III. Constitutional Implications of Disciplining Public Employee Off-Duty Conduct and the Role of the Internet

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Introduction: How Technology and the Web Changed the Workplace

First year middle school teacher Betsy Ramsdale is married to a professional photographer. Her husband took a picture of her pointing a rifle directly at his camera. She posted the image as her Facebook profile where it was accessible to Facebook's 150 million users.[1] A co-worker alerted Beaver Dam, Wisconsin, Middle School administrators to the picture. Superintendent Childs said Ramsdale exercised "poor judgment" and placed her on paid administrative leave while he investigated the matter. Ramsdale replaced the picture with a cartoon of a teacher at a chalkboard.

The story was covered in the local news. Madison, Wisconsin, television reported:

> Middle School parent Jennifer Buzzell said the teacher's decision to post the photograph was concerning. "I don't think it's appropriate." Buzzell told 27 News, "I'm not sure why this would be on the computer at all." "I don't see anything wrong with it," school parent Mark Hagstrom said, "she's on her time to do what she wants." School parent Chad Van Loo said "the photograph sends the wrong message."[2]

After more than a week on paid leave, Ramsdale was returned to the classroom.

Only a few years ago, off-duty behavior may have had only a remote possibility of being censured by a government employer. Today such off-duty behavior poses greater risk of discipline by employers. For example, in the previous decade, a high school art teacher's nude self-portraits displayed at a summer art community likely would not have been seen by her school community unless someone purchased one of her images and then displayed it in the area. Today, that teacher may display the images on her Web

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[1]Facebook is a social networking Web site that allows users to join networks organized by city, workplace, school, and region to connect and interact with other people. Users of Facebook can add friends and send them messages and update their personal profile to notify friends about themselves. Wikipedia, http://www. wikipedia.org/wiki/Facebook.

[2]WKOW 27 News, Madison Wisconsin. http://www.wkowtv.com/Global/story.asp?S=9781795&nav=menul362_2.

site. Consequently, students, 96 percent of whom are reported to spend nine hours a week on social network sites, could find that teacher's photos on the Internet and circulate copies in the classroom.[3] As a result, the employer must decide whether the teacher's legal, artful, off-duty expression so disrupts the workplace that the employer must intervene.

The infiltration of the World Wide Web into nearly all aspects of private and work life creates confusion as to what private, off-duty conduct may have a nexus to the workplace. Moreover, it has become increasingly difficult to define work time and work site. The proliferation of Blackberries,[4] smartphones,[5] and similar devices, has resulted in employees responding to e-mails, submitting work, and updating electronic work information at all hours of the day and night and frequently at locations far distant from the usual workplace. Further, these devices allow employees to engage in personal tasks at the workplace, during work or break time, with no significant disruption of work.[6]

Moreover, not only does life on the Web blur boundaries of time, it also creates additional "space" in which people act and communicate. Our community has greatly expanded beyond the physical environment in which we work and live to include virtual space in which people communicate. For example, by actively participating in online forums, people create close personal or professional relationships with other individuals throughout the world who share similar interests and/or occupations. Participants may share private information with virtual friends who they may have never met face-to-face.

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[3]National School Boards Association, *Creating & Connecting/Research and Guidelines on Online Social and Educational Networking* (2007), http://www.nsba.org/SecondaryMenu/TLN/CreatingandConnecting.aspx.

[4]Blackberry is a wireless handheld device that allows users e-mail, text message, Internet, FAX, Web browser, and mobile telephoning capabilities. Wikipedia, http://en.wikipedia.org/wiki/Blackberry (last updated Nov. 8, 2008).

[5]"Smartphones" is the term used to describe mobile phones that offer advance capabilities beyond a typical mobile phone, such as e-mail, Internet capabilities, and/or a full keyboard. Wikipedia, http://en.wikipedia.org/wiki/Smartphone (last updated Nov. 6, 2008).

[6]*See* Black Book PR & Communications, *Residential Internet Services: At Home with Generation Y* (Aug. 19, 2008), http://www.itweb.co.za/office/ysl/080819093 8.htm (Generation Y employees demand faster Internet connections at home to do more work at home); Emily Jesper, *Bright Side of Life* (Oct. 14, 2008), http:/ /www.fastcompany.com/blog/emilyjesper/gen-y-perspective/bright-side-life (lines blurred between work and play for Generation Y). *See also Gen Y and Boundaries (or Lack Thereof)-Part 1* (Aug. 24, 2008), http://onboardinggeny. com/gen-y-and-boundaries-or-lackthereof-part-1/ (career counselor advises employers that Generation Y employees blur time and space between work and private life).

Social networking sites are becoming increasingly common. Online social and professional networks such as LinkedIn,[7] Twitter,[8] Facebook, or MySpace[9] assist people in maintaining and establishing connections with individuals in distant locations as easily as with the person next door. These connections are often useful resources for employees of a specified occupation to discuss work-related issues and experiences with others in the field and to offer advice. For example, U.S. News & World Report recently told of thousands of teachers giving their insight into education and school experiences through blogging.[10] Educators are participating in groups such as "K-3 Teachers Talk" on Facebook where teachers around the world share resources and successful experiences in their classrooms.[11] Further collaboration and networking among educators takes place in the International Society of Technology in Education's (ISTE) virtual world where teachers create an avatar in Second Life[12] and attend educator conferences.[13] Although teachers recognize the risks of making their views more public through increased use of the Internet, they see enhanced benefits of sharing their view with others and learning colleagues' best practices.

The expansion of social media on the Web vastly expands the ease of obtaining information about others and allows individuals to distribute information to a huge audience at virtually no cost. As a result of this ease of obtaining information, the National Association of Colleges and Employers reported in 2006 that more than 20 percent of employers have expanded their background check

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[7]LinkedIn is a business-oriented social networking site mainly used for professional networking. Wikipedia, http://en.wikipedia.org.wiki/LinkedIn (last updated Nov. 8, 2008).

[8]Twitter is a free social networking and micro-blogging site that enables its users to send and read messages known as *tweets*. Tweets are text-based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers who are known as "followers." Wikipedia, http://en.wikipedia.org/wiki/Twitter.

[9]MySpace is a social networking Web site offering interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music, and videos for teenagers and adults. Wikipedia, http://en. wikipedia.org.wiki/MySpace (last update Nov. 8, 2008).

[10]Eddy Ramirez, *Blogging from the Classroom, Teachers Seek Influence, Risk Trouble*, U.S. News & World Report (Sept. 19, 2008), http://www.usnews.com/articles/education/k-12/2008/09/19/in-search-of-support-teachers-turn-to-blogging.

[11]K-3 Teacher Resources, http://www.k3teacherresources.com (last visited Nov. 11, 2008).

[12]Second Life is an online, 3-D virtual world created by its residents. *What is Second Life*, http://secondlife.com/whatis/ (last visited Nov. 9, 2008).

[13]International Society of Technology in Education (2008), http://www.iste.org/Content/NavigationMenu/Membership/Member_Networking/ISTE_Second_Life.htm.

of prospective employees to include Web-based searches as easy as "Googling" the applicant or reviewing social networking sites.[14]

In this new technological world where people openly communicate and interact on the Internet, the employer, the citizen, the student, and the student's parents have many opportunities to gather information about the public employee. Although sitting at home engaging in private activities with people all over the world, the employee is leaving a computer record of that activity. Further, the employee may be at home or in the workplace and engaging in work activity one minute and personal matters the next. Both the overlapping of personal and work matters, as well as the ease with which information regarding an employee can be discovered, raise confusion for employers and employees with respect to the following issues: (1) whether a particular activity is solely private, (2) whether the employer can restrict the employee's computer activity, and (3) whether the employer can gather information about employees.

How May the Constitution Restrict a Public Employer's Ability to Monitor or Search an Employee's Electronic Records?

Public employees have a constitutional right to be free from unreasonable searches. In *Maes v. Folberg*,[15] the University of Illinois seized a laptop computer purchased by the University but frequently kept at home by Professor Maes. Because the University had no policy regarding use of the school's equipment, the court held that Maes had a reasonable expectation of privacy regarding those computer records. Maes survived the defendant's motion to dismiss because she adequately pled that there was no legitimate basis to search her computer. However, an employer's announcement that it will inspect work computers may defeat its employees' claims of a reasonable expectation of privacy.

Merely obtaining records of an employee's electronic activity may expose the employer to liability. In *Quon v. Arch Wireless Operating Co.*,[16] the Ontario, California, Police Department issued pagers to its police officers. The employer's computer usage policy did not address pagers or text messaging, but an informal pol-

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[14]Marketing Hire, *Organizations "Google"/Review Job Candidate Profiles on Social Networking Sites* (2008), http:// www.marketinghire.com/careers/surveys/0806/employers-google-for-candidates.htm.

[15]504 F. Supp. 2d 339 (N.D. Ill. 2007).

[16]529 F.3d 892 (9th Cir. 2008).

icy provided that employees would pay for any text usage above 25,000 characters. In 2002, the city ordered a transcript of all pagers where employees exceeded the limit. Officer Quon exceeded the monthly limit by more than 15,000 characters by sending personal messages, often of a sexual nature. He sued the city and the wireless carrier who provided the transcripts to the city, alleging violations of the Stored Communications Act[17] and the Fourth Amendment. The court found that Quon indeed had an expectation of privacy in the content of his text messages based on the city's informal policy and that the wireless provider violated the Stored Communications Act by releasing the transcripts to the employer. Moreover, the court said that because the city's informal policy allowed personal use of the pagers, Quon could not have committed misconduct, and thus a formal proceeding could not be instituted against him. The employer's failure to align its computer policy with the actual technology used left it open to liability.

Off-Duty Conduct in the Internet Age

Greater Exposure of Private Behavior Makes Employers Nervous

As illustrated in several cases discussed below, with the advent of the Web, private acts now can be more easily exposed either by intentional self-disclosure or by the nefarious acts of others. A spurned spouse may intentionally publish private photos. What once may have been surreptitiously circulated now can be widely distributed throughout a community in minutes. A teacher may not know that she was photographed engaging in embarrassing activity and then years later learn that parents have stumbled upon the photos on the Web. Once these photos become public, the employer wonders how it should respond when its employees are expected to be role models. All involved parties are confused as to where to properly draw the line between private conduct beyond the employer's reach and conduct so affecting employment as to justify discipline. Arbitrators and courts often apply constitutional analysis to resolving these disputes.

[17] 18 U.S.C. §§2701-11.

What are the Standards for Disciplining Employees for Off-Duty Conduct?

Legislating Morality

The Illinois School Code has long explicitly provided that school boards can "dismiss a teacher for . . . immorality."[18] Many states have similar "morality" statutes for teachers.[19] The idea of what private behavior is immoral changes over time. In 1972, Elizabeth Reinhardt was fired as a teacher because she became pregnant while not married.[20] Fortunately for Ms. Reinhardt, the Appellate Court reversed the dismissal. It is highly unlikely any school board in Illinois today would even consider a termination on similar grounds. Applicants for municipal police and fire fighter positions in Illinois can be subject to "reasonable limitations as to . . . moral character."[21] Connecticut state law specifically prohibits a teacher from engaging in sexual intercourse with a student even if the student is of legal age and gives consent.[22]

The Pennsylvania Supreme Court upheld an arbitration award reinstating a classroom aide who had an adverse reaction when illegally wearing a friend's patch that dispensed a controlled substance. Arbitrator Elliott Newman concluded that the employer lacked just cause for termination and that the illegal activity was a foolish mistake and did not so grossly offend community standards to rise to the level of immorality.[23]

The Constitutional Basis for Requiring a Connection Between the Off-Duty Conduct and the Employee's Work and Ability to Perform Official Duties

Decision makers tread on thin ice when attempting to define and then enforce morality. Consequently, courts and arbitrators require employers to prove a nexus between the off-duty conduct and the job. In a subsequently oft-cited case, the California

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[18]105 ILCS 5/10-22.4 (2008).
[19]See ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6th ed. (2003), at 1312, n.33.
[20]Reinhardt v. Board of Educ. of Alton Cmty. Unit Sch. Dist. No. 11, 19 Ill. App. 3d 481, 311 N.E.2d 710 (Ill. App. 1974).
[21]65 ILCS 5/10-2.1-6.
[22]State v. McKenzie-Adams, 915 A.2d 822 (2007).
[23]Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Ass'n, PSEA-NEA, 939 A.2d 855 (Pa. 2007).

Supreme Court in *Morrison v. State Board of Education*[24] recognized that terms such as "immorality" are highly subjective, so it established unfitness-for-duty standards now used by many other courts and arbitrators. To determine whether conduct indicates a teacher's unfitness for duty, the court said it would examine:

1. the likelihood that the conduct may have adversely affected students or fellow teachers;
2. the degree of such adversity;
3. the proximity or remoteness in time of the conduct;
4. the type of teaching certificate held by the party (or the ages and maturity of the students);
5. the extenuating or aggravating circumstances, if any;
6. the praiseworthiness or blameworthiness of the motives resulting in the conduct;
7. the likelihood that the conduct would recur; and
8. the extent to which punishment would affect the constitutional rights of the teacher or other teachers.[25]

In Elkouri,[26] these standards are set forth as the touchstone in determining nexus in public employment off-duty conduct.

In *Morrison*, the court was called upon to decide whether a male teacher with a clean criminal record and an impeccable teaching record should lose his teaching credentials due to homosexual conduct outside of the workplace. The petitioner had, in the course of providing informal marital counseling to a male friend and colleague, engaged in sexual contact with this colleague. This colleague ultimately reported it to the school, prompting the petitioner to resign. More than a year later, the State Board of Education revoked the petitioner's teaching credentials. In reversing the revocation decision, the court held that the board had not come forward with sufficient evidence to demonstrate the petitioner's unfitness to teach. Relying on the unfitness factors, the court reasoned that the sexual conduct was a six-year-old isolated incident that was already three years old when the credentials were revoked. Moreover, the petitioner's motives "involved neither dishonesty nor viciousness, and the emotional pressures on both petitioner and [his colleague] suggest[ed] the presence

[24]461 P.2d 375 (Cal. 1969).
[25]*Id.* at 386.
[26]How Arbitration Works, 6th ed. (2003), at 1312.

of extenuating circumstances."[27] Finally, the court found no evidence that the petitioner's "ability to command the respect and confidence of students" would be impaired.[28]

The court warned that when government employers attempt to enforce "morality," they are obligated to link the conduct to the employee's fitness to perform the job:

> By interpreting these broad terms to apply to the employee's performance on the job, the decisions in *Hallinan*, *Yakov*, *Swan*, *Owens*, *Orloff* and *Jarvella* give content to language which otherwise would be too sweeping to be meaningful. Terms such as "immoral or unprofessional conduct" or "moral turpitude" stretch over so wide a range that they embrace an unlimited area of conduct. In using them the Legislature surely did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval. Hence the courts have consistently related the terms to the issue of whether, when applied to the performance of the employee on the job, the employee has disqualified himself.
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> In the instant case the terms denote immoral or unprofessional conduct or moral turpitude of the teacher which indicates unfitness to teach. Without such a reasonable interpretation the terms would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the state. In the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice constitute immoral conduct. (See Note (1967) 14 U.C.L.A.L.Rev. 581, 582.)[29]

The court held that a statutory requirement that employees act in a moral manner is not necessarily unconstitutionally vague. However, the court warned and ultimately held that the statute can be applied in an unconstitutional manner:

> Petitioner urges three substantive reasons to support his contention that section 13202 upon its face or as construed by the board deprived him of his constitutional rights. As we shall show, however, that section, as we have interpreted it, could constitutionally apply to petitioner.
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> Petitioner first suggests that the terms "unprofessional," "moral turpitude," and particularly "immoral" are so vague as to constitute a denial of due process. Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies.[30]

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[27] *Id.* at 387.
[28] *Id* at 389, n.35.
[29] *Morrison*, 461 P.2d at 382–83.
[30] *Id.* at 387.

> The words must have been used in the light of the fundamental purpose of the statutes to regulate the profession in the public interest and they can only be construed as intending to include conduct within their fair purport which either shows that the person guilty of it is intellectually or morally incompetent to practice the profession or has committed an act or acts of a nature likely to jeopardize the interest of the public. So construed, they vest in the board a power it may properly exercise. (See also *Arizona State Board of Medical Examiners v. Clark* (1965) 97 Ariz. 205, 398 P.2d 908, 915; *State v. Truby, supra,* 211 La. 178, 29 So.2d 758, 760-762; *Richardson v. Simpson* (1913) 88 Kan. 684, 129 P. 1128, 1130, 43 L.R.A., N.S., 911; *Aiton v. Board of Medical Examiners* (1911) 13 Ariz. 354, 114 P. 962, L.R.A. 1915A 691).[31]
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> As thus construed the statute is not unconstitutional on its face. This construction does not mean that the statute will always be constitutional as applied. There may be borderline conduct which would justify a finding of unfitness to teach but about which a teacher would not have a sufficiently definite warning as to the possibility of suspension or revocation. (See *Jordan v. De George, supra*, 341 U.S. 223, 231-232, 71 S.Ct. 703, 95 L.Ed. 886.)[32]

The court cautioned that an employer's challenges to an employee's morality is treading on constitutionally protected privacy rights and that the employer must establish a connection between the behavior and the work that the employee performs:

> Petitioner secondly contends that the ban on immoral conduct in section 13202 violates his constitutionally protected right to privacy. It is true that an unqualified proscription against immoral conduct would raise serious constitutional problems. Conscientious school officials concerned with enforcing such a broad provision might be inclined to probe into the private life of each and every teacher, no matter how exemplary his classroom conduct. Such prying might all too readily lead school officials to search for "telltale signs" of immorality in violation of the teacher's constitutional rights. (*Griswold v. Connecticut* (1965) 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510.) The proper construction of section 13202, however, minimizes the danger of such sweeping inquiries. By limiting the application of that section to conduct shown to indicate unfitness to teach, we substantially reduce the incentive to inquire into the private lives of otherwise sound and competent teachers.[33]

The court concluded that to be constitutionally sound, the employer must prove a rational connection between the immoral conduct and the work performed. The employer cannot rely on conjecture but must present evidence to establish that connection:

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[31] *Id.* at 389, n.35.
[32] *Id.* at 389, n.36.
[33] *Id.* at 390–91.

> Finally, petitioner urges that the board cannot revoke his life diplomas because his questioned conduct does not rationally relate to his duties as a teacher. No person can be denied government employment because of factors unconnected with the responsibilities of that employment. (*Pickering v. Board of Education* (1968) 391 U.S. 563, 572, 88 S.Ct. 1731, 20 L.Ed.2d 811, [other citations omitted]).[34]
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> This lack of evidence is particularly significant because the board failed to show that petitioner's conduct in any manner affected his performance as a teacher. There was not the slightest suggestion that petitioner had ever attempted, sought, or even considered any form of physical or otherwise improper relationship with any student. There was no evidence that petitioner had failed to impress upon the minds of his pupils the principles of morality as required by section 13556.5 of the Education Code. There is no reason to believe that the Schneringer incident affected petitioner's apparently satisfactory relationship with his co-workers.[35]
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> Before the board can conclude that a teacher's continued retention in the profession presents a significant danger of harm to students or fellow teachers, essential factual premises in its reasoning should be supported by evidence or official notice. In this case, despite the quantity and quality of information available about human sexual behavior, the record contains no such evidence as to the significance and implications of the Schneringer incident. Neither this court nor the superior court is authorized to rectify this failure by uninformed speculation or conjecture as to petitioner's future conduct. (See *H. D. Wallace & Assoc. v. Dept. of Alcoholic etc. Control* (1969) 271 A. C.A. 664, 668, 76 Cal.Rptr. 749; *Bley v. Board of Dental Examiners* (1927) 87 Cal. App. 193, 196, 261 P. 1036.)[36]

The D.C. Circuit Court of Appeals has similarly warned that a public employer enters dangerous territory when it attempts to determine standards of morality.[37] The court held that the nexus standard is critical to curbing government excess:

> The rational nexus requirement is perhaps nowhere more important than where an adverse action is taken against an individual on the basis of lawful, consensual, social behavior that is considered by his superiors to be "immoral" or "notoriously disgraceful." Without the limitations provided by the nexus requirement, such a standard would give the [government] free reign to purge itself of persons found to be distasteful…A pronouncement of "immorality" tends to discour-

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[34] *Id.* at 391.
[35] *Id.* at 392.
[36] *Id.* at 392–93.
[37] Hoska v. U.S. Dep't of the Army, 677 F.2d 131 (D.C. Cir. 1982).

age careful analysis because it unavoidably connotes a violation of divine, Olympian, or otherwise universal standards of rectitude.[38]

The Ohio Court of Appeals concluded that a married superintendent's sexual affair with a married subordinate did not necessarily justify termination.[39] Although the court indicated that such an affair could be considered immoral, to terminate an employee, the employer had to show more. Quoting an earlier decision, the court held: "as it relates to the termination of a teacher's contract, the conduct complained of must be hostile to the school community and cannot be some private act which has no impact on the teacher's professional duties."[40] The court held that without showing community hostility or other serious work impact, the employee was to be reinstated. The court cautioned that there was tremendous potential for abuse in using a standard that the employee would not constitute a good role model in the community.[41]

Whether there is a nexus between the conduct and employment will depend on the work of both the employer and employee. An Internal Revenue Service employee who fails to file a tax return can be disciplined by her employer because she is supposed to be a role model on tax compliance.[42] Similarly, a Department of Housing and Urban Development employee charged with enforcing federal housing laws can be disciplined for being a slum landlord while off-duty.[43] There is sufficient nexus to terminate a corrections officer for having an off-duty, four- or five-month dating relationship with a convicted felon and gang member.[44] Conversely, a librarian would likely not face discipline by her employer for either offense. But a driver's education teacher arguably would be more likely to face discipline for an off-duty driving under the influence (DUI) conviction than a physics teacher.[45] Disciplinary actions based on off-duty conduct trigger a factually intensive, case-by-case analysis.

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[38] *Id.* at 145 (citing Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969)).
[39] Bertolini v. Whitehall City Sch. Dist., 744 N.E.2d 1245 (Ohio App. 2000).
[40] *Id.* at 1252 (quoting *Florian v. Highland Local Bd. of Educ.* 24 Ohio App. 3d 41 (1983)).
[41] *Id.* at 1252.
[42] *See* Bennett v. Department of Treasury, 2005 MSPB LEXIS 6655 (2005).
[43] *See* Wild v. U.S. Dep't of Housing & Urban Dev., 692 F.2d 1129 (7th Cir. 1982).
[44] *See* Berrien County, Mich. & Police Officers Labor Council, 126 LA 938 (VanDagens, 2009).
[45] However, in *Stanbeck v. Summitt*, 1995 WL 370241 (Tenn. Ct. App. 1995), a driver's education instructor who was convicted of DUI and had his license revoked was reinstated to his teaching position by the court. The court held that there was no evidence that the conviction affected the instructor's teaching capabilities or effectiveness.

Applying the Nexus Test in the Electronic Frontier

Five recent dismissal decisions with varying outcomes are illustrative of the challenges facing public employees when their private behavior is publicly exposed.

First, an elementary school in L'Anse Creuse, Michigan, terminated a teacher for her behavior over the summer at a couple's joint bachelor-bachelorette party.[46] At a notorious outdoor summer party area, mannequins were rigged to allow party goers to drink shots of alcohol while appearing to perform oral sex on the mannequins. Unbeknownst to the teacher and without her permission, someone took pictures of her making it appear she engaged in oral sex in a public area. The pictures were uploaded to a Web site about the party area. Two years later parents discovered the Web site, and students, community members, and school staff viewed the pictures. When questioned by the school administration, the teacher said that what she did off school property and off school time was "not anybody's business." The teacher expressed no regret or remorse; although, after the dispute escalated she wrote to the Web site operator and asked that the photographs be removed.

The teacher's discipline and termination was entirely based on the school's claim that the teacher engaged in immoral and unprofessional activity that was contrary to the school's sexuality curriculum and was in disregard for her responsibilities as a role model. Under the Michigan Teacher Tenure Act, the school suspended the teacher with pay pending the outcome of the dismissal hearing. Two cases resulted: a grievance arbitration and a teacher tenure hearing. As to the grievance proceeding, the Michigan Education Association grieved the teacher's suspension and arbitrator William Daniel found that the school could not establish just cause for any discipline. However, in the end, the arbitrator held that the paid suspension was not grievable as the school was acting in accordance with the Teacher Tenure Act.[47]

Even so, when evaluating the merits of the school's conduct regardless of whether the suspension was grievable, the arbitrator found that the school would not have just cause to discipline her for her "adult activity of a salacious nature" because the teacher's

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[46]Land v. L'Anse Creuse Pub. Sch. Bd. of Educ., Docket No. 07-54, 1 (State of Mich. State Tenure Comm'n, 2008), *available at* http://web1mdcs.state.mi.us/NXT/gateway.dii?f=templates&fn=default.htm&vid=mdoeal:public.

[47]L'Anse Creuse Public Schools, 125 L.A. 527, 528 (Daniel, 2008).

activity did not involve the school or her capacity to teach. After the grievance hearing, the school terminated the teacher, clearly disregarding the grievance arbitrator's opinion that such discipline would not be for just cause. Once discharged, the teacher appealed her dismissal at the Michigan State Tenure Commission.[48] Much like the school, the Tenure Commission did not consider the arbitrator's decision; however, similar to the arbitrator, the Commission concluded that the teacher's behavior "was not professional misconduct." The Commission did not doubt the sincerity of the school community's objection to the teacher's conduct, but when evaluating the circumstances surrounding the teacher's actions, the Commission found the conduct did not involve a school activity, students, or teaching obligations. The activity was not illegal, it harmed no one, and there was no evidence that children were present. Further, the teacher never discussed her activity while at school. The Commission ultimately concluded that because the teacher's acts were not misconduct, the negative publicity concerning those acts was irrelevant. Thus, the Commission ordered the school to reinstate the teacher with back pay.[50]

In a similar case, a school district in Warren City, Ohio, dismissed a high school teacher whose nude pictures were posted on the Web by his estranged wife.[51] Early in the teacher's marriage, he had posed for a picture in the couple's bedroom while "exhibiting an exaggerated smile with his hand on his erect penis." As the marriage deteriorated, his wife threatened to embarrass him at work with the photos. The teacher later learned from a fellow high school teacher that more nude pictures appeared on a MySpace site that had been created, presumably by the ex-wife, using a name similar to his. The site stated that he desired to party with "girls, guys, or goats" and included multiple false blog entries, designed to embarrass the teacher. In addition, the photos were uploaded to two dating sites. Students printed the photos, the local newspaper identified the Web sites, and the pictures were posted on the front door of a local pub. Four days later, the teacher began efforts to shut down the Web sites. However, the

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[48]Bertolini v. Whitehall City Sch. Dist., 744 N.E.2d 1245 (Ohio App. 2000).
[49][Reserved]
[50]*Id.* at 10.
[51]Warren City Bd. of Educ., 124 L.A. 532, 532–33 (Skulina, 2008).
[52][Reserved]

teacher's efforts could not curtail the harm already caused by all of the photos and statements.

In response, the school board placed the teacher on home assignment and launched an investigation into the teacher's online activity. During the investigation, the school board found that, in addition to the ex-wife's salacious conduct, the teacher admitted he twice inappropriately used the school district's e-mail server. The first incident involved an e-mail to his wife that included a picture of the couple's "baby daughter with superimposed adult naked female breasts." The second e-mail was of an article about orgasms and sexual health. Based on both the publicity of the nude photos and the impropriety of the teacher's two e-mails, the school board terminated the teacher's contract, and the teacher grieved his dismissal.

Arbitrator Thomas Skulina had "no doubt in my mind that a frontal nude photograph of a male with a supercilious grin and his hand on his erect penis qualifies as immoral, aka obscene."[53] By making such a pronouncement on the "immorality" of a photograph, and strangely immorality with obscenity, the arbitrator was stepping on the dangerous brink about which the *Morrison* and *Hoska* courts warned. By pronouncing what is "immoral," he was avoiding careful analysis. The obscenity, though, was not the ultimate basis for the arbitrator's decision, and he later qualified his judgment by saying it would not be proper for an arbitrator "to opine about the morality of the photo play of this married couple in the privacy of their bedroom." Instead, the arbitrator concluded that the teacher's actions and inactions after the photo was taken justified his dismissal.

More specifically, the arbitrator determined that a person holding a "responsible position at his place of employment" has a duty to "secure obscene photos of himself." He also faulted the teacher for not hiring an attorney to help him get the photos or to legally restrain his wife from disseminating them. The teacher made a pro se effort to get an order of protection, but did not attempt to get an order regarding the pictures and did not make any disclosure about the pictures to the prosecutor. Further, the arbitrator faulted the teacher for not warning his principal about his wife's threats to use the pictures and for the teacher's failure to get help from the principal or from the computer experts at the school. Thus, the arbitrator's final conclusion rested not only on the con-

[53] *Id.* at 536.

tent of the photos, but rather on the publicity of the photos and the lack of effort on the teacher's part to rein in that publicity.

Both of these cases show that behavior occurring far away in place and time from the workplace can intrude into the workplace because of third parties' use of the Internet. The "offense" in both cases was very similar—photos of teachers engaged in sexual activity. However, the Warren City teacher had advanced warning that the pictures could be disclosed, while the other teacher was blindsided. Critically, the Warren City teacher did not take any action to prevent the disclosure of the picture or to warn his employer that the disclosure might occur.

Similarly, Arbitrator Evans in *Washington Metropolitan Area Transit Authority*[54] determined that the actions which an employee takes to mitigate the harm of an electronic communication may be critical to a just cause analysis. Here, the employee, a white Washington, D.C., Metropolitan police officer, received a racially and sexually offensive "joke" from a friend as a text message on his phone. The officer believed that he deleted the message from his phone. Instead, while off-duty, he had inadvertently forwarded the message to his wife, in-laws, co-workers, and others. After his displeased wife told him what he had done, he attempted to find out to whom he had sent the message so that he could apologize. Most notably, the officer had inadvertently forwarded the racially offensive text message to an African-American co-worker. Understandably, the co-worker who received the message was highly offended.

Seeking forgiveness, the police officer immediately apologized to the co-worker and attempted to do so again later in the day. However, once the department's Division of Professional Responsibility and Inspections found out about the racially charged text message, the officer was fired for discrediting himself and his department. The officer's union grieved the termination, but the arbitrator concluded that this set of facts created a sufficient nexus to the workplace because the offensive message went to a co-worker. Arbitrator Evans, though, reduced the dismissal to a suspension because the action was inadvertent and because the employee immediately apologized and sought forgiveness.

In a superficial application of nexus standards, Arbitrator Barry Baroni upheld the dismissal of a tenured teacher by the Phenix City, Alabama, Board of Education who posted graphic images of

[54]124 L.A. 972, 978 (Evans, 2008).

herself on publicly accessible Web sites.[55] Copies of the images were anonymously given to the superintendent by "concerned parents," and he determined that the nude images were of her, that they were publicly accessible, and that the conduct was lewd, immoral, and made her unfit to teach.

At the hearing, the teacher admitted that most of the images were of her completely or partially nude, including close-up images of breasts and genital areas. She also wrote in the Web sites that she was looking for sexual relationships. Some of the images were still accessible on the Web sites at the time of the arbitration hearing. The arbitrator noted that the Alabama courts (citing 30- to 60-year-old cases as precedence) require a very low burden of proof on school boards when dismissing tenured teachers. He quoted the legal standard for dismissal as being "any ground put forward by a school committee in good faith in which (it) is not arbitrary, irrational, unreasonable or irrelevant to the committee's task of building up and maintaining an efficient school system. Limited only by the statutory provision that they must be good and just causes, the jurisdiction and discretion to determine what these causes may be rests in the hands of the school authority."[56] Under such a low burden of proof, the arbitrator's conclusion that the teacher's behavior was "hard core" may be sufficient to uphold a dismissal that is not arbitrary, irrational, unreasonable, or irrelevant. However, the arbitrator went on to apply the *Morrison* standards to the facts of this case. He concluded that three of the *Morrison* standards applied: (1) the likelihood that the conduct may adversely affect the students or fellow teachers, (2) the degree of such adversity anticipated, and (3) the likelihood of recurrence of the questioned conduct. His analysis was made in one sentence: "The Internet nudity was 'hardcore' and could be easily accessible by anyone, and, it was proved that the documents from Board Exhibit 9 were obtained by the Board from internet websites as late as November 11, 2008, less than a month prior to the arbitration hearing."[57]

Such a cursory conclusion may meet the standards established by the Alabama courts. It does not meet the analysis required in *Morrison* to show that the employer did not interfere with constitutional privacy interests and that the employer established a

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[55] Phenix City Bd. of Educ. and Ala. Educ. Ass'n, 125 L.A. 1473 (Baroni, 2009).
[56] *Id.* at 1476.
[57] *Id.* at 1477.

rational connection between the conduct and the work, which is support by evidence and not conjecture. The *Phenix City* opinion sets forth significant conjecture of harm but does not show any evidence of any adverse effect on students or co-workers. There was no evidence, as suggested by *Morrison*, that the events became "so notorious as to impair petitioner's ability to command the respect and confidence of students and fellow teachers." The *Morrison* court warned that any conclusion must be "supported by evidence or official notice." The court held that the burden to present that evidence is on the employer: "In this case, despite the quantity and quality of information available about human sexual behavior, the record contains no such evidence as to the significance and implications of the Schneringer incident. Neither this court nor the superior court is authorized to rectify this failure by uninformed speculation or conjecture as to petitioner's future conduct." The constitutional analysis set forth in *Morrison* requires far more than a determination that an employee's off duty conduct was "hard core."

Finally, in *Falmouth Educators Association*,[58] Arbitrator James Collins, although not specifically referencing *Morrison*, did engage in an analysis of the nexus standards when a teacher assistant was fired for inappropriate postings on his MySpace page. Keith Driscoll was a 27-year-old employee who worked for more than four years in the same school that he had attended as a student. To stay connected with former school and college classmates, he created a MySpace page with help from a friend. He did not know that he could limit access to his page and he believed, according to the site's rules, that people only older than age 18 could view his page. He indentified himself by name, picture, residence, and where he worked. He posted numerous items that were vulgar and included references to drinking and smoking. Nothing pornographic or illegal was posted. One parent viewed the site and complained to the superintendent and when she felt the superintendent did not act fast enough (less than a week over Christmas break), she reported the page to the press.

After investigation, Driscoll was fired for conduct unbecoming an educator because he had posted "graphic content, including but not limited to lewd, sexually offensive language, a crude reference to a penis, a sexually explicit video, references to your alcohol use and inappropriate disclosure of your personal life. . . ."

[58]Falmouth Educators Ass'n and Falmouth Sch. Comm. (Collins, 2008).

The dismissal notice also indicated that Driscoll had indentified his place of employment, and that by representing the school district he was violating the public trust. In analyzing the case under a just cause standard, the arbitrator noted that the school had no rule about its expectation of employee behavior concerning off-duty, online social networking. The school never gave any guidance to employees about off-duty Internet use. Nevertheless, Driscoll knew that he served as a role model. The arbitrator held that Driscoll should have foreseen the risk of posting inappropriate content on the Internet and that by not attempting to secure that information or to limit access to the information, he therefore failed to conduct himself appropriately in public.

However, the arbitrator concluded that dismissal was an inappropriate discipline for the offense. He found that Driscoll could not have been aware that a single instance of posting inappropriate content would result in dismissal. He noted that although the content was "vulgar and inappropriate for association with an educator, the content was typical of the kind of communication and crude humor in which many people in their twenties engage among themselves, and Mr. Driscoll did not post anything illegal or pornographic and did not intentionally post his page publicly." He concluded that the breach of public trust could be healed, that both teachers he worked with said they would have no problem continuing to work with him, that Driscoll immediately removed the page when he was notified of the concern, and that Driscoll could learn from the experience. Driscoll was reinstated with a three-day suspension.

Conclusion

To attract and retain talented employees in a world wired and webbed, employers must recognize the importance of a host of new boundaries. Employers are confronted with lines between work time and personal time, between work space and personal space, that are more blurred than ever before. Because of this difficulty, the employer can no longer tightly control its image or its message.

On the other side of the equation, employees need to understand that today's employer may be uncomfortable in this new reality. Given the focus on the nexus test, employees need to know when they are potentially harming themselves or their employer. The speed and distance at which messages are broadcast requires

that employees be vigilant at protecting their own image by acting quickly when their employment may be adversely affected.

The Constitution protects the employee's privacy interests until those interests interfere with the public employer's interests. Once the government's interests are affected, the government bears the burden to present evidence and to prove a rational connection between the off-duty conduct and employment and that there was harm to that employment relationship that can be remedied by only discipline.