

SOCIAL MEDIA: THE GOOD, THE BAD AND THE UGLY



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Labor-Management Initiative Conference
January 25, 2013
Phoenix, Arizona

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Facebook and Twitter

- **Facebook**: “Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.” “Giving people the power to share and make the world more open and connected.”

www.facebook.com

- **Twitter**: Twitter is a real-time information network that connects you to the latest information about what you find interesting. Simply find the public streams you find most compelling and follow the conversations.

www.twitter.com

Statistics

- 1 Billion active Facebook users (Oct. 2012)
- 4,331 Facebook employees
- On Average, 584 million daily active FB users (Sept. 2012)

www.facebook.com

- Twitter has approximately 500 Million registered profiles
- Twitter averages 11 new accounts.....per second

www.mediabistro.com



TWITTER 2012

The Finest Statistics on the King of Microblogging Services



over 465 million ACCOUNTS

175 million TWEETS A DAY



A BRIEF HISTORY OF TWITTER



TWITTER'S FOUNDERS



TWITTER UNDER FIRE

FEBRUARY 9, 2012
Security breaches forced users Twitter for accounts that were victims of public opinion from and individuals because they "directly harm the life, safety, and property of people in general".

FEBRUARY 16, 2012
Twitter admits to erasing users' address books from smartphones and storing the information on its servers for as long as 18 months.

WHAT MAKES YOU RETWEET?



HOW PEOPLE USE IT

HOW DO YOU ACCESS IT?



HOW DO YOU DECIDE WHO TO FOLLOW?



WATCHING TWITTER GROW

\$259 million
Twitter's projected Advertising Revenue in 2012

11 Twitter accounts created every second

\$540 million
Twitter's projected Advertising Revenue by 2014

1 Million Accounts
currently added to Twitter every day

Statistics

- Social Media accounts for approx. 25% of all time spent online
- Facebook accounts for nearly 10% of all website traffic in the U.S.
 - Source: *Experian.com (2012)*

THE POWER OF SOCIAL MEDIA

News of Osama Bin Laden's killing broke on Twitter and Facebook before it did on **ANY** major media news outlet!!!





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Statistics that should SCARE Employees

- By 2015, 60% of employers will monitor social media pages. *www.findlaw.com*
- 44% of employers use social networking sites to research job candidates
 - “Use of drugs or drinking and posting of photographs deemed ‘inappropriate’ or ‘provocative’ were identified as the most popular reasons why employers eliminated a candidate after viewing their social networking profile.”
www.pcworld.com
- 39% of employers have looked up profiles of current employees on social networking sites
- **It should be no surprise that management researches employees’ online profiles**

Monitoring Software

- Social Sentry: Software sold to employers that will automatically monitor employees' social networking accounts
- Spytech
- SpectorPro
- SniperSpy
- XPCSpyPro
- ActivTrak – FREE!!!

- ⦿ So you get fired because of a Facebook post...what to do?
- ⦿ Post about it onFacebook, of course
- ⦿ “Fired by Facebook” is a Facebook page where those who have been fired because of postings made on Facebook can tell their stories!!!



fired

Always Be Cautious!!!!

- Potential future employers will screen your page during the hiring process, find out what happened with former employers, and know that you badmouth prior employers!!!

A Full Facebook Profile

- Educational History
- Employment History
- Marital Status*
- Religious views*
- Political views*
- Family members
- Birthday
- Current Location
- Likes/Dislikes
- Online and offline contact information/residence
- Uploaded photos and videos
- Wall posts
- Status updates
- “Friends” lists
- Email and real-time communication

* Employers cannot ask for this information or consider in employment decisions

Employees - Don't Beat Yourself!

- Typically, an interviewer/potential employer can't ask about: religion, marital status, sexual orientation, age, political affiliation/views, union membership, etc.
- **BUT**....if the info is on your Facebook page or you put it on Twitter they don't have to ask and can make hiring decisions based upon impermissible criteria!

Regulation and Monitoring of Off-Duty Conduct

- Off-duty conduct that in any way reflects negatively on the Department & has the potential to impair Department efficiency can form the basis of discipline.
 - Public Safety Members can never shed their roles as employees, even off duty, because “part of their job is to safeguard the public’s opinion of them” *Locurto v. Giuliani*, 447 F.3d 159 (2d Circuit 2006).

The Legal Ramifications of Social Networking

- **June 2006:** Marion County, FL Sheriff's deputy fired for "conduct unbecoming" – posted picture of self on MySpace in uniform with comments about women's breasts, binge drinking and nude swimming
- **2006:** Three (3) Palm Beach Sheriff's Deputies and their wives engaged in group sex and made videos. Videos sold on Internet. Deputies were terminated. Termination upheld on appeal. *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342 (11th Cir. 2006)

The Legal Ramifications of Social Networking

- Police officer in New Mexico lists his occupation on Facebook as “human waste disposal”
 - Result: Placed on desk duty + new department-wide policy implemented to govern use of social networking
- Police officer fired after filming self stripping off police uniform and masturbating. Sold video on eBay.
 - Result: Termination --- Upheld by U.S. Supreme Court , 9-0. San Diego v. Roe, 543 U.S. 77 (2004).
 - *“Officer's activities, though outside the workplace and purportedly about subjects not related to his employment, had injurious effect on mission of his employer and were not entitled to First Amendment protection”*.
 - Government employers CAN restrict their employees' speech in ways that would be unconstitutional if applied to general public. *Exception: speaking as a citizen on matters of public concern.

The Legal Ramifications of Social Networking

Even if you think you're helping, others may see it differently!

- Shannon Hills, AR police officer fired after posting the following on Facebook:
"If you live in Alexander and you're drinking and driving, get yourself a designated driver. If you don't and you're out on the streets, you'll wish you had. Just a word to the wise."
- Chief said post hampered the DUI checkpoint operation and the officer 'caused the termination on himself'.

The Legal Ramifications of Social Networking

- Indiana State Police Trooper posted drunken photos of himself on Facebook with a .357 Magnum pointed at his head by officer from different agency.
- Trooper also posted comment about homeless man ruffed up by police in California: “These people should have died when they were young, anyway, I’m just doing them a favor”
 - Result: Resignation (trooper)
 - Result: 5 day susp. w/o pay



The Legal Ramifications of Social Networking

- 2011: Bourne, MA firefighter posted Facebook comments utilizing foul language in tirade criticizing work assignment.
 - **“Stuck at (expletive) mandatory, on top of that I got to put up with (expletives) who love this Town and are involved in this (expletive) politically motivated paraid(sic)”**
 - **Result: Terminated. Basis:** “flagrant misconduct, ridiculed and disparaged fellow members of the department” “Used profane, obscene, indecent, or disrespectful language that was even offensive to the gay community.”



<http://www2.turnto10.com/news/2011/feb/25/cape-firefighter-fired-facebook-postings-ar-406513/>

The Legal Ramifications of Social Networking

- Moncks Corner, S.C. – Police officer relieved of duty after posting photo on Facebook of women in bikinis on hood of patrol car participating in fundraiser, “Tits n Tats”, featuring employees of Diamonds North Night Club.

The Legal Ramifications of Social Networking

Bonus: One of these women is a Sheriff's Deputy!



But.....

- ⦿ What about my 1st Amendment Rights?!?!
- ⦿ I was off duty!!!!
- ⦿ Don't I have constitutionally protected privacy interests?!?!
- ⦿ This is my private life – they can't do this to me!!!!
- ⦿ I didn't say anything that wasn't true!!!!

The Limitations of Constitutional and Legal Protections

- There are two common constitutional protections often raised by public employees seeking remedies for discipline based upon social media: 1) 1st Amendment protected speech and 2) Protected Privacy Interest(s)
- In either context the constitutional protections are substantially balanced between the employees rights vs. the right of the public employer to effectively direct and maintain its workforce.
- **When it comes to social media and technology both legislators and the courts have been slow to adopt a clear course of action.**

The Limitations of Constitutional and Legal Protections

- Courts are generally holding that off-duty conduct that negatively reflects upon the Department or has even the potential to disrupt the Department can form the basis for discipline.
- “Police officers and firefighters alike are quintessentially public servants. As such, part of their job is to safeguard the public's opinion of them, particularly with regard to a community's view of the respect that police officers and firefighters accord the members of that community.” *Locurto v. Giuliani*.

Existing 1st Amendment Protections

- *Garcetti v. Ceballos*, 547 U.S. 410 (2006) - district attorney claimed was passed up for promotions after voicing concern verbally and in writing that a fraudulent search warrant was being relied upon by prosecution.
- SCOTUS held: “When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for 1st Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *547 U.S. at 421*

The 1st Amendment and Public Employee Speech

Union Representatives

- Firefighter speaking in capacity as union rep is protected – union status equates to citizenship. *Davison v. City of Minneapolis*, 490 F.3d 648 (8th Cir. 2007).
- Police Officer making statement in capacity as union representative speaks as citizen, not employee. *Shefcik v. Vill. of Calumet Park*, 532 F.Supp.2d 965 (N.D. Ill. 2007). See also, *Nagle v. Vill of Calumet Park*, 554 F.3d 1106 (7th Cir. 2009) – **speech protected but was held not a matter of public concern.**

The 1st Amendment and Public Employee Speech

Love v. Rehfus, 946 N.E.2d 1 (Ind. 2011)

- Firefighter terminated for sending a political email criticizing the fire chief, while off-duty and from his home computer.
- Ind. Supreme Court held that the firefighter was speaking as a citizen on a matter of public concern plus strong 1st Amendment character of the speech outweighed any disruption of governmental interest.
- The email was viewed by the Court as 100% political speech, without parsing the statements or ideas presented in the email.

The 1st Amendment and Public Employee Speech

- Often courts will separate parts of online speech to determine which elements of the speech are protected and which are not.
- If the employer relies on both protected and unprotected speech for adverse employment action, courts will often uphold the employer's action based on the reliance of the unprotected speech alone.
- This common approach provides greater deference to the employer employees rarely succeed when courts take this approach.

The 1st Amendment and Public Employee Speech

Monz v. Rocky Point Fire Dist., 853 F.Supp.2d 277 (E.D. N.Y. 2012)

- Volunteer firefighter engaged in public lobbying for stricter alcohol regulations and made internal complaints about other firefighter's defacing of political posters. Management refused to reinstate the firefighter after he went on voluntary leave.
- District court held that the lobbying was protected speech, but that the internal complaints were not. The presence of the unprotected speech justified the refusal to reinstate.

The 1st Amendment and Public Employee Speech

Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007)

- Corrections officer was terminated after making comments on union website comparing the Sheriff to Hitler, those following the Sheriff's instructions to Hitler's generals, officers to the Jews being marched to death chambers, and further, referencing the plot to assassinate Hitler in regard to the Sheriff.
- Court of Appeals held that non-threatening elements of the post were protected political speech, but that the threatening elements were not protected. The unprotected speech with prior bad conduct was sufficient to justify termination.

Social Media and the Constitutional Right to Privacy

- Supreme Court has recognized the potential for protected privacy interests in even text messages sent on employer owned devices. *City of Ontario, Cal. V. Quon*, 130 S.Ct. 2619 (U.S. 2010).
- SCOTUS declined to recognize a protected property interest in electronic messages due to the evolving nature of technology
- Importantly, SCOTUS found that **even** if a protected privacy interest exists, that public employers are entitled to access such information for reasonable work-related purposes.

Social Media and the Constitutional Right to Privacy

- There is much ground to be covered regarding social media and privacy rights
- SCOTUS' holding in *City of Ontario* leaves the door open to evolving protections of public employees' and general citizens' privacy rights
- This open ended question can be problematic for both employers and employees.

Adopting Effective and Legal Social Media Policies

- A good social media policy can safely establish boundaries and save municipalities and fire departments a fortune in legal fees.
- The best social media policies are clear, concise, and are narrowly tailored.
- Policies must strike a definitive balance between employer and employee rights.
- Forbes suggests restricting media policies to cover four basic criteria “**Don’t Lie, Don’t Cheat, Don’t Steal, and Don’t Reveal**”

Adopting Effective and Legal Social Media Policies

- When in doubt employers should be cautious. Overly inclusive, unclear, or overly broad policies are ripe for attack in litigation.
- Illegal or unconstitutional social media policies will invite litigation at great expense to both labor and management.
 - *The NLRB has established model social media policies. Note: NLRB not applicable to public employees*

Adopting Effective and Legal Social Media Policies

- Baltimore firefighters terminated after they joked anonymously in internet forums about refusing to respond to runs at a restaurant that refused to provide a firefighter discount.
- The fire chief responded by instituting an expansive social media policy that included:
 - A bar from commenting on matters of public concern while on duty
 - Possible discipline for anything written online that is deemed to violate conduct rules, irrespective of off duty status or anonymity
 - Fire units can no longer maintain individual unit websites

Adopting Effective and Legal Social Media Policies

- Philadelphia adopted a very broad policy denying both on and off duty firefighters the ability to:
 - Identify themselves as members of the fire department without express permission from the Commissioner.
 - Post any information or pictures which “may bring the member’s or the department’s reputation into question”.
 - Post racist or sexist comments, inaccurate information, personal attacks, or rumors.
- Both the Baltimore and Philadelphia policies pose restrictions that may be unconstitutional.

Employers Requesting Social Media Passwords

- Employers are now requesting social media or personal email passwords of prospective employees as a condition of employment.
- In early 2012, U.S. senators requested that the Attorney General begin investigating the legality of such practices.
- There are currently no cases or legislation specifically addressing this coercive, but voluntary provision of personal information to prospective employers.

Employers Requesting Social Media Passwords

- Current constitutional privacy law and other federal laws may apply to such requests.
- The emerging privacy interest recognized in *City of Ontario* may pave the way for prohibiting such employer conduct as a violation of constitutionally protected privacy interests.

Social Networking TIPS

(Employees)

- Don't be on Facebook, Twitter, MySpace, etc.
- But if you must.....
 - Activate all privacy settings
 - "Friend" only those people you know and trust
 - Avoid posting pictures
 - Monitor your page
 - Don't post anything you wouldn't want your mother to see
 - Complain about employment problems to your Union President!!
 - Don't use social networking sites after drinking!
 - **USE YOUR BRAIN!!!!**

Social Networking TIPS (Employers)

- Adopt clear, concise, and narrowly tailored social media policies.
- When adopting social media policies, rely on well drafted or legally tested policies or preferably seek competent legal counsel.
- Impose social media policies in an equitable fashion; disparate treatment of similarly situated employees is not permissible.
- Avoid over reaching or surveilling off duty employee conduct that is not work related. Reliance on this type of speech is likely to expose both you and your department to liability.
- Don't request prospective or current employee social media or private email passwords.

Employees REMEMBER.....

You are responsible for your online activity! Once you post something on the Internet or otherwise transmit information electronically it is effectively there FOREVER!

Employers

REMEMBER.....

- ⦿ Implement clear, concise, reasonable and fair policies
- ⦿ Don't overreact when an employee uses social media to express an opinion ... take a step back to process the information. But act decisively if the circumstances call for it.

Thank You

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