LAW UPDATE
EDUCATION

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A CAUTIONARY TALE FOR BOARD MEMBERS ON SOCIAL MEDIA

Federal Court Lays Out Factors That Can Lead To Individual Liability

The United States District Court for the Southern District of California recently issued an opinion that addresses blocking members of the public from social media sites maintained by school board members.

In *Garnier v. Poway Unified School District*[1] two candidates for board seats set up Facebook pages while campaigning. After both were elected, they maintained the pages and configured them to reflect their board positions, with a "political info" section, listing their district email addresses. Plaintiffs, a husband and wife who frequently attended and commented at board meetings, began posting on the board members' sites. The board members blocked them from their Facebook pages, contending that their posts were "repetitive and unrelated comments" that caused the original posts to be buried.[2] The posts were not profane or threatening and almost all related to the school district. Plaintiffs filed suit against the board members in their individual capacities claiming they were blocked in retaliation for criticizing them.

The court held that plaintiffs had standing to bring a First Amendment Claim even though they could communicate through other means. However, the court held that the board members had "qualified immunity" from money damages because at the time they blocked the plaintiffs, the law did not clearly establish that this conduct violated a constitutional right.[3] The following are some of the issues the court looked at in terms of liability for individual board members:

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[1] *Garnier v. Poway Unified School District* (S.D. Cal. 2019) 2019 U.S. Dist. LEXIS 167247 and *Garnier v. O'Connor Ratcliff* (S.D. Cal. 2021) 2021 U.S. Dist. LEXIS 7613.

[2] For example, one of the plaintiffs posted the same comment on 42 posts made by the board member. However, in the later phase of the case the court found that scrolling past even numerous, repeated comments would take minimal time due to Facebook's truncation of comments.

[3] The outcome would likely have been different if the case were brought now due to subsequent court precedent such as the ruling in *Knight First Amendment Institute of Columbia University v. Trump* (S.D.N.Y. 2018) 302 F.Supp.3d 541). In *Garnier*, the court noted that the case involved legislative branch officials (which meant that plaintiffs could attend a board meeting to express the same views) rather than executive branch officials as in the *Trump* case, but still found that the board members acted under color of state law in blocking the plaintiffs.

- Did the official use the social media platform as a "tool of governance" to inform the public about official activities?
- Did the official "swath the [social media page] in the trappings of . . . office"?
    - Use of official title;
    - Listing government phone number, email address;
    - Listing government website URL;
    - Posting content with a strong tendency toward matters related to the office.
- Are the page's interactive features available to the public without limitation?
- Are restrictions on use of the forum consistently enforced?

The court held that the close connection between the board members' posting and their official status meant they were "acting under color of state law," which in turn meant they could be sued under "a federal statute known as section 1983" triggering liability for attorney fees.

The court further held the board members' pages became public fora when they placed no restrictions on the public's access to the pages or use of the interactive component. Because there were no consistently enforced restrictions on topics that could be discussed on the site, the court held that they did not qualify for "limited public forum" status, but rather would be considered a "designated forum" to which stricter constitutional standards apply when reviewing restrictions on public access.

Ultimately, the court partially denied plaintiffs' motion to enter judgment on the case before trial, citing a need for more evidence on whether the board members could have been justified in blocking the posts based on the allegation that the posts were disruptive. In the later phase, the court found that even if blocking comments was not based on their content, it was not narrowly tailored to a "reasonable restriction on time, place or manner" of the protected speech. Likening the situation to cases involving removal of disruptive persons from board meetings, the court noted that case law reflects the need to show actual disruption and even then, the disruption would not likely support an indefinite ban on participating in the meetings. Here, the plaintiffs were blocked from the board members' social media pages for a period of three years. The court suggested that blocking for a month may pass muster based on disruption, "given the ease at which a page administrator can block and unblock a user," but three years would not.

The law is definitely still evolving in this area. However, the case provides a good overview of the standards that may be applied with respect to social media and websites maintained by

individual board members for use in connection with their official roles where there is an interactive component.[4]

Please contact our office if you have questions or need further information on this topic.

- Grant Herndon

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[4] For K-12 districts, CSBA's Board Bylaw 9012 (Board Member Electronic Communications) now contains the following reference based on this case, "Whenever a Board member uses a social media platform to communicate with the public about district business or Board activities, the Board member shall not block access to a member of the public based on the viewpoint expressed by that individual."