

**SOCIAL MEDIA LEGAL ISSUES
UPDATE**

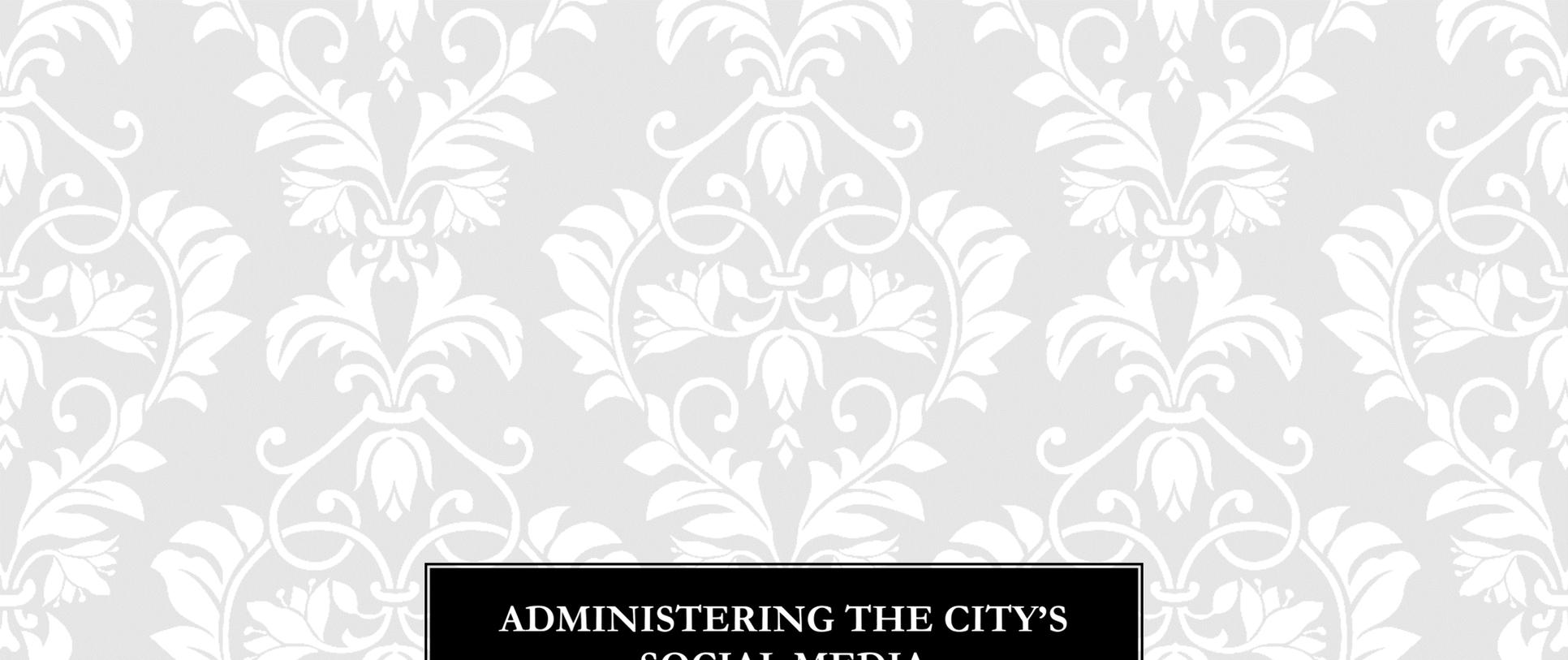
Jennifer Richie, City Attorney, Waco
TCAA Summer Conference 2016

OVERVIEW

The screenshot shows the Facebook page for Waco Mammoth National Monument. The page header includes the name and a search bar. The main content area features a large image of a mammoth skeleton and a post from the monument. The post includes a pie chart showing the distribution of scouts across different regions.

Region	Count	Percentage
Southwest	1,000	50%
Northwest	1,000	50%
Alaska	25	1%
International	1,000	50%
Midwest	1,000	50%
National Capital Region	1,000	50%

- Administering the City's Social Media
- Employment Issues



**ADMINISTERING THE CITY'S
SOCIAL MEDIA**

WACO'S SOCIAL MEDIA PRESENCE

- 1 City Facebook page
- 19 City Department Facebook Pages
 - Police
 - Health District
 - Waco Mammoth Site
- 8 Twitter accounts
- 5 Instagram accounts
- 19 different employees administering these accounts



ADMINISTERING THE CITY'S FACEBOOK PAGES

PAGE	LIKES
City of Waco Public Information	6,944
Parks and Recreation	5,226
Waco City Cable Channel (WCCC.TV)	344
Waco-McLennan County Library	1,612
Waco-McLennan County Public Health District	468
Cottonwood Creek Golf Course	5,822
Waco Police Department Neighborhood Services	14,282
Waco Police Department Community Outreach	1,060
Waco Mammoth National Monument	6,153
Cameron Park Zoo	30,935
Waco Crime Stoppers (Waco's Most Wanted)	1,121
Waco Transit	658
Brazos Nights Concert Series	12,880
Waco Police Department	30,069
Waco-McLennan County Office of Emergency Management	1,519
Waco & the Heart of Texas (CVB)	31,645
Waco Convention Center	10,590

ADMINISTERING THE CITY'S TWITTER ACCOUNTS

ACCOUNT	FOLLOWERS
@cityofwaco	10,000
@WacoLibrary	483
@wacomclennanOEM	919
@CamParkZooWaco	2,936
@WacoandtheHOT	1,443
@WacoConventionC	628
@wacostransit	979
@wacopolice	12,400

ADMINISTERING THE CITY'S SOCIAL MEDIA

- The law is developing.
- In 2010, the City of Redondo Beach, California, deleted its Facebook page based on a presentation from the City Attorney to the City Council on legal concerns.
- City of Redondo Beach now has a Facebook page.

ADMINISTERING THE CITY'S SOCIAL MEDIA

- *Hawaii Defense Foundation, et al. v. City and County of Honolulu, et al.*, 2014 WL 2804448 (June 19, 2014)
 - City removed two posts from its Police Department's Facebook page and banned the posters.
 - The city and county were sued and settled by changing their policy and paying attorney's fees.

FIRST AMENDMENT

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

FIRST AMENDMENT

- **Government Speech**
- **Public Forum**
 - **Traditional**
 - **Designated**
 - **Limited**
- **Non-public**

GOVERNMENT SPEECH

- Expanding area of the law
- *John Walker, III, Chairman, Texas Department of Motor Vehicles Board, et al. v. Texas Division, Sons of Confederate Veterans, Inc., et al.*, 576 U.S. ___, 135 S.Ct. 2239 (2015) (holding that Texas license plates are government speech and thus, denial of a Confederate license plate does not violate free speech rights).

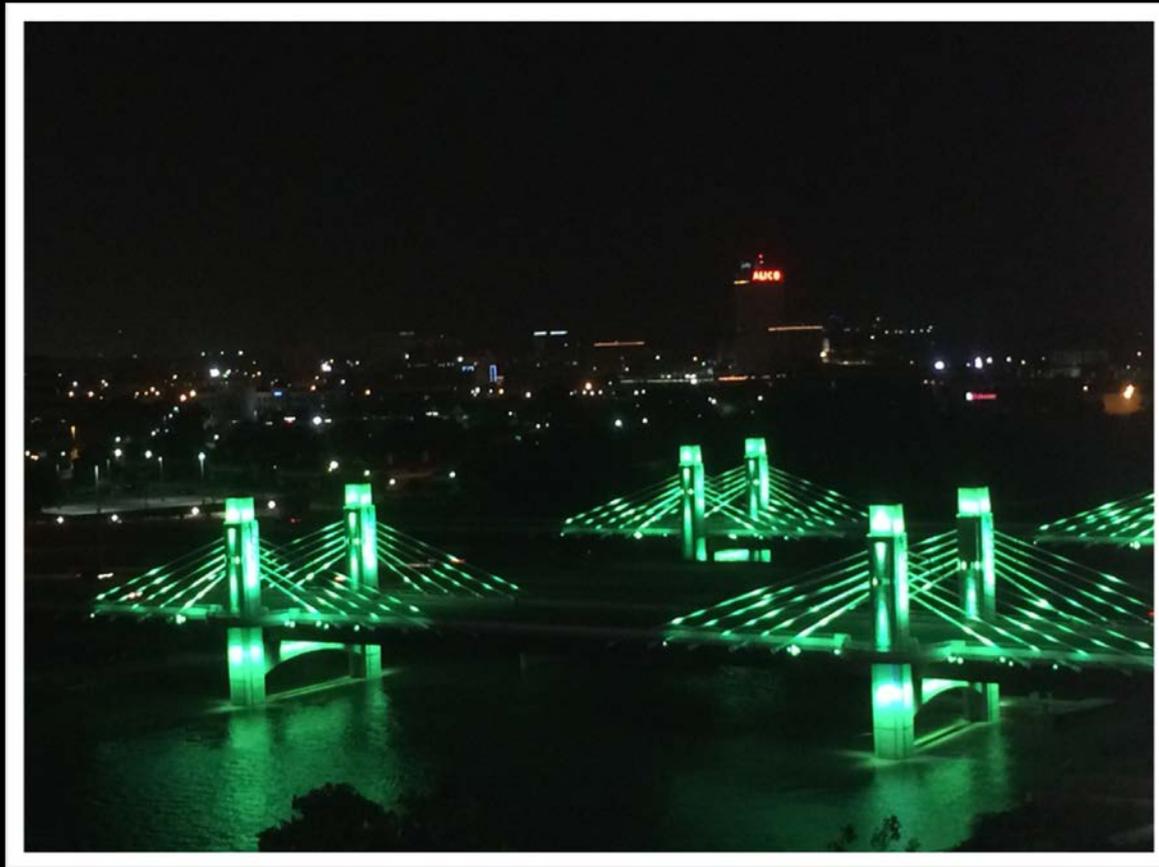
GOVERNMENT SPEECH

- *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125 (2009) (finding that city did not violate the 1st amendment when it refused to place the Seven Aphorisms of Summum statue in its park, a park that contained a statue of the Ten Commandments).
 - Court stated that there are limits to government speech, like the establishment clause (at 1132).
- See establishment clause cases: *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854 (2005); *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192 (1980).

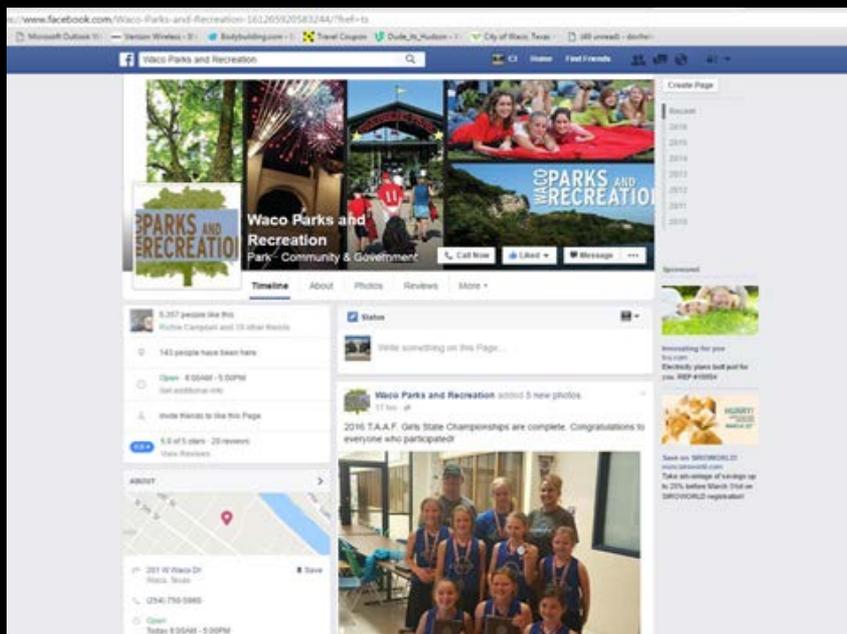
GOVERNMENT SPEECH

- “The point of the new ‘government speech doctrine’ ... is to allow government to express its own view point and reject alternative viewpoints.”
 - Mary Jean Dolan, Government Identity Speech and Religion: Establishment Clause Limits After Summum, 19 Wm & Mary Bill Rts. J. 1(2010).

GOVERNMENT SPEECH



SOCIAL MEDIA: GOVERNMENT SPEECH



- Non-interactive forums, like our web page, would be government speech
- *Sutcliffe v. Epping School District*, 584 F.3d 314 (1st Cir. 2009) (holding that town's refusal to place a link to an organization on its website was government speech, and the website was not a public forum)
- Twitter?
- Facebook pages probably not government speech

PUBLIC FORUM DOCTRINE

- **Public Forum**
 - **Traditional**
 - **Designated**
 - **Limited**
- **Non-public**

Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 103 S.Ct. 938 (1983).

PUBLIC FORUM DOCTRINE

- Traditional
 - May not have content based rules unless narrowly drawn for compelling government interest (strict scrutiny)
 - Content neutral rules still need to be narrowly tailored to a significant government interest and leave open alternative means of communication
 - Streets and parks that have been devoted to public expression by history or government fiat
- Social Media probably not traditional public forum – no history

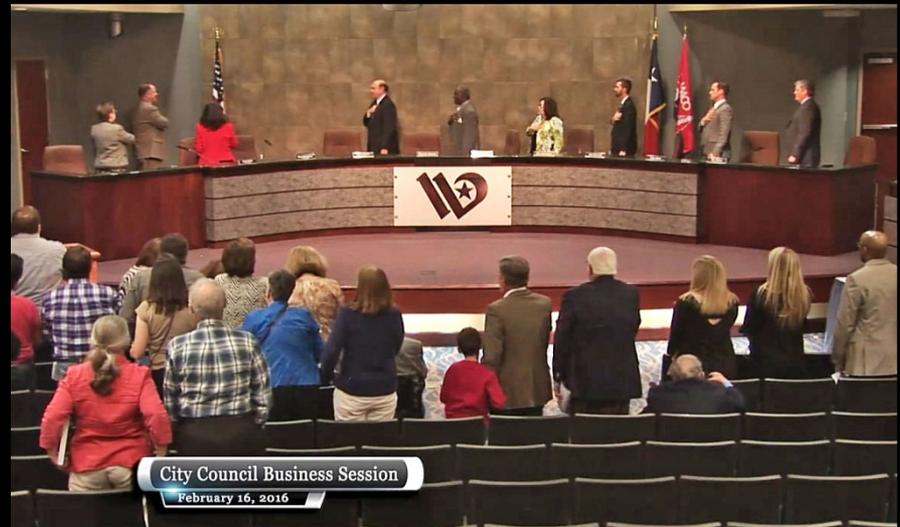
PUBLIC FORUM DOCTRINE

- Designated
 - Public property that the state has opened for expressive content
 - If open it to all, you go through same legal analysis as traditional, i.e. narrowly drawn to compelling government interest

Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 103 S.Ct. 938 (1983).

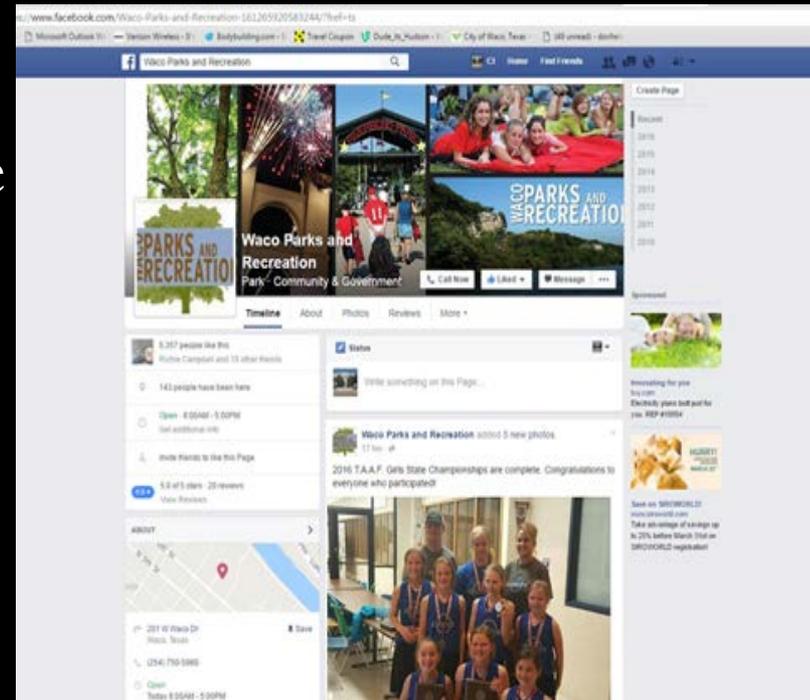
PUBLIC FORUM DOCTRINE

- Limited Public Forum
 - Opened only to a certain group of people or certain subject
 - Must be reasonable and viewpoint neutral
- Example: Council meeting

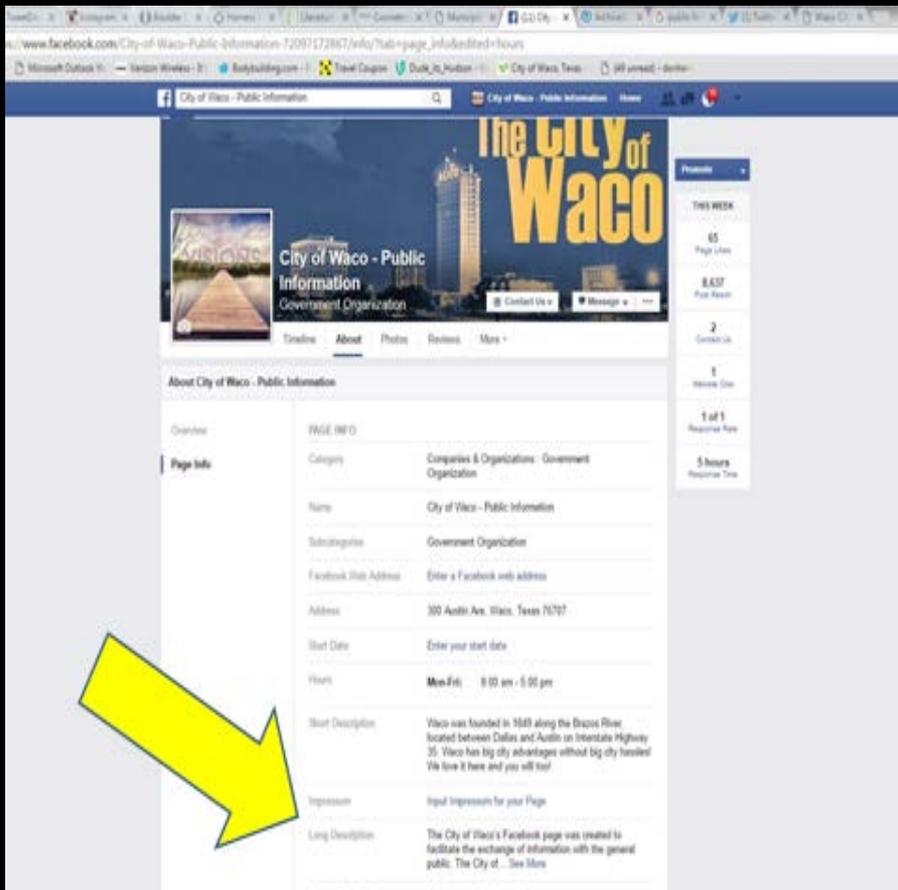


FACEBOOK AS A LIMITED PUBLIC FORUM

- Interactive social media sites can be limited public forums if they are focused and limited in scope and topic.
- Need rules to limit your scope



FACEBOOK AS A LIMITED PUBLIC FORUM



- Can post rules for City's Facebook under About -- Page Info – Long Description
- Like council meeting rules, you are attempting to limit the subjects open for discussion on your Facebook page.
- Restrictions have to be reasonable and viewpoint neutral.

FACEBOOK AS A LIMITED PUBLIC FORUM

- Designate employees who can administer Social Media for the City **AND TRAIN THEM!**
 - Best practice is to put social media administration in their job description
- Create a policy for administration of City Social Media sites

FACEBOOK AS A LIMITED PUBLIC FORUM

- Trained staff that:
 - If the post is on topic, but is negative, then the post remains
 - Presumption that the post remains
 - The broader the subject of your Facebook page, the less you can delete



OTHER ISSUES TO CONSIDER

- Open Meetings
 - Online Message Board (TEX. GOV'T CODE § 551.006)
- Disability Access to Social Media
- Privacy
- HIPAA
- Texas Election Code Section 255.003: Unlawful use of public funds for political advertising
- FLSA
 - Consider using exempt employees to administer social media.



**OTHER ISSUES TO CONSIDER:
OPEN RECORDS**

- Social Media posts are considered public information and are subject to records retention requirements
- Need to archive your social media pages
- Archiving Service may not be able to archive closed group Facebook pages
 - Waco stopped its 2 internal Facebook pages because we could not archive them



EMPLOYMENT ISSUES

GOOD RESOURCES

- Sheila Gladstone, *Social Media & HR: Friends or Enemies?*, TMHRA Annual Conference (Summer 2014)
- Sheila Gladstone, *Is Your Policy Manual Up to Date?*, TCAA Summer Conference (June 19, 2014)
- Courtney Barksdale Perez, *Social Media Policies and the Public Employer: Lessons Learned from the Private Sector*, State Bar of Texas Suing and Defending (July 18, 2013).

FIRST AMENDMENT: FACTORS THAT COURTS CONSIDER

- Whether the speech was made as an employee or as a citizen
- If as a citizen, whether the employee's speech was a matter of public concern
- Even if of public concern, whether the employee's First Amendment interests in speaking outweigh the interests of the government, as an employer, in providing effective and efficient services
- If all of the above, whether the employee has shown that the speech played a substantial part in the government's employment decision

Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951 (2006); *Pickering v. Bd. of Education of Township High School Dist. 205, Will County, Ill.*, 391 U.S. 563, 88 S.Ct. 1731 (1968).

RECENT CASES

- *Graziosi v. City of Greenville, Miss.*, 775 F.3d 731 (5th Cir. 2015)
 - Upheld termination of police sergeant that posted on mayor's Facebook page:
 - Criticism for not sending department representatives to a police funeral in another city; and
 - Criticism of the Chief's leadership
 - Found that officer was speaking as a citizen
 - Sgt. was off duty and on home computer
 - Public speaking was not part of her normal duties
 - Fact that officer identified herself as a police officer in her post does not make the speech that of an employee

RECENT CASES

- *Graziosi v. City of Greenville, Miss.*, 775 F.3d 731 (5th Cir. 2015) CONTINUED
 - Found that post was not of public concern; was an internal squabble
 - Whether a statement addresses a matter of public concern is a question of law
 - Weighed the content, form, and context of the post
 - Found significant that Sgt. was just back from a suspension and was mad at the Chief
 - Stated that even if she was speaking on a matter of public concern, City's substantial interests in maintaining discipline and close working relationships and preventing insubordination within the department outweighs officer's interest
 - Do not need to prove actual disruption
 - Prevention of future disruption is sufficient justification

RECENT CASES

- *Stinebaugh v. City of Wapakoneta, et al.*, 630 Fed Appx. 522 (6th Cir. 2015)(finding that fire chief contacting a council member about purchasing a fire truck was as a citizen and not as an employee)
- *Liverman v. City of Petersburg, et al.*, 106 F. Supp.3d 744 (E.D. Va. 2015) (finding a post about Police Department's promotional process was of public concern but post about the inexperience of a particular sergeant was personal and not of public concern)

RECENT CASES

- *Duke v. Hamil*, 997 F.Supp.2d 1291 (N.D. Ga. 2014)(upholding demotion of deputy police chief after he posted an image of a confederate flag on Facebook page and stated that “it is time to start the second revolution”; stating that this was too disruptive to the department)
- *Buker, et al. v. Howard County, et al.*, 2015 WL 3456750 (D. Md. May 27, 2015)(granting MSJ for Howard County for termination of a Battalion Chief who posted “beating a liberal to death” and “liking” the post described below; found post’s disruption to department outweighed 1st Amendment right)
 - 2015 WL 3456757 (D. Md. May 27, 2015)(denying MSJ and finding no heightened interest of Fire Department because terminated volunteer fire fighter who posted in response to above posting “pick a black one, those are more ‘scary’” was not in management)
- *Gresham v. City of Atlanta, et al.*, 542 Fed. Appx. 817 (11th Cir. 2013)(finding disruption to a Police Department when employee criticized another officer on Facebook rather than report it to chain of command)

RECENT CASES

- *Bland, et al. v. Roberts, et al.*, 730 F.3d 368 (4th Cr. 2013)(finding employee's "like" of a political campaign page was protected 1st Amendment activity)
- *Vincent v. Story County, Iowa*, 2014 WL 10007079 (S.D. Iowa Jan. 14, 2014) (on MSJ, finding victim witness coordinator's "like" of a post about a police shooting of a family member to be too disruptive to the office; seemed persuaded by county attorney telling employee ahead of time not to comment about the shooting)