



Ethics, Investigations, and the Digital Frontier: A choose your own adventure in new-media land

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Choose your
own
Adventure!



Ethics in the Age of New Media



facebook

YouTube

Broadcast Yourself™

twitter

myspace.com™
a place for friends

LinkedIn®



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Before we begin, some ground rules for our adventure....



1. We can't come up with all of the possible scenarios so please suspend disbelief for one hour and play along
2. There are lots of things like the Hatch Act and suitability determinations we won't be able to cover
3. We understand the scale of seriousness of the story is not monumental, but it is important nonetheless
4. Your agency has a policy against employees using their .gov email address for anything other than official business
5. Your agency has a *de minimus* use policy for IT equipment allowing for some personal use
6. Your agency has suitable notices and requires employees to sign acknowledgements that any IT equipment issued to them and used by them is property of the USG

**7. You have a FANTASTIC
relationship with your IG!**

And one more thing....



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You have a fantastic relationship with your OIG and you would never forget to contact them!

For the purposes of our adventure, we will assume that you immediately went to the OIG with the information you are given and the OIG declined the matter.



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*Flip to the next slide to
begin your adventure....*





It was a dark and stormy night... *well, not really*



You are an ethics officer in the Government Effectiveness and Efficiency Commission (GEEC) and there is a knock on your door....

Who?

Jack, the time and attendance keeper from the GEEC contracting office, has come to see you.

What?

Jack tells you that he thinks there is a potential ethics problem with Jill, a Contracting Officer, who works in his office.

When?

Jack says that Jill called in sick on Wednesday of last week but he suspects she wasn't sick.

Where?

Jack's friend is "friends" with Jill on Facebook and said that he saw photos of Jill at the Nat's game the same day she was "sick." His friend also thinks that the President of MegaCorp, a vendor bidding on a large GEEC contract, was in the pictures with Jill.



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What do you do?

- A) Create a fake Facebook account, “friend” Jill, and see if you can see the pictures for yourself
- B) Use your real Facebook account and “friend” Jill
- C) Send Jack back to talk to his friend and see if he can get more information
- D) Log into Facebook and see if Jill’s pictures are public



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***And, of course, you're not going
to forget the OIG!***





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Final Answer?





Answer A – Fake Facebook Account



Undercover Operations: Things to Consider

- Who's Leading the Investigation?
- Social media provider issues
- What if it's criminal?



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Answer A – Fake Facebook Account



Social Media Provider Issues

- Terms of service
 - Most social media ToS require real identities
 - Cybercrime laws
- Voluntary disclosure
 - Law enforcement has authority to request information about user accounts
 - User may be notified





Answer A – Fake Facebook Account



Who's Leading the Investigation?

- Agency has inherent authority to investigate certain violations, but beware:
 - Agency policy
 - Referral and notification issues
 - Evidence: collection and preservation
- OGE authorized to investigate ethics violations
 - Usually based on agency report of investigation
 - OGE usually recommends that OIG investigate
- OIG authorized to investigate *all* violations involving agency programs and operations





Answer A – Fake Facebook Account



What If It's Criminal?

- Need authorizing statute to conduct criminal investigations
- Undercover operations must follow special procedures
 - *Attorney General's Guidelines on FBI Undercover Operations*
- 28 U.S.C. 535 – Duty to Report
- Evidence – collection and preservation
- Privacy considerations





Answer A – Fake Facebook Account



Why Supervisors Should Refer to the OIG or DAEO

- Follow agency policy and the law
- “Deconfliction”
 - The OIG might not investigate, but referral will assure deconfliction
- Worst case scenario if you do not refer allegation
 - *You may be subject to disciplinary action.*
 - *You may blow the case.*
 - *You may be personally liable in tort.*

Don't Circumvent Legal Process!



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*Return home to try
another option.*





Answer B – Real Facebook Account



Timing is important – Part 1

Timing may be key in determining whether an employee has a reasonable expectation of privacy. If the employer and employee are already friends, the employee has consented to sharing this information and therefore it would be difficult to argue a reasonable expectation of privacy.

Let's have a quick 4th Amendment refresher...



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Answer B – Real Facebook Account



4th Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”



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Answer B – Real Facebook Account



When does it apply?

- Extends beyond criminal investigations
- Applies when Government acts as an employer
- Government employees do not lose their Fourth Amendment rights merely because they work for the government (*O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)).
- Two-step analysis:
 1. Operational realities
 2. If legitimate privacy expectation, reasonableness standard





Answer B – Real Facebook Account



REP and Social Media

- There are 4th Amendment considerations with respect to an employee's virtual life
- Public new media account (no privacy settings) - 4th Amendment is not implicated
- If privacy settings, may have REP
- Employees generally have REP in their personal items in the workplace (such as purses, luggage, and briefcases)
- Same rationale may apply to new media accounts, even if the employee accesses the accounts at the workplace





Answer B – Real Facebook Account



Timing is important – Part 2

If the employer friended the employee after learning about the incident, the employee may have a reasonable expectation of privacy. Also, we may have entered the undercover (UC) realm and the employer should follow the agency's UC rules.



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*Return home to try
another option.*





Answer C – Get more information



Agency?

- If an employer directs complainant to take such actions (such as print a snapshot or allow employer to use complainant's FB account), then complaint may be considered an agent of the employer and could be violating federal law enforcement UC rules.



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*Return home to try
another option.*





Answer D – Public Information



Yes, you can continue your investigation!

- Agencies can discipline for work related violations
- In this case, we have a Time and Attendance violation and a potential conflict of interest

But, what if you saw more...

- *Jill has comments on her “Wall” about future GEEC contracts*
- *Jill has other photos of her attendance at MegaCorp events*
- *Jill has comments on her “Wall” about corruption in her office*



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Answer D – Public Information



1st Amendment: Freedom of Speech

- “Congress shall make no law...abridging the freedom of speech.”
- Public employers are allowed to discipline speech, including speech via social media platforms
- Balancing Test: Employee’s interests in commenting on “matters of public concern” vs. Employer’s interest in promoting efficiency of public services





Answer D – Public Information



1st Amendment - 3 ?'s to Ask:

1. Was the public employee speaking on a matter of public concern?
2. Was the employee speaking as a citizen or as a public employee?
3. Do the interests of the government in promoting efficient operations outweigh the interests of the employee in commenting on matters of public concern?





Answer D – Public Information

NLRB vs. American Medical Response (AMR)

- Facts
 - Supervisor denied request for union rep.
 - Employee criticized supervisor on Facebook & co-workers posted supportive comments
 - Employee was fired for Facebook posts
- NLRB alleged AMR violated employee's right to engage in protected concerted activities (act together to improve working conditions)





Answer D – Public Information



NLRB vs. AMR: Impact

- Case does not represent current law
- NLRA doesn't apply to feds
- NLRB's general position is still that employers are permitted to regulate employee behavior, including speech on social media websites
- “Generally, employee grievances, personality conflicts, etc. are not a matter of public concern





Answer D – Public Information



Public Info: Final Thoughts

- Speech made pursuant to official duties or on matters not deemed to be of “public concern” is not protected
 - Be aware of other issues: discrimination, whistleblower, etc.
- Discipline is not prohibited if the impact on the employer outweighs employee’s interest in making the speech and the public’s interest in hearing it



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*Return home to try
another option.*





So what's the answer?!?!



Well, as you can see, it depends....

1. Don't try to use law enforcement techniques , such as undercover operations, if you don't have the proper authority
2. Be sure to deconflict with other offices that may have an interest in the matter
3. Understand the scope of your investigation
4. Be sensitive to creating an "agent" relationship
5. Be aware of potential REP triggers
6. If information is public you can use it, but make sure it is public
7. Be aware of 1st amendment speech rules for federal employees
8. Understand that this is still a developing area of the law and there will be more questions than answers

AND ALWAYS.....



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Don't forget the OIG!





Thank you for your time
and attention!

Questions?



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