Just as important, Keefe's attitude, practice, and conduct had the potential to impact patient care. Students in the nursing program must be able to communicate and collaborate in order to provide the best care for their patients. As a result, the court affirmed that the college was entitled to discipline Keefe for the Facebook posts both on and off campus because they were enforcing academic standards of professionalism. The court thus upheld the college's position that Keefe's statements were unprofessional, and that Keefe lacked the necessary professionalism to continue in the program.(Levin, 2016)

It is important to note that the 8th Circuit also made a statement about college and university speech in general in the *Keefe* case. "As our sister circuits have recognized, a college or university may have an even stronger interest in the content of its curriculum and imposing academic discipline…When a university lays out a program's curriculum or requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them."(Keefe v. Adams , 2016) One concerned group, The Foundation for Individual Rights in Education (FIRE), stated, "We at FIRE are dismayed and perplexed by the Eighth Circuit's rationales for denying Keefe's claims. As FIRE's Ari Cohn stated to U.S. News, this decision is "an end-run around student rights. … Students in professional programs could find themselves in an increasingly perilous situation where they have to refrain from saying anything that might offend or upset someone else or risk being thrown out of their program. In this case, the standards were so vague that discipline could be meted out for any disfavored speech.""(Greenburg, 2016)FIRE also commented:

Our concerns about elevating broadly worded professionalism codes over the First Amendment were expressed in an amici curiae ("friend of the court") brief we submitted to the Eighth Circuit, joined by Alliance Defending Freedom. In our brief, we highlighted how vague and subjective professionalism codes may be used to unlawfully punish protected student speech. We argued that public colleges "may not require students to conform to professional conduct codes that violate the First Amendment," nor "interpret professional conduct codes to permit punishment of students for speech otherwise protected by the First Amendment." We also discussed how CLC abused its power by unlawfully punishing online speech:

Public colleges cannot justify the suppression of student speech on the Internet unless it has some tangible impact on campus. Even then, colleges may only subject students to discipline for online unprotected speech, such as true threats, harassment, and defamation. The College did not prove that Mr. Keefe's speech fell into any of those unprotected categories. Rather, it simply claimed an unlimited right to regulate student speech online based on whether the speech offended someone else. The First Amendment does not permit such a result.(Greenburg, 2016)

The opinions from the courts are as diverse as the social media platforms that students use. Social media will continue to expand and students will continue to post. Students will continue to test the limits of their universities' tolerance for different types of speech both on and off campus. There are several rules for on campus social media speech and several more for off campus social media speech. As one commentator has noted: Despite the proliferation of student speech on social media and elsewhere online, the federal circuits and state courts remain divided over the level of First Amendment protection that should be accorded to such speech, created by students in their personal time in their homes or elsewhere outside of school. Several courts, including those discussed herein, have given school administrators discretion and authority to punish such speech in the same way that speech on school premises may be punished under Tinker's disruption standard, especially when administrators perceive a real threat by the speech. Other courts, though, have declined to extend the Tinker standard that far away from the school setting. School administrators are faced with great uncertainty in finding the appropriate legal standard to balance student speech rights with their responsibility to maintain order, discipline and most of all safety…Whether tweets, Facebook posts and blogs are fully protected by the First Amendment, or whether schools can punish students for such speech, when done off campus, is a question that the United State Supreme Court will ultimately have to settle.(Levin, 2016)

3 The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was passed by the United States Congress in 1990. The law makes it illegal to discriminate against a qualified person with a disability. It is also illegal to retaliate against a person because that person complained about discrimination, filed a charge of discrimination, or participated in a discrimination investigation or lawsuit.(The Americans with Disabilities Act, 1990) The ADA also requires reasonable accommodation for persons with a physical or mental impairment that substantially limits a major activity of life unless doing so would impose an undue hardship. In addition to Section 504, Title II of the ADA prohibits public entities (e.g., state government, public schools, public colleges) from denying qualified persons with disabilities the right to participate in or benefit from the services, programs, or activities that they provide, and from subjecting such individuals to discrimination if the exclusion or discrimination is due to the person having a disability.(The Americans with Disabilities Act, 1990)

When the ADA went into effect, there were no social media platforms to consider. One of areas of concern is student accessibility to social media platforms used by instructors and their universities. The "Americans with Disabilities Act (ADA) requires educators to offer adjustments for academic learning. Faculty members need to consider a chosen medium's ability to accommodate students' diverse learning needs, which include accessibility as defined by the ADA. Unfortunately, this is not always the common practice, even without the inclusion of social media in the classroom."(Ahlquist, 2013) Making sure that students with disabilities succeed in their education and university program is critical to everyone. The federal government has developed an online toolkit for making social media more accessible. It can be found at https://www.digitalgov.gov/resources/federal-social-media-accessibility-toolkit-hackpad/.

In 2010, Arizona State University (ASU) learned the importance of accessibility in all platforms. ASU made a decision to use Amazon's Kindle DX as a means to distribute electronic textbooks to its students. All students would use the Kindle device as part of pilot program that included five other institutions of higher learning.(Wauters, 2010) The National Federation of the Blind (NFB) and the American Council of the Blind (ACB) sued ASU alleging that the Kindle devices were not blind friendly. The menu system and Kindle store did not have text-to-speech features making it almost impossible for blind students to operate. In fact, blind and seeing impaired students could not turn on the text-to-speech feature without help. NFB and ACB alleged that this violated the ADA.

Although Arizona State University denied the allegations, they eventually settled the case, which did not include the payment of damages. The press release issued at the time of the settlement stated:

The settlement agreement among the parties was reached in light of several factors, including: (1) ASU's commitment to providing access to all programs and facilities for students with disabilities, including students who are blind or have low vision; (2) the fact that the pilot program will end in the Spring of 2010; (3) Amazon and others are making improvements to and progress in the accessibility of e-book readers; and (4) the university's agreement that should ASU deploy e-book readers in future classes over the next two years, it will strive to use devices that are accessible to the blind.The United States Department of Justice is also a party to the agreement, which does not involve the payment of any damages or attorney's fees or costs. Marc Maurer, President of the National Federation of the Blind, said: "The National Federation of the Blind is pleased with this settlement, which we believe will help to ensure that new technologies create new opportunities for blind students rather than new barriers."(Blind, 2012)

Even though this case does not deal directly with traditional social media, it does show that every format used by a university system or individual professor must comply with the Americans with Disabilities Act. Employees and instructors must remember accessibility is the key to compliance.

4 Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act (FERPA) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the United States Department of Education(FERPA, 1974).FERPA requires that institutions and their employees maintain control over educational records,[1] student's grades, social security or identifying numbers, medical records or information.

[1]FERPA precludes the disclosure of educational information without the prior approval of the student or parent. The issue of what constitutes "educational information" has been hotly contested and subject to much litigation since the inception of FERPA. FERPA defines "education records" as "records, files, documents, and other materials" that are "maintained by an educational agency or institution, or by a person acting for such agency or institution." While it is clear that educational information includes a student's transcripts, GPA, grades, social security number, and academic evaluations, courts have also included in this category certain psychological evaluations. "Education records" also include any record that pertains to an individual's previous attendance as a student of an institution. In this regard, information pertaining to lawsuits or other claims that are related to a former student are covered under the definition of "education record" under FERPA and are precluded from disclosure absent prior approval. FERPA has, however, excluded from the definition of "education record" the use of "peer grading." In this regard, the 2008 revisions to FERPA implemented the U.S. Supreme Court decision in Owasso Independent School District v. KristjaFalvo, which held that peer grading was not educational information for purposes of FERPA. According to the court, "peer grading," a practice whereby one student scores/grades the work of another student, is generally not encompassed by FERPA because the information is not created or "maintained" by the educational institution or an agent of the institution. Rather, the information is created and maintained by another student.

FERPA requires only that an institution to maintain control over information in its possession. As a result, instructors can require a student to comment in student forums on social media, post to blogs, create social networking groups, and answer questions online. All these instances may be outside the purview of FERPA because they are not in the possession of the university.(McGuire, 2017)

One commentator has made the following suggestions about social media in the university community and FERPA:

While it's important to check with your own institution regarding FERPA policy guidelines, here are some policy suggestions culled from a variety of university sites for instructors who want to incorporate social media into their classrooms:

- When students are assigned to post information to public social media platforms outside of the university LMS, they should be informed that their material may be viewed by others.
- Students should not be required to release personal information on a public site.
- Instructor comments or grades on student material should not be made public. (Interestingly, grades given by other students on "peer-graded" work can be made public under FERPA). (ACE, 2008)
- While not clearly required by law, students under the age of 18 should get their parent's consent to post public work.

FERPA does not forbid instructors from using social media in the classroom, but common sense guidelines should be used to ensure the protection of students.(Orlando, 2011)

5 Conclusions

In addition to the above suggestions, instructors and institutions should always:

- Use common sense when using social media in the classroom.
- Create rules for the use of social media in the classroom.
- Require professionalism and ethics both on and off campus if students are enrolled in a professional program.

In light of the widespread use of social media and the rapid development of new social media platforms, institution of higher learning must be aware of the changing and diverse law affecting free speech and social media. And, as social media introduces new issues of accessibility and privacy to the traditional learning environment, colleges and universities must be ready to address those issues so that education is available and protected.

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This exception, however, stops at the time the test or assignment is collected and recorded by the teacher. Courts have adopted similar reasoning with respect to teacher evaluations and negative letters of recommendation written by the teacher but not "maintained" by the educational institution in its files. Courts have been reluctant to find that these records are subject to FERPA because they do not meet the strict definition of an "educational record" according to FERPA. Regarding reference letters and resumes, the key is whether these records include or incorporate the student's "educational information" (i.e., GPA, grades, social security numbers, and so forth). If these documents contain "protected" educational information, they cannot be disclosed without satisfying FERPA's predisclosure requirements. An educational institution may not provide an employer, headhunter, or other employment agency with a student's resume or confidential letter of reference that contains protected educational information unless it first obtains approval from the student or the student's parent. http://study.com/academy/lesson/using-social-media-under-ferpa.html

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