ALSB Journal of Employment and Labor Law
Volume 15, 26 – 44, Spring 2014

Facebook's "Like" – the First Amendment and Free Speech in the Workplace

Paula C. O'Callaghan[*]
Jerome D. O'Callaghan[**]

I. INTRODUCTION

Free speech and the workplace have engaged one another in an often contentious relationship.[55] Free speech is not just a legal issue; it is a management issue as well. As noted by Bruce Barry, "[T]he reality of freedom of expression at work is not just a matter of legalities; it is also about the discretionary choices that individual employers make about employee freedom, managerial discipline, and workplace culture."[56] This is ever more relevant in the social media age.[57] Three quarters of American workers in a 2011 survey reported that they belonged to one or more social media networks.[58] The world's most popular social network is Facebook.[59] Social media tools such as Facebook have transformed the workplace into a boundary-less "public square," giving employees more outlets to express their thoughts, and employers more challenges to discipline and culture.[60]

This paper analyzes a recent case from the Fourth Circuit Court of Appeals ("Fourth Circuit") where a public employee's Facebook activity allegedly resulted in the termination of his employment.[61] The activity consisted of clicking the "Like" button on a political campaign page. Was this *speech*? If so, was it constitutionally protected speech?

This social media workplace drama involves more than just who *likes* who in terms of social association. It involves the definition of activities considered speech, what levels of

---

The authors thank two anonymous reviewers for their valuable comments which improved the manuscript. Material contained in this paper was presented to the Academy of Legal Studies in Business 2013Annual Conference in Boston. The authors thank ALSB conference session attendees for their useful feedback.

[*] Associate Professor, Business and Executive Programs, The Graduate School, University of Maryland University College.

[**] Associate Dean, Arts & Sciences, Associate Professor of Political Science, State University of New York at Cortland.

[55] "Free Speech on and off the job has been a topic of some interest to attorneys, especially employment lawyers, who wrestle routinely with the legalities involved in circumstances where people are disciplined or fired for their actions." BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE 21, Berrett-Koehler (2007).

[56] Id.

[57] See generally, Colin M. Leonard and Tyler T. Henry, *From Peoria to Peru: NLRB Doctrine in a Social Media World*, 63 SYRACUSE L. REV. 199 (2013).

[58] ETHICS RESOURCE CENTER, NATIONAL BUSINESS ETHICS SURVEY OF SOCIAL NETWORKERS 8 (2013), http://www.ethics.org/resource/national-business-ethics-survey%C2%AE-social-networkers-nbes-sn-risks-and-opportunities-work (last visited April 10, 2014).

[59] Steven J. Vaughan-Nichols, *Facebook remains top social network, Google+, YouTube battle for second,* ZDNET, http://www.zdnet.com/facebook-remains-top-social-network-google-youtube-battle-for-second-7000015303/ (last visited April 10, 2014).

[60] "The workplace is increasingly becoming a public square, where employees...share ....experiences with hundreds or even thousands of friends and followers online." ETHICS RESOURCE CENTER, *supra* note 7 at 22.

[61] Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013).

protection *speech acts* are afforded and whether those acts can be the basis of a negative employment action.[62] As one observer noted, what makes this case especially unique is that the plaintiff was a public employee, and the government generally may not discharge public employees for their speech activities – yet the employee lost his case on summary judgment.[63] Legal observers generally agree that the district court erred, at least as to the free speech issue.[64]

As both Facebook, Inc. ("Facebook") and the American Civil Liberties Union ("the ACLU") provided amicus support for the plaintiff on appeal, it appears there are significant consequences at stake for titans of business and policy. This paper explores the arguments made in this case at both the district court and appellate levels, considering the implications for social media and free speech in the public workplace.[65]

II. BACKGROUND OF *BLAND* V. *ROBERTS*

In 2009 B.J. Roberts, the sheriff of Hampton, Virginia ("the sheriff" or "Sheriff Roberts"), ran for re-election.[66] During the campaign, one of his deputy sheriffs, Daniel Ray Carter, Jr. ("Carter" or "Deputy Carter"), used his Facebook account to express support for Jim Adams ("Adams"), one of Roberts' rivals.[67] Roberts won re-election; shortly thereafter he fired Carter and five other employees of the sheriff's office.[68] In 2011 all six sued the sheriff, both in his personal and professional capacity, alleging that he violated their constitutional rights of free

---

[62] This case involves questions of both qualified immunity and free speech. However, the analysis in this paper will be limited to the free speech issues.

[63] Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012), *aff'd in part, rev'd in part and remanded*, 730 F.3d 368 (4th Cir. 2013); See, also, Jeffrey N. Rosenthal, *Like it or Not, Online Preferences are Not Protected Speech*, PENNSYLVANIA LAW WEEKLY (January 22, 2013), http://www.blankrome.com/index.cfm?contentID=37&itemID=2976 (last visited April 10, 2014).

[64] See, Venkat Balasubramani and Eric Goldman, *Facebook "Likes" Aren't Speech Protected By the First Amendment–Bland v. Roberts*, TECHNOLOGY & MARKETING LAW BLOG, April 26, 2012, http://blog.ericgoldman.org/archives/2012/04/facebook_likes.htm (last visited April 10, 2014); David L. Hudson, Jr., *"Like" is Unliked: Clicking on a Facebook Item is Not Free Speech Judge Rules,* ABA JOURNAL (Sep. 1, 2012, 3:00AM CDT), http://www.abajournal.com/magazine/article/like_is_unliked_clicking_on_a_facebook_item_is_not_free_speech_judge_rules/ (last visited April 10, 2014); and The Associated Press, *Clicking 'Like' on Facebook Is Not Protected Speech, Judge Rules*, N.Y. TIMES, May 5, 2012, http://www.nytimes.com/2012/05/06/us/clicking-like-on-facebook-is-not-protected-speech-judge-rules.html (last visited April 10, 2014).

[65] See, for example, Scott Bomboy, *Facebook demands First Amendment Protection for the like button*, CONSTITUTION DAILY, http://blog.constitutioncenter.org/2012/08/facebook-demands-first-amendment-protection-for-the-like-button/ (last visited April 10, 2014).

[66] The plaintiffs allege that Roberts "used his authority to bolster his reelection efforts, including using employees to manage his political activities, using prisoners to set up campaign events and forcing his employees to sell and buy tickets to campaign fundraisers." Bland v. Roberts, 857 F.Supp. 2d 599, 601 (E.D. Va. 2012), *aff'd in part, rev'd in part and remanded*, 730 F.3d 368 (4th Cir. 2013).

[67] Id. at 601. Roberts' rival Adams was a 16-year veteran of the sheriff's office, and the third-in-command, who had recently resigned to run against Sheriff Roberts. See, DIGITAL MEDIA LAW PROJECT, *Bland v. Roberts*, http://www.dmlp.org/threats/bland-v-roberts (last visited April 10, 2014).

[68] Bland v. Roberts at 601. The case involves six plaintiff-appellants: Bland, Carter, Dixon, McCoy, Sandhofer and Woodward. Only Carter and McCoy were involved with Facebook activity. Carter pressed the "Like" button to indicate his approval of his boss's political rival, Adams. McCoy had other Facebook activity indicating support for Adams. Carter and McCoy, were sworn uniformed deputy sheriffs in the department. The four other plaintiffs were not implicated in any social media activity related to this case.

speech[69] and free association by terminating their employment.[70] The plaintiffs alleged the firings were tied to a showing of support for the campaign of Adams.[71] Of the six plaintiffs, two – Carter and Robert McCoy ("McCoy") – had social media activity, both on Facebook, related to their support of the Adams campaign.

While both Carter and McCoy enjoyed the title of *Deputy Sheriff*, their job description did not entail law enforcement activities, they were correctional officers. They worked in the *Corrections Division* and had taken a *Basic Jailer* course, but had not completed the more complex *Basic Law Enforcement* course. They had very limited powers of arrest and according to their testimony did not even know they had the power of arrest. Their duties centered on routine jailer tasks; as such they had little if any policy role in the Sheriff's office.[72]

Sheriff Roberts maintained that his deputies were let go because of "unsatisfactory work performance" and he asserted that their actions "hindered the harmony and efficiency of the Office."[73] He moved for summary judgment on five counts, including the claim that the plaintiffs' speech was not entitled to First Amendment protection under the Constitution.[74]

III. THE "LIKE" BUTTON IN FACEBOOK

Some familiarity with the social network Facebook and its feature, the "Like" button ("Like"), is useful to appreciate the *Bland v. Roberts* litigation. Facebook, Inc. is a NASDAQ listed company with a $2.74 billion valuation. [75] Facebook's social media site is the most popular social network in the world with more than 1.1 billion users; it is estimated that half of all internet users visit the Facebook site at least once per month.[76] This free-for-users social media platform allows users to set up a profile and to invite friends to connect and share each other's news, photos and content.[77]

According to Facebook, Like is "one of the most ubiquitous actions by Facebook users on the web today."[78] Like in Facebook is a blue rectangular box containing two images: a hand giving a *thumbs-up* sign and the word "Like."[79]

---

[69] Only four (Carter, McCoy, Dixon and Woodward) of the six plaintiffs pursued First Amendment claims at trial. Id. at 603.

[70] Id. at 602. Complaint and other relevant case documents available at DIGITAL MEDIA LAW PROJECT, *supra* note 16.

[71] Bland v. Roberts at 601.

[72] Bland v. Roberts, 730 F.3d 368, 372 (4th Cir. 2013).

[73] Bland v. Roberts, 857 F. Supp. 2d 599, 603.

[74] The five counts were: (1) Plaintiffs did not adequately allege protected speech under the Constitution;(2) Even if their speech was protected, plaintiffs failed to raise a genuine dispute of material fact regarding retaliation;(3) Plaintiffs failed to raise a triable issue with regard to their political association claim;(4) Roberts is entitled to qualified immunity in his individual capacity; and (5) Roberts is entitled to sovereign immunity in his official capacity. Bland v. Roberts, 857 F. Supp. 2d 599, 602.

[75] The company went public in a 2012 initial public offering. CRUNCHBASE, *Facebook*, http://www.crunchbase.com/company/facebook (last visited Oct. 31, 2013).

[76] Steven J. Vaughan-Nichols, *supra* note 8.

[77] FACEBOOK, http://www.facebook.com/help/345121355559712/ (last visited April 10, 2014).

[78] FACEBOOK, https://developers.facebook.com/docs/opengraph/guides/og.likes/ (last visited April 10, 2014).

The breadth of action that takes place instantly as a result of one click on Like is complex. Clicking Like on an object on a page in the Facebook domain (a "Like-click") sets into motion a series of activities that include having the *liked* activity visible on that user's news page or newsfeed and the pages of those they have selected to view their profile.[80] Each user has the ability to select who may view aspects of their profile; the available options are the user's Facebook friends, all Facebook users or the world at large.[81] "Users" is not limited to individuals. Since the introduction of Facebook "Pages" for politically affiliated organizations in 2006, Facebook has been open for politics.[82]

IV. DEPUTY CARTER'S FACEBOOK ACTIVITY

Carter clicked Like on the Adams political campaign page on Facebook.[83] There is evidence to suggest that Carter's support for "Jim Adams for Hampton Sheriff" appeared, with his permission, to all Facebook users – not just his Facebook friends.[84] Although Sheriff Roberts is not a Facebook user,[85] he admitted he became aware of Carter's activity on Adam's Facebook page.[86] Carter's employment was terminated after the election.[87] The sheriff's stated reasons for firing Carter and the five other plaintiffs included "unsatisfactory work performance" and actions that "hindered the harmony and efficiency of the office."[88] The factual allegations made by Carter and the other plaintiffs suggest that Sheriff Roberts explicitly demanded

---

[79] See, for example, FACEBOOK, https://developers.facebook.com/docs/plugins/like-button/ (last visited Oct. 31, 2013); Facebook offers developers a range of options for customizing the plugin. See, FACEBOOK, https://developers.facebook.com/docs/plugins/ (last visited, April 10, 2014). It should be noted that on November 6, 2013 Facebook made changes to the design of the Like button. The "thumbs-up" sign is no longer part of Like. See, https://developers.facebook.com/blog/post/2013/11/06/introducing-new-like-and-share-buttons/ (last visited April 10, 2014).

[80] According to the amicus brief filed by Facebook, in 2009 at the time the events of this case took place, when a user clicked on the Like button the user's name and profile photo appeared on the Page. This is no longer the case with the Like button in Facebook. Brief for Facebook, Inc. as Amicus Curiae in support of Appellant Carter, Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-1671), available at http://www.aclu.org/files/assets/bland_v._roberts_appeal_-__facebook_amicus_brief.pdf (last visited April 10, 2014).

[81] Brief for Facebook, Inc. at 17.

[82] Id. at 12.

[83] According to "Factual and Procedural History" of the case, one of the candidates Roberts was running against was Jim Adams, a former Lieutenant Colonel in the sheriff's department known to all of the plaintiff-appellants. Bland v. Roberts, 857 F. Supp. 2d at 601.

[84] Id.

[85] See, *Clicking 'Like' on Facebook Is Not Protected Speech, Judge Rules,* N.Y. TIMES (May 5, 2012), http://www.nytimes.com/2012/05/06/us/clicking-like-on-facebook-is-not-protected-speech-judge-rules.html

[86] Bland v. Roberts, 857 F. Supp. 2d at 606.

[87] Carter was one of four deputy plaintiffs not retained by the sheriff after the election. The sheriff maintained that these deputies were not retained on the basis of "unsatisfactory work performance or for his belief that their actions 'hindered the harmony and efficiency of the Office.'" Id. at 603.

[88] Id. at 602.

allegiance in the election from employees in the sheriff's office; those who showed opposition to his campaign would be punished for doing so.[89]

V. DEPUTY MCCOY'S FACEBOOK ACTIVITY

One other Hampton sheriff's office employee also used Facebook, although not the Like-click, to demonstrate his support of Roberts' rival. Robert McCoy ("McCoy") "claims he posted a message on Adam's Facebook page which he later took down."[90] Although the post was removed by McCoy, Sheriff Roberts admitted he also was aware of McCoy's activity on Adam's Facebook page.[91] McCoy also found himself out of a job after the election.[92]

VI. DISTRICT COURT RULING IN *BLAND* V. *ROBERTS*

U.S. District Court Judge Raymond Jackson considered Sheriff Roberts' motion for summary judgment in April 2012. He first addressed the plaintiffs' claim that Sheriff Roberts failed to reappoint four of the plaintiffs in retaliation for their support of Adams in the election, violating their free speech rights under the First Amendment.[93] Judge Jackson applied the three-prong test set out by the Fourth Circuit in *McVey v. Stacy* to determine whether a public employee has a claim for First Amendment retaliatory discharge.[94]

The three prongs are:

> (1) Whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a personal matter of personal interest;
>
> (2) Whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and
>
> (3) Whether the employee's speech was a substantial factor in the employee's termination decision.[95]

Judge Jackson highlighted the first prong of the test, emphasizing that *speech* must exist "before an evaluation of the remaining prongs can occur."[96] Evaluating the two Facebook-

---

[89] Id. at 601.; Bland v. Roberts, 730 F.3d 368, 381 (4th Cir. 2013).

[90] On appeal counsel for the Sheriff referred to evidence that McCoy had merely made the post to Adams' page as an accident, without understanding how Facebook works. Oral Argument at 22:15, Bland v. Roberts, 857 F.Supp. 2d 599; 2012 U.S. Dist. LEXIS 57530 (E.D. Va. 2012), http://coop.ca4.uscourts.gov/OAarchive/mp3/12-1671-20130516.mp3 (last visited April 10, 2014).

[91] Bland v. Roberts, 857 F. Supp. 2d at 606.

[92] Id. at 603. McCoy was one of four deputy plaintiffs not retained by the sheriff after the election. The sheriff maintained that these deputies were not retained on the basis of "unsatisfactory work performance or for his belief that their actions 'hindered the harmony and efficiency of the Office.'"

[93] Id.

[94] McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998). The court in McVey relies in substantial part on the earlier test developed in Pickering v. Board of Education, 391 U.S. 563 (1968). Citing Pickering, the Fourth Circuit noted that "The First Amendment protects public employees from termination of their employment in retaliation of their exercise of free speech on matters of public concern. Protection of the public interest in having debate on matters of public importance is at the heart of the First Amendment."

[95] Id. at 277-78 as cited in Bland v. Roberts, 857 F. Supp. 2d at 603.

[96] Bland v. Roberts, 857 F. Supp. 2d at 603.

related claims together, he noted that he found McCoy's Facebook activity to be more "nebulous" than Carter's.[97] Because McCoy had removed the message that he had posted to Adam's Facebook page, Judge Jackson asserted that he could not determine the "content of the message" and therefore found "insufficient evidence for the Court to adequately evaluate [McCoy's] claim" on the merits.[98]

With respect to Carter, Judge Jackson found that Carter did *Like* Adams' Facebook page.[99] He later asserted that, "The Court will not attempt to infer the actual content of Carter's posts from one click of a button on Adams' Facebook page. For the Court to assume that the Plaintiffs made some specific statement without evidence of such statements is improper."[100]

He also found that Sheriff Roberts had knowledge of both Carter's and McCoy's presence on Adams' Facebook page.[101] However, Judge Jackson found that the sheriff's knowledge would be "relevant [only] if the Court found the activity of liking a Facebook page to be constitutionally protected."[102]

Reviewing the circumstances of this case, Judge Jackson concluded, in a statement that attracted a lot of attention in legal circles,

> **It is the Court's conclusion that merely "liking" a Facebook page is insufficient speech to merit constitutional protection**[103]...Simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has been previously warranted constitutional protection...Facebook posts *can* be considered matters of public concern; however, the Court does not believe Plaintiffs Carter and McCoy have alleged sufficient speech to garner First Amendment protection.[104] [emphasis added]

Judge Jackson reasoned that Carter's claim should fail because "'liking' a Facebook page is insufficient speech to merit constitutional protection" as it does not involve "actual statements."[105] He also denied the free speech claims of two other plaintiffs who had engaged in speech-related activities not involving the internet and social media (i.e. bumper stickers, lack of outward support for Roberts) for want of evidence that the sheriff was aware of these facts.

The judge cited two public-employee dismissal cases from other circuits, *Mattingly* and *Gresham*, where the controversy was based in Facebook activity; those courts "found that constitutional speech protections extended to Facebook posts..."[106] He distinguished those cases on the basis that "...actual statements existed within the record."[107] In *Mattingly v. Milligan*, per Judge Jackson, the court held that Mattingly's Facebook wall post was constitutionally protected

---

[97] Id.

[98] Id.

[99] Id.

[100] Id.

[101] Id.

[102] Id.

[103] Id. at 603.

[104] Id. at 604.

[105] Id.

[106] Id. at 603.

[107] Id.

speech.[108] Likewise, in *Gresham*, a wall post in Facebook was held to be speech on a matter of public concern, according to Judge Jackson.[109] The judge went on to distinguish these wall statements in Facebook from Carter's Like-click because they involved "actual statements" that warrant constitutional protection.[110] According to Judge Jackson, "no such statements exist in this case. Simply liking a Facebook page is insufficient."[111]

On the freedom of association claims, the judge found all of the plaintiffs had offered little evidence "about their 'association' with the Adams campaign."[112] This was so even though there was no dispute about Roberts' knowledge of Carter and McCoy's activity on Adams' Facebook page.[113] The judge did allow that there might have been a "perception" within the Sheriff's office that they supported Adams, but Judge Jackson maintained that there was insufficient evidence "as a matter of law" to support a claim based on perception.[114]

Judge Jackson ruled Sheriff Roberts was entitled to both qualified and Eleventh Amendment immunity, insulating him from all of the plaintiffs' claims.[115] As the immunity claims rest on a separate and complex body of law, this article will refrain from reviewing that theme.

Sheriff Roberts won summary judgment on all counts. The firing of Carter and the other employees was justified on the basis of the Sheriff's belief that the employees had "hindered the harmony and efficiency of the Office."[116] The district court decision clearly identifies the Sheriff's claim but does not discuss how the factual assertions supported that conclusion.

VII. *BLAND* V. *ROBERTS* ON APPEAL

---

[108] Id. at 604. In *Mattingly*, an Arkansas case, the court applying the *Pickering/Connick* test did determine that the Facebook posts of Mattingly, a public employee, were speech on a matter of public concern. *Mattingly v. Milligan*, 2011 U.S. Dist. LEXIS 126665, *14 (E.D. Ark. Nov. 1, 2011). However, it did not discuss the threshold question Judge Jackson raised of whether the posts to Facebook were speech at all. The court in *Gresham* likewise took a similar approach, applying the *Pickering/Connick* criteria and finding that Gresham's posts were a matter of public concern as a public employee. There was no consideration whether the Facebook posts qualified as speech. See, *Gresham v. City of Atlanta*, 2011 U.S. Dist. LEXIS 116812, *15 (N.D. Ga. August 29, 2011), *aff'd* , 542 Fed. Appx. 817, 2013 U.S. Dist. LEXIS 20961 (11th Cir. Oct. 17, 2013).

[109] Id.

[110] Id.

[111] Id.

[112] Id. at 606.

[113] Id.

[114] Id.

[115] On the qualified immunity issue, the judge found that although a "...very broad proposition that employees cannot be fired for their political opposition does exist[,]"that principle was not violated here" in part because "It was not clear that the Plaintiffs ever spoke out in a meaningful way to merit First Amendment protection." Id. at 607.

Judge Jackson also found that Sheriff Roberts enjoyed Eleventh Amendment immunity from suit in his official capacity, saying "...even if the Court found that Plaintiffs had adequately stated First Amendment claims, the Sheriff...would still be immune from liability." Id. at 610.

[116] Id.

Carter and his fellow plaintiffs appealed Judge Jackson's decision to the Fourth Circuit.[117] Because of the judge's finding that "merely liking a Facebook page is 'insufficient speech' to merit constitutional protection[,]"[118] Carter, in particular, received vigorous amicus support from both Facebook and the ACLU.[119]

1. Facebook Arguments

In its *amicus* brief to the Fourth Circuit, Facebook contended that liking a Facebook page, or any website, is speech because the action generates "verbal statements and communicative imagery on the User's Profile" as well as in the news feeds on the friends' pages.[120]

Facebook explained that

> When Carter clicked the Like button on the Facebook Page entitled "Jim Adams for Hampton Sheriff," the words "Jims Adams for Hampton Sheriff" and photo of Adams appeared on Carter's Facebook Profile in a list of Pages Carter had Liked...the 21st-century equivalent of a front-yard campaign sign. In addition, an announcement that Carter likes the campaign's Page was shared with Carter's Friends, and Carter's name and photo appeared on the campaign's Page in a list of people who Like the Page.[121]

The core of the Facebook brief relies on four propositions. First, the U.S. Supreme Court has held that something nonverbal can be used to convey a message to qualify as "speech."[122] Next, Facebook contends that online statements can be afforded no less protection than similar statements spoken elsewhere – a theory not questioned by Judge Jackson.[123] Just as residential campaign signs are protected by the First Amendment, the same level of protection applies to Carter's Like-click posts.[124]

Finally, Facebook asserted "the use of social networking and other online communities to rally support for political candidates and causes is a contemporary example of quintessential political speech."[125] The site began allowing political candidates and parties to maintain profile pages on the site in 2006; it also claimed that Facebook played significant roles in political elections such as the 2008 U.S. presidential election.[126]

2. American Civil Liberties Union Arguments

---

[117] DIGITAL MEDIA LAW PROJECT, *supra* note 16.

[118] Bland v. Roberts, 857 F. Supp. 2d at 603.

[119] Brief for Facebook as Amicus Curiae in support of Appellant Carter, *supra* note 29.

[120] Id. at 9.

[121] Id. at 3.

[122] See Cohen v. California, 403 U.S. 15, 18 (1971), where a jacket conveyed a message offensive to some, as cited in Brief for Facebook *supra* note 29 at 10.

[123]Brief for Facebook, Inc., *supra* note 29 at 10.

[124] Id.

[125] Id. at 12.

[126] Id.

The ACLU based its *amicus* argument on three pillars: 1) that the plaintiffs' speech was political and therefore constitutionally protected; 2) that a public employee's comment about a political candidate is subject to the *Pickering* test[127]; and 3) that the sheriff is not entitled to qualified immunity because he violated the plaintiffs' constitutional rights.[128] An essential element of *Pickering* is the balancing of interests between the free speech rights of the public employee and the employer's interests in the efficient operation of the public workplace.[129] If a public employee is found to be speaking about a matter of public concern, that speech will be protected by the First Amendment unless it can be shown that the government's interests outweigh the employee's.[130]

The ACLU's brief noted that even if Judge Jackson had concluded that clicking the "Like" button was not pure speech, it surely should have qualified for protection as "symbolic expression" citing landmark Supreme Court cases on flag burning, arm bands, and parades, among others. [131] Stressing the similarity between "Like" in Facebook and similar off-line political activity, the brief contended, "[i]ndeed, there would have been no difference between wearing a pin that says, 'I like Ike' and pressing a 'Like' button on Dwight Eisenhower's Web page, had one existed."[132]

According to the ACLU, *Pickering v. Board of Education* and *Connick v. Myers* control this case.[133] The first step of the *Pickering/Connick* analysis involves establishing whether the employee's speech concerned a matter of "public concern."[134] The ACLU asserted that Carter clearly met this step, as there "…is no doubt that the discussion of a candidate's suitability for office and the debate on their qualifications are squarely within the First Amendment's citadel."[135] The second step involves balancing "the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[136] On this point, the ACLU pointed out that "[t]he First Amendment affords the broadest protection to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[137]

---

[127] In Pickering v. Board of Education of Township High School District, 391, U.S. 563 (1968) the Supreme Court established a three-part test applicable in situations where public employees are punished for free speech.

[128] Brief for American Civil Liberties Union and ACLU of Virginia as Amici Curiae supporting Appellants, Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-1671), https://acluva.org/10680/bland-v-roberts-amicus/ (last visited April 10, 2014).

[129] Id. at 16.

[130] Id.

[131] Id. at 7. See for example, Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[132] Id. at 9.

[133] Id. at 24 citing Pickering v. Board of Education of Township High School District, 391, U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983).

[134] Id. at 25 citing Connick, 461. U.S. at 147-48.

[135] Id. [citations omitted]

[136] Id. citing Pickering, 391 U.S. at 568.

[137] Id. citing Roth v. United States, 354 U.S. 476, 484 (1957).

Lastly, the ACLU argued that Judge Jackson erroneously concluded that Sheriff Roberts was entitled to qualified immunity because an official may not violate a clearly established constitutional right, such as First Amendment rights.[138]

3. Oral Arguments

On May 16, 2013 a three-judge panel of the Fourth Circuit heard oral arguments in the appeal of *Bland v. Roberts*. Counsel for the plaintiffs-appellants, spent the first seven minutes of his argument addressing the qualified immunity issue, followed by five minutes addressing the free speech and associational issues.[139] The judges questioned counsel about the Facebook posts,

Question by Judge:

> How many of your clients were on Facebook and is there evidence that the Sheriff was aware of it?[140]

Counsel for Plaintiffs-appellants:

> Captain McGee testified they were on Facebook and 'we were all surprised about that, because they' – referring to McCoy and Carter – 'seemed to be supporting the Sheriff's opponent.' Colonel Bowden the second in command of the office testified that she monitored Facebook. She testified that she saw McCoy on Facebook with Carter and that she went to the Sheriff at the about the same time...there are 5 or 6 witnesses in this record who saw McCoy on Facebook. Carter's posts are in the record. The Sheriff himself admits McCoy was on Facebook...[141]

Three minutes of argument were reserved for counsel from Facebook, who argued on behalf of Carter and McCoy.[142] Counsel made five points in his argument,

- Online speech is not entitled to less protection than any other type of traditional speech
- Liking a page on Facebook represents a deliberate choice to share a preference for something with one's friends and possibly a broader audience
- When someone likes content it is a statement on the pages of friends and the person's own profile page. Even if it is symbolic speech, it is still speech.
- Protection of speech is central to Facebook's mission
- A contrary ruling risks chilling the speech of users if this type of speech is not protected[143]

The judges asked no questions of counsel from Facebook during his argument.[144]

---

[138] Id. at 22-29.

[139] Oral Argument at 7:00, Bland v. Roberts, 857 F.Supp. 2d 599; 2012 U.S. Dist. LEXIS 57530 (E.D. Va. 2012) *appeal docketed*, No. 12-1671 (4th Cir. May 22, 2012), *available at* http://www.ca4.uscourts.gov/OAaudiotop.htm.

[140] Id. at 7:38.

[141] Id.

[142] Id. at 12:00.

[143] Id.

Counsel for Sheriff Roberts spent approximately six minutes addressing issues of immunity before moving on to the free speech claims, agreeing that the case involves "novel issues of social media."[145]

During his free speech argument, Judge Thacker challenged Sheriff Roberts' counsel, "...If Mr. Carter clicked on Like because he liked something...how is that any different from him perhaps putting a sign in his yard that says, 'I Like Ike'...?"[146] Sheriff Roberts' counsel went on to suggest to the panel that clicking Like is analogous to "opening a door" to see what is behind it, or just to get a discount coupon.[147] This comment describes a common practice on Facebook in the commercial context;[148] however, counsel's response does not seem especially relevant to this specific case which involves a political campaign page. What type of coupon or discount would be associated with a page sponsored by a candidate for sheriff? It has been reported that Carter's colleagues were "shocked" to see his support for Adams on his Facebook page; Carter surely was not just clicking for a coupon or just to see what would happen.[149]

VIII. THE FOURTH CIRCUIT DECISION

Chief Judge Traxler, writing for the majority in *Bland v. Roberts*, analyzed the two claims advanced by the appellants: the first claim alleged a violation of rights of association by Sheriff Roberts, and the second claim alleged a violation of free speech rights.[150]

Citing *Connick* and *Pickering* Chief Judge Traxler reiterated the general proposition that "the rights of public employees to speak as private citizens must be balanced against the interest of the government in ensuring its efficient operation."[151] Relying on *McVey v. Stacy*, the Fourth Circuit laid out the familiar three-prong test for evaluating Carter's claim. The first element separates citizens speaking on matter of public concern from those speaking about personal matters. The second element weighs the relative value of the employee's interest against a

---

[144] Tom Schoenberg, *Facebook Tells Court "Like" Feature Vital to Free Speech* (May 16, 2013, 4:20 PM ET), BLOOMBERG, available at http://www.bloomberg.com/news/2013-05-16/facebook-s-like-faces-free-speech-test-in-u-s-court.html (last visited April 10, 2014).

[145] Oral Argument *supra* note 88 at 15:32.

[146] Id. at 24:00.

[147] Id.

[148] Mr. Rosen asserted that people often click the button just to get a coupon or a discount. This view does find support in the retail consumer environment. According to recent research, this was the #2 most often cited reason (42%) that study participants became a fan of brands on Facebook. The #1 reason was "to support the brand I like" (49%). Syncapse, *Why do Consumers Become Facebook Brand Fans* (June 26, 2013), as cited in Bianca Bosker, *Why your friends go around 'Liking' brands on Facebook*, HUFFINGTON POST, available at http://www.huffingtonpost.com/2013/06/27/brands-facebook-survey_n_3510760.html (last visited April 10, 2014).

[149] Tom Schoenberg, *Facebook's "Like" Free-Speech Test in U.S. Court* (May 16, 2013, 12:00 AM ET), BLOOMBERG, available at, http://www.dailyreportonline.com/id=1202600410106/Facebook's-'Like'-Faces-a-Free-Speech-Test-in-Federal-Appeals-Court?slreturn=20140310181150 (last visited April 10, 2014).

[150] The Sheriff's qualified-immunity defense also was addressed in the Fourth Circuit opinion. See, Bland v Roberts 730 F.3d 368, 391-393 (4th Cir. 2013).

[151] "The Supreme Court in Connick v. Myers, 461 U.S. 138 (1983), and Pickering v. Board of Education, 391 U.S. 563 (1968), has explained how the rights of public employees to speak as private citizens must be balanced against the interest of the government in ensuring its efficient operation." Bland v. Roberts, 730 F.3d 368, 373 (4th Cir. 2013).

government interest in providing effective and efficient services. The third element asks if the termination was substantially based on the employee's speech.[152]

The critical part of the test is the balancing required in the second prong, and for that the Chief Judge relied on the precedent set in *Rankin v. McPherson*: courts must examine "the employee's role and the extent to which the speech impairs the efficiency of the workplace."[153] This approach is consistent with the concept that the dismissal of public employees because of their political affiliations violates the Constitution in most instances.[154] Chief Judge Traxler concluded that three plaintiffs, including Carter, "created genuine factual disputes regarding whether the Sheriff violated their association rights."[155]

Looking to precedent in the Fourth Circuit regarding dismissal based on political affiliation, the court concluded that the status of "policy maker" is a critical distinction. In some instances a deputy sheriff has been counted as a policy-maker, and so under the *Elrod-Branti* line of Supreme Court precedents, these deputies may be fired for the sole reason of their political affiliation (citing *Jenkins v. Medford*).[156] However in another precedent in the Fourth Circuit, *Knight v. Vernon*, a jailer was found not to rise to a policy-maker level of importance; thereby increasing the jailer's First Amendment protection. The law protected Knight from termination for political reasons.[157] Chief Judge Traxler examined not simply the title *Deputy Sheriff* in Hampton County, but also the duties assigned, and found that in this instance the plaintiffs had job duties "essentially identical to those of the plaintiff in *Knight v. Vernon*."[158] On that basis, political loyalty was not an "appropriate requirement" for performance as a deputy sheriff. The net result is that the balancing required by the second prong tilts in favor of Deputy Carter. Chief Judge Traxler concluded that Sheriff Roberts was not entitled to summary judgment on the basis that he could terminate Carter and McCoy[159] for being insufficiently loyal to him.[160]

The court also found that Deputy Carter had created a genuine factual dispute regarding the possibility that lack of political allegiance was a key factor in his dismissal. Deputy Carter's claim of infringement of freedom of association remained valid and was remanded to the District Court.[161] Chief Judge Traxler also held that the action of the Like-click is "conduct that qualifies as speech"[162] for First Amendment purposes, contrary to the District Court finding.

In addition to finding that this case involved pure political speech, the Fourth Circuit also found that Deputy Carter also would receive the benefit of the Supreme Court's symbolic speech doctrine. "Aside from the fact that liking the Campaign Page constituted pure speech, it also was

---

[152] 730 F.3d 368, 374 (4th Cir. 2013); citing McVey v Stacy 157 F.3d 271(4th Cir. 1998).

[153] Id. at 374 citing Rankin v. McPherson, 483 U.S. 378, 388-91 (1987).

[154] See summary of the law provided in Rutan v. Republican Party of Illinois 497 U.S. 62 at 69-72 (1990).

[155] 730 F.3d 368, 376 (4th Cir. 2013).

[156] 730 F.3d 368 at 376 citing Elrod v Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), Branti v Finkel 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980) and Jenkins v Medford 119 F.3d 1156 (4th Cir. 1997).

[157] 730 F.3d 368 at 378. See, Knight v. Vernon 214 F3d 544 (4th Cir. 2000).

[158] Id. at 378.

[159] As well as a third plaintiff, Dixon. Id. at 380.

[160] Id. at 380.

[161] Id. at 394.

[162] Id. at 386.

symbolic expression. The distribution of the universally understood 'thumbs up' symbol in association with Adams's campaign page, like the actual text that liking the page produced, conveyed that Carter supported Adams's candidacy."[163] Agreeing with the argument suggested by counsel for Facebook, the Fourth Circuit saw the Like-click as equivalent to a political yard-sign. Applying the *Pickering* test, the court agreed with Deputy Carter that he spoke as a private citizen on a matter of public concern. Turning to a balancing of interests as required by the second prong of *Pickering*, the court concluded "on the record before us, Carter's interest in expressing support for his favored candidate outweighed the Sheriff's interest in providing effective and efficient services to the public. Carter's speech was political speech, which is entitled to the highest level of protection."[164]

This conclusion is bolstered by the court's finding that "nothing in the record in this case indicates that Carter's Facebook support of Adams's campaign did anything in particular to disrupt the office or would have made it more difficult for Carter, the Sheriff, or others to perform their work efficiently."[165]

As far as Deputy Carter's claim goes, the appeals court was convinced that he had created a genuine factual issue: was his dismissal due to protected free speech activity? In such a context the District Court's summary dismissal in favor of the defendant was the wrong outcome.

The court went on to consider the issue of qualified immunity raised by Sheriff Roberts. This issue produced a split decision on the court with the majority upholding Sheriff Roberts' immunity on the basis that the sheriff could have reasonably believed he had the authority to dismiss Carter.[166] This result left Sheriff Roberts protected on some claims, but, as the court noted, qualified immunity does not extend to a reinstatement claim. The case was then remanded to the District Court for a decision on Carter's reinstatement claim.[167]

IX. ANALYSIS

The Fourth Circuit opinion represents a significant step forward regarding the rights of social media users in the context of employment discrimination in the public sector. It is important that the court understood the Like-click to be speech, and/or symbolic speech,

---

[163] Id. at 386.

[164] Id. at 387.

[165] Id. at 388.

[166] Relying on the Eleventh Amendment, Sheriff Roberts argued that a government official can invoke immunity when he or she is sued in their individual capacity. The Fourth Circuit agreed – but on this issue the court was divided, Judge Hollander wrote in dissent that Roberts' immunity claim fails, while the majority (Chief Judge Traxler and Judge Thacker) upheld the claim. Id. at 395. The critical issue in this case was: when Carter was fired in 2009, was his right to free speech and free association regarding the Roberts-Adams election contest clearly established? More precisely, would a reasonable person have known that the right was clearly established? The majority concluded that in 2009 "a reasonable sheriff could have believed he had the right to choose not to reappoint his sworn deputies for political reasons, including speech indicating the deputies' support for the Sheriff's political opponent." Id. at 391. The majority believed that the state of law on political patronage in the Fourth Circuit in 2009 could be summed up in the term "mixed signals" – thus it was reasonable for Sheriff Roberts to think he had the authority to dismiss Carter. Id. The majority concluded that the district court had not erred on this issue and that Sheriff Roberts did enjoy "Eleventh Amendment immunity against those claims to the extent they seek monetary relief against him in his official capacity." Id. at 394.

[167] The other plaintiff with Facebook activity, McCoy, also won a remand on the issue of reinstatement, as did one other plaintiff, Dixon. Id. at 394.

warranting First Amendment protection. While the outcome of the case was not all that the plaintiff had sought, the remand to the district court clearly suggests that dismissal is not a legally protected strategy for public employers regulating the online activity of non-policy maker employees.[168]

The opinion of Chief Judge Traxler identifies symbolic expression as one of the doctrines that protects Carter's Like-click. However that observation appears incidental to the thrust of the opinion. A closer look at the history and mechanics of the symbolic expression doctrine reveals a very close fit between the concerns raised by Deputy Carter and the goal of the doctrine.

The Supreme Court has a long history of affording to expressive conduct (a.k.a. symbolic speech or symbolic expression) a significant degree of First Amendment protection. In *Stromberg v. California*[169], the Court overturned a provision in a California statute that prohibited the display of a red flag as a "sign, symbol or emblem of opposition to organized government." Chief Justice Hughes concluded "The maintenance of the opportunity for free political discussion...is a fundamental principle of our constitutional system. A statute which, upon its face and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." [170] Under *Stromberg* announcing a political conviction was just as valuable constitutionally as the opportunity to make a speech about one's political convictions.

Later cases included First Amendment evaluation of prohibitions against wearing armbands in a public school as a form of anti-war protest (*Tinker v. Des Moines Independent Community School District*[171]), burning the US flag (*Texas v Johnson*[172]), and regulation of political campaign contributions (*Buckley v Valeo*[173] and *Citizens United v Federal Election Commission*[174]). In each of these examples the litigants arguing for speech protection were successful. The history of Supreme Court decisions in this area makes it clear that the symbolic speech doctrine endorses first amendment protection for a wide range of nonverbal communication. There is no reason, at least at first glance, to exclude the use of software to indicate preferences in a virtual public forum (e.g., the Like-click) from the list of behaviors that may benefit from symbolic speech protection.

In this context it is valuable to recall core concepts that underlie the Supreme Court's shift toward supporting symbolic speech litigants. In the seminal flag salute case of 1942, *West Virginia State Bd. Of Educ. v. Barnette*,[175] Justice Jackson considered the constitutional significance of government regulations requiring a flag salute and the recitation of the pledge of allegiance:

---

[168] This is not to say that all online activity is automatically irrelevant to employment decisions. At least in cases where the employee's speech has been shown to have no disruptive effect in the workplace, there is a greater expectation today that the speech will be protected.

[169] 283 U.S. 359 (1931).

[170] Id. at 369.

[171] 393 U.S. 503 (1969).

[172] 491 U.S. 397, (1989).

[173] 424 US 1 (1976).

[174] 558 US 310 (2010).

[175] 319 U.S. 624, 632 (1943).

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short-cut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design…

Justice Jackson understood that a variety of acts that are nominally non-speech are nevertheless communicative in a non-trivial way. Like all the instances cited in prior Supreme Court symbolic speech cases, the use of the Like-click function in Facebook is a "primitive but effective way of communicating ideas" and a "shortcut from mind to mind." The word "Like" was on the icon that Carter clicked, with an image (thumbs up) beside it, and so the communicative intent and impact were clear.

There are instances where the Court recognized that litigants were engaged in symbolic speech, nevertheless the plaintiffs failed to prevail as the government interest effectively outweighed the free speech claim. One example is the *U.S. v O'Brien* case where a protester's claim of a First Amendment right to burn a draft card was held as insufficient to outweigh a significant government interest in the draft mechanism.[176] Another example is nude public dancing; in two instances the Supreme Court has recognized nude dancing as protected expressive conduct, but nevertheless upheld local regulations of strip clubs (*Barnes v. Glen Theatre*,[177] and *Erie v. Pap's A.M.*[178]).

The Supreme Court's approach to symbolic speech coalesced in the four prong test stated in *O'Brien*. Chief Justice Warren's opinion in *O'Brien* remains the central tool in the Supreme Court's analytical framework for symbol speech cases. Though decided in 1968, the Court has adhered to the *O'Brien* framework for at least thirty years.[179]

The *O'Brien* test requires the government to prove four different elements to justify the legality of the government regulation:

> [a] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[180]

Deputy Carter's symbolic-speech claim falls under the *O'Brien* test and the contest becomes one of evaluating the government's effort to prove the four O'Brien elements:

- that the dismissal was within the constitutional power of Roberts,
- that the dismissal furthered an important government interest,
- that the interest in dismissing Carter was unrelated to the suppression of free expression, and

---

[176] 391 U. S. 367 (1968).

[177] 501 U.S. 560 (1991).

[178] City of Erie v. Pap's A.M., 529 US 277 (2000).

[179] Rondi Thorpe, *City of Erie v. Pap's A.M. The First Amendment: Wounded in the War for Freedom of Expression*, 36 GONZ. L. REV. 183, 184 (2000).

[180] 391 U.S. 367, at 377.

- that the incidental restriction on alleged First Amendment freedoms was no greater than was essential to the furtherance of the government interest.[181]

For the purposes of this review, we will take for granted that the sheriff has constitutional power to dismiss employees and so the first prong is met. The second element requires discovery of the government interest in firing these six employees. The Supreme Court has addressed the issue of firing public employees in a number of cases involving free speech claims.[182]

Particularly relevant to the "Like-click" dispute in Deputy Carter's case is *Rankin v. McPherson*,[183] a case where words spoken by an employee of a law enforcement office caused the issue. McPherson made a controversial statement (wishing the President would be assassinated) to a co-worker during the course of her employment as a data entry clerk in a Constable's office. On the basis of that comment, she was fired. The Supreme Court upheld her claim that the dismissal violated her First Amendment rights. The Court emphasized how distant her role was from actual law enforcement. It also evaluated possible state interests that might justify dismissal. The Court asked if the statement "interfered with the efficient functioning of the office"?[184] They also concluded that it did not discredit the office in public. Likewise the statement did not demonstrate a "character trait" that made McPherson "unfit to perform her work."[185] The McPherson court's analysis boiled down to:

> The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal.[186]

In the case of Carter's dismissal there are two distinguishing features. One is that the Like-click was public in a way that McPherson's comment was not. The second is that Carter did serve in a "public contact role"[187] while McPherson did not. Nevertheless both McPherson and Carter were beneath policy making status. In some ways Carter's work as a jailer puts him closer in position to Rankin's back office duties. To satisfy the second prong of the *O'Brien* test, the sheriff has to be able to show an impact on the governmental interest in workplace harmony and efficiency. As noted by the Fourth Circuit, that impact was not shown in this case.[188]

To satisfy the third and fourth elements in *O'Brien* the sheriff would need to argue two things. First, Sheriff Roberts must prove that his interest in dismissing Carter was unrelated to the suppression of free expression. However once the Like-click is understood as symbolic

---

[181] Id.

[182] 391 U.S. at 377.

[183] Pickering v. Board of Education, 391 U.S. 563 (1968), Rankin v McPherson 483 U.S. 378 (1987), and Garcetti v. Ceballos 547 U.S. 410 (2006).

[184] 483 U. S. 378.

[185] 483 U. S. at 389.

[186] Id.

[187] Id.

[188] 730 F.3d 368, 380-384 (4th Cir. 2013).

speech, Sheriff Roberts has no claim to make here. Second he would have to argue that the dismissal was an "incidental restriction" on Carter's First Amendment rights, one that was "essential" to furthering the interest in a harmonious workplace. This line of argument is also a dead end for Sheriff Roberts. Given the extraordinary amount of political work the Sheriff demanded of his employees,[189] it seems the opposite is true; Sheriff Roberts' design for a harmonious workplace was founded on substantial interference with the political speech of his employees. In sum, application of the key tenets of the symbolic speech doctrine leads to the same conclusion the Fourth Circuit reached: free speech doctrine protects Carter in his Like-click activity.

While Carter's partial victory indicates an important advance regarding social-media and employment law, the overall context of this decision is one of doctrinal "mixed signals." The reason for that goes to back to the seminal case of *Pickering v. Board of Education*.[190] *Pickering* has been the subject of numerous analyses since 1968 and continues to haunt public employee speech cases. In 2006 Justice Kennedy writing for the *Garcetti* court summed up the *Pickering* doctrine, listing the elements in the test (speaking as a citizen, topic of public concern, etc.); he then reached this conclusion:

> The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. …A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.[191]

Here is the classic dilemma in public employee free speech cases. A court should consider whether the employer had "adequate justification" – but this term explains little. A court should examine the speech to see if it has "some potential to affect the entity's operations." The choice of the term "potential to affect" gives employers a lot of leeway, and it is worth noting that the Fourth Circuit did not investigate the "potential" impact of Carter's speech. Potential impact is a very unsteady measure for a court to rely on.

Justice Kennedy continued his *Pickering* review with a nod to the inevitable fact that any employment involves limitation on freedom; government employers are no different from private employers in seeking control of the workplace. But important values lie on the employee's side too:

> At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. … So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.[192]

---

[189] Id.

[190] 391 U.S. 563 (1968).

[191] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[192] Id. at 418-419.

Two elements from this analysis stand out: employees might speak out in ways that impede government functions; and, restrictions on speech have to be necessary for efficient and effective operation of the office. In *Bland v. Roberts* there was no effort by Deputy Carter to violate the law, disrupt office functions, or violate office policy. The Fourth Circuit did find that the efficient and effective operation of the sheriff's office had not been shown to have been affected by the Like-click.[193] At the same time the Fourth Circuit did note how the Facebook activity (and other anti-Roberts campaign activities) had been discussed at the office and had been understood to be controversial behavior.[194] The Fourth Circuit might easily have read Carter's behavior in a more critical light. The *Pickering* standards are sufficiently open-ended as to invite more litigation in the vein of *Bland v Roberts*.

X. FUTURE IMPLICATIONS

The Fourth Circuit's decision is controlling law in only five jurisdictions: Maryland, Virginia, West Virginia, North Carolina and South Carolina. However, as this is a case of first impression, closely watched and well-publicized,[195] it is likely to be persuasively cited in others.

For a public employee, the *Bland v. Roberts* decision assures that making a Like-click on a political campaign page in Facebook, or other social media platforms, would be constitutionally protected speech under the First Amendment. For a public employer, the Fourth Circuit's opinion indicates that it may not make an adverse employment action in response to social media speech that is political and does not affect the efficiency of the workplace.

Beyond that, it is difficult to predict the broader implications of this case without reference to specific context. The *Pickering/Connick* test requires a balancing of the interests of the individual v. those of the workplace. The difficulty for the plaintiffs in social media speech cases is that, as Bruce Barry has pointed out in his analysis of public employee free speech cases, court decisions are based on interpretations of vague and shifting standards.[196] Further, for law enforcement plaintiffs, courts are generally sympathetic to employers' interests when the employers are police departments.[197] Courts act on the theory that law-enforcement organizations depend more than most agencies on maintaining order, discipline and close working relationships.[198] The limited victory of Deputy Carter in this case is something of an anomaly.

While, generally speaking, private companies are not bound by the First Amendment, there are related legal issues for employers in this area. For example, the National Labor Relations Board ("NLRB") has, in recent years, ruled on approximately 36 complaints about discipline or firings related to social media.[199] Section 7 of the National Labor Relations Act

---

[193] 730 F.3d 368, 387 (4th Cir. 2013).

[194] Id at 380-383.

[195] After the district court ruling the case was extensively reported on by major new outlets including *The Atlantic*, *BloombergBusinessweek*, *CNET*, *CNN*, *Fortune*, *Fox News*, *National Public Radio*, *NBC News*, *The Los Angeles Times*, *The New York Times*, *The Wall Street Journal* and *The Washington Post.* The case even received coverage in international publications such as *The Guardian*, *The Times*, and others.

[196] BARRY, *supra* note 4 at 92.

[197] Id at 93.

[198] Id.

[199] Robert Sprague and Abigail Fournier, *Online Social Media and the End of the Employment-at-Will Doctrine*, 52 WASHBURN L.J. 557, 560 (2013). See also, Christine Neylon O'Brien, *The Top ten NLRB Case on Facebook Firings and Employer Social Media Policies*, 92 OR L. REV. 337 (2013).

("NLRA"), ensures that employees have "...the right to... to engage in other concerted activities for the purpose of ... mutual aid or protection..."[200] The NLRA applies to all private employers whose interstate commerce activities exceed a minimal level.[201] The NLRB is currently considering whether a Like-click is protected concerted activity under the terms of the NLRA.[202]

Any combination of symbolic speech and public employee speech leads ultimately to the same dilemma: accurately determining the impact of speech on the workplace. As that determination is open to subjectivity and error, the courts should recognize online activities such as the Like-click as speech in the same manner as they once recognized Tinker's armband as speech. In this respect the Fourth Circuit decision is an important step forward. Further, the courts should put the burden on employers to demonstrate clearly disruptive impact on the workplace before considering any regulation that restricts employee speech.

Ultimately, *Bland v. Roberts* is about the difficulty in prioritizing free speech in the management context. Placing the burden on the employer to prove that speech is disruptive to the efficient functioning of the workplace is nevertheless consistent with fundamental principles underlying the purpose of the First Amendment. As Thomas Emerson points out in his treatise on freedom of expression, "The right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically-organized society."[203]

One of the core values of the First Amendment is the protection of political speech; it follows that there is a burden on the courts to accord political speech such a high value that employers (public or private) will be dissuaded from punishing it. Likewise courts must be cognizant of the evolving forms (symbolic, virtual etc.) that political speech can take in the social media age; this is a burden the courts must bear, whether they like it or not.

---

[200] National Labor Relations Act, Pub. L. No. 74-198, ch. 372, § 7, 49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 157 (2006)).

[201] See, 29 U.S.C. § 152(2) and http://www.nlrb.gov/rights-we-protect/jurisdictional-standards

[202] Three D, LLC d/b/a Triple Play Sports Bar and Grille, Case 34-CA-12915, (N.L.R.B Div. of Judges, January 3, 2012), available at http://www.nlrb.gov/case/34-CA-012915 (last visited April 10, 2014). A recent decision by the U.S. Court of Appeals for the District of Columbia Circuit has questioned the validity of all 2012 NLRB decisions. The D.C. Circuit court held that the NLRB Board lacked a quorum because President Obama's January 4, 2012 appointments to the Board were unconstitutional. See, Noel Canning v. NLRB, 705 F.3d 490, 493 (D.C. Cir. 2013). This case was appealed to the U.S. Supreme Court where oral argument was heard on January 13, 2014. See, National Labor Relations Board v. Noel Canning, (No. 12-1281), available at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1281.htm (last visited April 10, 2014).

[203] Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 883 (1963).