



# LAW UPDATE

## LABOR AND EMPLOYMENT

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### FACEBOOK FIRED<sup>1</sup>

Schools Legal Service has often advised of the reach that districts and the courts have on public employees when it comes to social media and the potential for disciplinary action. National Public Radio warned us back in 2011 referring to social media as “new and ever-changing,” by stating, “Friendly Advice for Teachers: Beware of Facebook.” District employees should be well aware that haphazardly blasting away on any social media account in today’s volatile social climate could be a risky proposition.

The California Education Code states, “A permanent employee shall not be dismissed except for one or more of the following causes....” and lists eleven specific causes of action that can affect a permanent employee’s release from service.<sup>2</sup> Two such causes of action are immoral conduct<sup>3</sup> and evident unfitness for service.<sup>4</sup> Although “immoral” may have many definitions depending on what source you use, teacher immorality has been defined as “when educators fail to uphold their role as a model individual and citizen to students and violate the morals of the community.”<sup>5</sup>

Patricia Crawford was a guidance counselor (disciplinary standards similar to that of teachers due to certification requirements) with the Jurupa Unified School District in San Diego. Following a series of student protests and walkouts in support of the nationwide “Day Without Immigrants Campaign,” Crawford sent an email to several colleagues expressing her disappointment with the protesting students. Several other employees took to Facebook and posted similar sentiments. In a continuing Facebook thread by Crawford and other teachers in the district, Crawford posted, “Cafeteria was much cleaner after lunch, lunch itself went quicker, less traffic on the roads, and no discipline issues today. More, please.” Another teacher posted information that described students absent from school on the day of the boycott as “lazy,” “drunk,” “failing,” and “troublemakers.” Several students responded to the posts, and at one point, Crawford replied to the students that they should, “Get over yourselves.” The posts immediately went viral and the community responded with notable outrage.

<sup>1</sup> Hidy, K. M., McDonald, M. S. E. (2013). Risky business: The legal implications of social media’s increasing role in employment decisions. *Journal of Legal Studies in Business*.

<sup>2</sup> Education Code § 44932

<sup>3</sup> Education Code § 44932(a)(1)

<sup>4</sup> Education Code § 44932(a)(6)

<sup>5</sup> Alexander, K., & Alexander, M. D. (2012). *American Public School Law* (Eighth ed.). Wadsworth Publishing

In responding to the numerous inquiries by local and national media outlets, as well as public comment and subsequent vandalism of the school, the district's board informed Crawford it intended to dismiss her for "immoral conduct" and "evident unfitness for service" under California Education Code section 44932. Crawford appealed the board's decision to the Commission on Professional Competence (Commission). The Commission found Crawford's comments negatively impacted students, the school, the district, and the community, and indicated that Crawford's conduct was "immoral" and, therefore, she was "unfit" to serve.

At the Trial Court level, Crawford argued that there were fixed categories of conduct that constituted "immoral conduct" such as sexual contact with a student and controlled substance offenses, none of which were applicable to her conduct.<sup>6</sup> The Trial Court disagreed and upheld the Commission's decision ruling that, "A teacher's conduct is 'immoral' under [Education Code] section 44932 (a)(1) when it negatively affects the school community in a way that demonstrates the teacher is 'unfit to teach.'"

The Appeals Court, finding that "immoral" was overbroad and by itself not enough to render Crawford unfit to teach, further applied what are known as the "Morrison Factors" in analyzing Crawford's fitness.<sup>7</sup> Those factors are:

- (1) the likelihood that the conduct may have adversely affected students or fellow teachers and the degree of such adversity anticipated, (2) the proximity or remoteness in time of the conduct, (3) the type of teaching certificate held by the party involved, (4) the extenuating or aggravating circumstances, if any, surrounding the conduct, (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct, (6) the likelihood of the recurrence of the questioned conduct, and (7) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

Along with applying several of the above criteria to Crawford, the Court again quoted *Morrison* in that "immoral conduct" in section 44932(a)(1) "stretch[es] over so wide a range" that it "embrace[s] an unlimited area of conduct." Crawford argued against this analysis because it would essentially allow schools to dismiss employees for any speech simply based on the public's response. The Court reasoned that public opinion and response to an employee's conduct or speech is appropriate when determining whether the employee is unfit to teach.<sup>8</sup> Further, a teacher may be discharged when her "conduct has gained sufficient notoriety so as to impair her on-campus relationships." After all, "the impact of publicity caused by the employee's conduct is an appropriate consideration under *Morrison* because the public's response may affect a permanent employee's ability to perform his or her job."<sup>9</sup>

Crawford (and *Morrison*) suggests that inclusive of the enumerated and measurable grounds for permanent employee dismissal under section 44932 are dismissal grounds based on public opinion. The ruling in Crawford makes clear that Crawford was terminated not for the content of her speech (all First Amendment arguments aside), but the reaction it garnered from the local

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<sup>6</sup> Educ. Code §§ 44010 and 44011

<sup>7</sup> *Morrison v. State Board of Educ.* (1969) 1 Cal.3d 214, 224-5.

<sup>8</sup> *Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 561, 560

<sup>9</sup> *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 220

public. The students were offended that Crawford did not agree with (or openly support) their cause. Her contrary reaction and comments on the walkouts created a situation where a majority of the students (91% Hispanic) and administration no longer trusted Crawford to effectively and objectively act as guidance counselor at the school, thereby rendering her unfit to serve.

Conduct on social media adds a new dimension to employee discipline issues. Today we are able to, with just a keystroke, provoke strong community sentiments that can have an impact on relationships in the school setting. Just this year, social media postings have reportedly resulted in the dismissal of teachers who have posted comments on controversial topics, such as posting a selfie flipping off a Trump-Pence bumper sticker<sup>10</sup>, supporting author J.K. Rowling<sup>11</sup>, questioning COVID statistics and school-reopening safety measures<sup>12</sup>, referring to students as “germ bags”<sup>13</sup>, refusing to use a trans student’s chosen gender pronoun for religious reasons<sup>14</sup>, and voicing political affiliation<sup>15</sup>, just to name a few.

With that said, districts do have the power to discipline employees for posting content on social media where a connection to the workplace or workplace relationships can be demonstrated. The content of the speech and its negative impact must, of course, be analyzed on a case-by-case basis. Nevertheless, remember, LEA’s are free to examine speech that “stretches over so wide a range that it embraces an unlimited area of conduct.” (*Morrison, supra.*)

Should you need to work through a situation involving employee use of social media or have any questions regarding this update, please contact Schools Legal Service.

– ERIC K. ALFORD

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*Education Law Updates are intended to alert clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Please consult legal counsel as to how the issue presented may affect your particular circumstances.*

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<sup>10</sup> Patch.com: A teacher who flicked off a Trump-Pence bumper sticker and posted the picture on Facebook was reportedly fired from the John Carroll School. (September 19, 2020)

<sup>11</sup> Reclaimthenet.org: “High school counselor who was fired for criticizing students that skipped class to protest loses appeal.” (August 14, 2020) Rowling has been accused of being transphobic and pro-biological woman.

<sup>12</sup> New Orleans Public Radio: “New Orleans Teacher Fired For Criticizing Her School’s Reopening Plan” (July 24, 2020)

<sup>13</sup> abcnews.go.com: Teacher joked to her friends that students were “germ bags” because she was tired of catching illnesses from school kids. Stated she had been sick for six months, and every time she started to recover she would get another bug from a student.

<sup>14</sup> The Washington Post: “Virginia teacher fired for refusing to use trans students pronoun” (October 1, 2019). The WestPoint Virginia high school teacher refused to use the pronoun “he” for a student who claimed that they had transitioned earlier in the year. Teacher indicated that his religious beliefs prevented him from “lying” about the student’s gender.

<sup>15</sup> The Detroit News: “Walled Lake teacher says Trump tweets led to firing; school district denies it” (July 21, 2020)