

Facebook Friends and Twitter Tirades: Managing Social Media at Work

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Employers & Lawyers. Working Together

Agenda

- Hiring
- Brand Protection
- Harassment
- Unfair Competition
- Evidence of Discriminatory Intent

Risks In Using Social Media in the Hiring Process

■ Invasion of Privacy

- Does the applicant have a “reasonable expectation of privacy?”
- **Key Question: Is the applicant’s profile accessible to the public at large or only through friends?**



Problems Arise When Employers
Deceptively Access Applicant’s Social Media

Other Risks In Using Social Media In The Hiring Process

- Discrimination
 - Profile provides information you may not want imputed to your employment decision, e.g., race, pregnancy status, age, disability, religion, sexual orientation, genetics, etc.
 - Allows applicant to argue that employer relied on improper characteristic
- ***Discrimination Avoidance Tip:*** Don't let hiring committee members view applicant's social media. Use a designated employee or third-party.
 - ***Only look for specific things to report to hiring committee, e.g.:***
 - Inappropriate photos or ties to a competitor

Limitations On Access

- Legal Claims:
 - Invasion of Privacy
 - Federal and State Wiretapping laws
 - Electronic Communications Privacy Act of 1986
 - Stored Electronic Communications Act
- Exceptions:
 - System provider
 - Prior consent



Limitations On Access

- Unauthorized Access
 - *Pietrylo v. Hillstone Restaurant*, 2009 WL 3128420 (D. N.J. 2009)
 - Managers violated SECA by knowingly accessing private Facebook page without authorization.



State Privacy Laws

- More than 20 states prohibit employers from requiring employees to provide social media usernames or passwords
- Some states also prohibit employers from requiring employees to accept supervisors or co-workers as “friends” or “followers”

Brand Issues: Negative Employee Posts

- “Demoralizing over worked under paid and under appreciated.” (Glass Door, April 3, 2014 – anonymous risk analyst; company name redacted)
- “Ehhh. much time must be spent on CYA with colleagues.” (Glass Door, March 18, 2014 – anonymous ex-employee; company name redacted)

NLRA Section 7: Protected Concerted Activity

- Collective (2+ employees) or intended to induce or initiate group action AND
- Concern terms or conditions of employment

What Is Protected?

- Complaints concerning the company's sales event (over the quality of the cookies and beverages)
- Angry employee (transferred to a lesser position) who posts, using expletives, that they are “done being a good employee,” with “friends”/co-workers saying they are “right behind” the
- Postings about supervisors (attitude or style) or who got a promotion are protected/concerted activity

What Is Not Protected?

- Comments made solely by and on behalf of the speaker
- Actions or comments that interfere with employer's business, employee's own work, or that of other workers
- Employee attacks the employer's product, or complaints are "egregious," then it is no longer "protected"
- Employee generally posts using expletives and company's name, followed by posts that "the company does not appreciate its employees" if the other employees do not engage in dialog or support (in the form of group action) as a result
- Complaints about a co-worker that are only tangentially related to the charging party's own working conditions are not protected
- Rants on Facebook about co-workers hating the employee making the posts is not protected

Lawful Or Unlawful?

- Manager scolds employees in front of guests in a “raised, harsh tone”
- Upset employee goes outside and uses cell phone to post message on Facebook:

***“Bob is such a NASTY MOTHER F--KER don’t know how to talk to people!!!!!!
F--k his mother and his entire f--king family!!!! What a LOSER!!!! Vote Yes
for the UNION!!!!!!”***

Lawful Or Unlawful?

UNLAWFUL

- In *Pier Sixty, LLC*, 362 NLRB No. 59 (March 31, 2015), Board held 2-1 that employee's "impulsive reaction" to manager's conduct was protected concerted activity; discharge was unlawful
- Board cited to evidence that company tolerated similar foul language

Lawful Or Unlawful?

- Car Salesman
- Complains to Boss he doesn't trust commissions are calculated correctly.
- Boss tells Employee to stop complaining.
- Employee loses his temper and yells at his Boss that he is:
 1. a “fucking mother fucker,”
 2. a “fucking crook,”
 3. an “asshole”,
 4. “stupid” and that “nobody likes him.”
- Employee then stands up shoves chair aside, and tells Boss if he fired him, his Boss would will “regret it.”
- Employee is fired.

Lawful Or Unlawful? (Cont.)

UNLAWFUL!

- Board concluded employee did not lose protection of the Act because his conduct was not “menacing,” “physically aggressive,” or “belligerent.”
- *Plaza Auto Ctr., Inc.*, 360 NLRB 972 (May 28, 2014)

California and Colorado

- State laws that apply to any off-duty lawful conduct

Harassment on Social Media

- Employers are not immune just because harassment occurs outside the office
 - **EEOC:** Social media harassment can contribute to a hostile work environment finding
- Potential grounds for liability
 - Posts from an employer's device (i.e., work phone, laptop)
 - Posts during work hours
 - Employer knowledge of harassing posts and failure to remedy

A Couple of Cases...

■ *Amira-Jabbar v. Travel Services Inc.*

- Employee posts photo of company outing on Facebook
- Co-worker posts racially derogatory comment
- Court: harassment sufficiently work-related to factor into “totality of circumstances” analysis for a hostile work environment claim

■ *Blakely v. Continental Airlines*

- Male pilots posted “derogatory and insulting” gender-based remarks about plaintiff on company’s online bulletin board, “Continental Forum”
- Plaintiff’s defamation claim against company was dismissed
- NJ Court: where employer benefitted from maintenance of online board, it had duty to remedy discrimination once it obtained knowledge of it

A Couple of Cases...

#MeToo



Alyssa Milano ✓
@Alyssa_Milano

Follow



If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

1:21 PM - 15 Oct 2017

24,794 Retweets 53,456 Likes

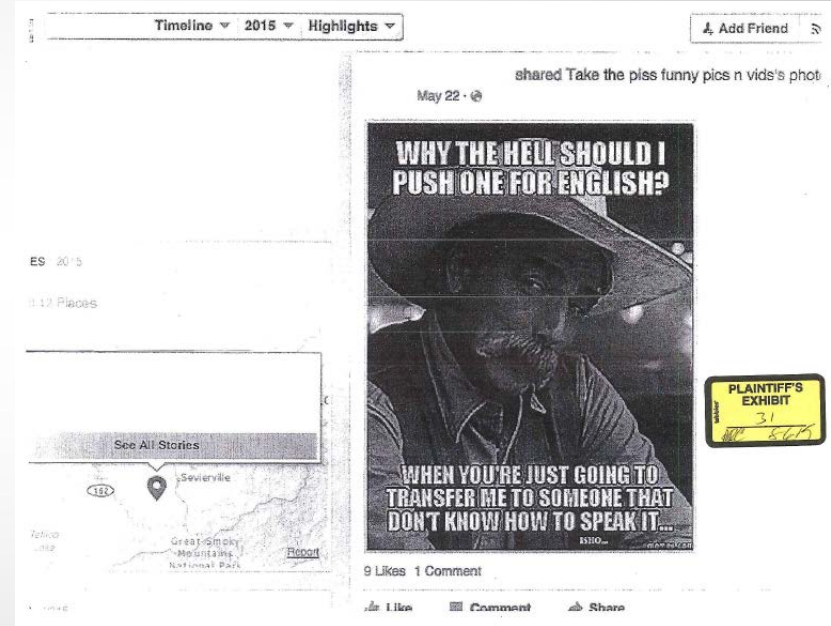
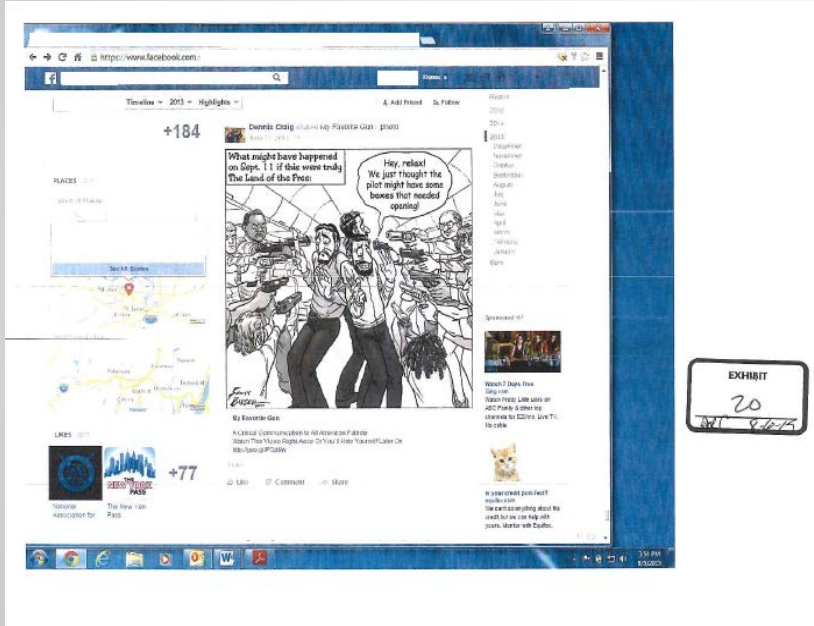


68K 25K 53K

Unfair Competition

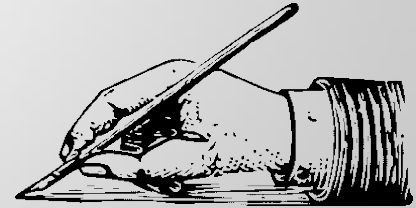
- *Pre-Paid Legal Servs., Inc. v. Cahill and Invidia, LLC v. DiFonzo*
 - posts on public Facebook page touting benefits of new employer's products and professional satisfaction with new employer not violate non-solicit even though customers were "friends"
- *Mobile Mini, Inc. v. Vevea*
 - posts on a social media website regarding employee's new job likely violated her non-solicitation agreement with her previous employer where her social media network included at least one of her former employer's customers

Evidence of Discriminatory Intent



Solutions: Well Drafted Policies

- The more general the rule is written the more likely it will be found to be unlawfully overbroad.
- When drafting the rule, focus on the employer's legitimate interests and make that statement clear.
- Give lawful examples of what is prohibited.
- Use disclaimers—start with a general disclaimer regarding NLRA rights (understanding that may not be enough) and then use a specific disclaimer to adequately capture the type of lawful activity exempted from the rule.



Terms To Avoid In Policy Prohibitions

- ✓ Disparage/criticize/complain
- ✓ Prohibitions on negativity
- ✓ Prohibitions on inappropriate discussions, being “rude” or “discourteous”
- ✓ Critical of company or management vs. product disparagement
- ✓ Prohibitions on profanity (some impulsive behavior must be tolerated)
- ✓ Requirements to follow chain of command
- ✓ Prohibition on identifying self as company employee
- ✓ Rules prohibiting “insubordinate conduct”
- ✓ Policy that prohibits talking about the company, from posting anything they would not want their manager to see, or posting anything “inappropriate or sensitive”

Other Policy and Practice Changes

- Lower threshold to trigger investigation (*i.e.*, social media)
- Create internal social media platforms

Use of Employer Agreements

- Employers benefit from having signed agreements that require employees to turn over laptops or other electronic devices for inspection and imaging at termination or upon request.
- Such agreements should include an employee's personal electronic devices if used for work.

Assert Violations of Website's “Terms of Use”

- Simply by using a website, users agree to the terms and conditions set forth in the site's “Terms of Use.”
- The “Terms of Use” prohibit individuals from using the website to commit unlawful acts.

No Unlawful Acts [Sample provision]:

At all times, you agree to use the [].com site in accordance with these Terms of Use and in accordance with all federal, state, and local laws, ordinances, and regulations.

Use of Website's Complaint Procedure

- When posts are defamatory, discriminatory, threatening, abusive, or harassing, check the site's Terms of Use. If the post violates the Terms of Use, complain to the website. Request to have the post removed.
- When posts improperly use trademarks or disclose employee medical conditions or other HIPAA-protected information without consent, check the Terms of Use to ensure this is prohibited. If so, complain and ask that the post be removed.