

THE COLLISION OF MYSPACE, YOUR SPACE AND OUR SPACE

Presented by

Stephen J. Roppolo
Fisher & Phillips LLP
Houston, TX
713-292-0150



Presenter



- Steve Roppolo
- Regional Managing Partner, Houston Office, Fisher & Phillips
- 22 years representing employers in hospitality industry
- Employment Litigation, Labor Negotiations/Arbitrations

Explosion of Social Networking

- Myspace:
 - From 2005-08, world's most used social networking site
 - Down to 30 million users
 - Currently owned by Justin Timberlake and online media company



Explosion of Social Networking

- Facebook:
 - Largest social networking site
 - More than 800 million active users; more than half log in every day
 - 2011 revenues projected to come in at \$4.27 Billion—more than double 2010



Explosion of Social Networking

- LinkedIn:
 - “Professional” site
 - More than 135 million users; adding two members every second
 - Revenue through first 3Q of 2011: \$354 million
 - 71% of users over age 35



Explosion of Social Networking

- Twitter:
 - More than 200 million user accounts
 - As of September, 2011, 230 million tweets per day, an increase of 110% since January 1, 2011



Interesting Statistics Relating To Employment

- 42% of companies say layoffs have increased data “leakage”
 - 34% of companies were harmed by sensitive info release
 - 31% of companies terminated someone for e-mail violations
 - 24% of companies say e-mail subpoenaed
 - 8% terminated someone for use of social networking sites
-
- Proofpoint’s 2009 Study on Outbound e-mail and Data Loss Prevention

Employment Screening Tool?

- According to Career Builder.com survey, nearly half (45%) of US employers report using social networking sites to dig up information about job candidates



Conflict in the Workplace

- 60% of employees believe their online activities are none of their employer's business
- 50% of employers believe they have a right to monitor social networking sites



Conflict in the Workplace

- 75% of employees say their employer doesn't have a social networking policy
- But, 50% of employers report they have a social networking policy



A New Vocabulary

- Sexting
- Textual harassment
- Driving while intoxicated
- Name squatting

A Few Horror Stories:

**How Employees Caused Themselves
Problems At Work**

A “Family Emergency”

Kevin called in and reported that he would miss work due to a ‘family emergency.’ A few days later, he posts his picture from a Halloween party.



<http://www.switched.com/2007/11/13/lying-male-intern-busted-in-a-dress-on-facebook>

“Drunken Pirate” Teacher

Woman who lost teaching degree over MySpace photo sues university

A woman denied a teaching degree on the eve of graduation because of a MySpace photo has sued the university. Millersville University instead granted...

The Associated Press

MILLERSVILLE, Pa. — A woman denied a teaching degree on the eve of graduation because of a MySpace photo has sued the university.

Millersville University instead granted Stacy Snyder a degree in English last year after learning of her Web-published picture, which bore the caption “Drunken Pirate.”

“I dreamed about being a teacher for a long time,” said Snyder, 27, who now works as a nanny.

The photo, taken at a 2005 Halloween party, shows Snyder wearing a pirate hat while drinking from a plastic “Mr. Goodbar” cup. It was posted on her own MySpace site.

Although Snyder apologized, she learned the day before graduation that she would not be awarded an education degree or teaching certificate.

Jane S. Bray, dean of the School of Education, accused Snyder of promoting underage drinking, the suit states.

The federal lawsuit seeks at least \$75,000 in damages. Millersville spokeswoman Janet Kacsos referred questions to a state System of Higher Education spokesman, who declined comment.

Copyright © 2007 The Seattle Times Company

http://seattletimes.nwsourc.com/html/nationworld/2003685221_webmyspacesuit28.html



Runnin' Down the Boss

Philadelphia Eagles staffer Dan was fired after remarking on his Facebook page about the firing of star safety Brian Dawkins:

“Dan is [expletive] devastated about Dawkins signing with Denver. . . Dam Eagles R Retarted!!”



<http://pacdudegames.com/blog/dan-leone-the-philadelphia-eagles-and-the-art-of-tact/>

Pittsburgh Pirate Mascot “Outta’ Here!”

- Andrew, one of 18 men who take turns posing as pierogies in a race after the fifth inning of every home game, was dismissed by the team because he posted disparaging remarks about the Pirates on his Facebook page.



How to Lose Your Job Before Your First Day

Home > geek > How to Tweet Your Way Out of a Job

How to Tweet Your Way Out of a Job

March 17, 2009 Hutch Carpenter [Go to comments](#) [Leave a comment](#)

★★★★★ 4 Votes

I saw this exchange on Twitter, which is a painful lesson in how NOT to use Twitter in this tough economy.

A lucky job applicant tweeted the following:

“ Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.

This tweet caught the attention of Tim Levad, a channel partner advocate for Cisco. To which he responded:

“ Who is the hiring manager. I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the web.

Ouch! The person who dissed the Cisco offer quickly took their Twitter account private. But Twitter search retained the record.

Remember a couple months ago when the PR guy's tweet about Memphis [came back to bite him](#)? This is another example of the need to be careful with what you post on Twitter, and social media in general.



Photo credit: Victoria-Ann

<http://bhc3.wordpress.com/2009/03/17/how-to-tweet-your-way-out-of-a-job/>

©Copyright 2011
All rights Reserved

Employment Screening Tool?

- Some employers now search Google as part of their regular background checks for applicants
- Looking for red flags
 - Attitudes/behaviors that do not mesh well with employer's core values, misbehavior, or pose potential liability for employer

Employment Screening Tool?



[View Photos of Me \(65\)](#)

[Edit My Profile](#)

Karen 'Luchka' Gieselman

[Wall](#)

[Info](#)

[Photos](#)



 [Edit Information](#)

Basic Information

Networks:	UNC Alum '06
Sex:	Female
Birthday:	April 27
Hometown:	Columbia, SC
Relationship Status:	Married
Political Views:	Tree-Loving Conservative
Religious Views:	Christian

Other Forms of Discrimination

Education and Work

Grad School: UNC '06
J.D., Law

College: Eckerd College '03
Political Science, International Relations

High School: Eastview '00

Age

Relationship Status: Single

Interested In: Men

Looking For: Dating
A Relationship
Networking

Sexual Orientation

Basic Information

Sex:

Birthday:

Hometown:

Children:

Parents:

Siblings:

Relationship Status:

Familial Responsibility

Employment Screening Tool?

- **Caution – Risk May Outweigh Possible Gain**
 - Savvy user will set privacy settings to restrict access to information
 - Facebook/MySpace profile indicates race, religion, disability, sexual orientation or other protected categories of candidate
 - Important defense for failure to hire claim is actual ignorance of protected characteristic

Avoiding the Pitfalls

- Consider the following options:
 - Search only LinkedIn - site intended for professional networking
 - Displays user's education and experience, may have professional references
 - Caveat: Savvy applicant could manipulate information

Avoiding the Pitfalls

- Consider:
 - Obtaining written consent before searching Internet or social networking sites
 - If search reveals information that played a part in not hiring, keep copy of information and consider giving candidate opportunity to address the information
 - Be consistent - if you check any, check all candidates

The Basics Still Apply. . . .

- EEOC & State Agency Guidelines on Pre-Employment Inquiries
- Fair Credit Reporting Act Limitations
- Beware what you learn
 - If you know it, you probably relied upon it
 - Ignorance can be helpful
- How you get the information matters
 - If you hire an agency to check for you, they're probably your agent
 - Invasion of privacy claims

Avoiding the Pitfalls

- Caution managers on pitfalls of becoming “friends” with employees on social networking sites
 - Don’t reveal anything you wouldn’t say or post in the break room
 - Diligently use privacy controls to manage flow of information
- Could become part of harassment or discrimination claim even though “personal” page

Beware What You Post

- Plaintiff tried to show discriminatory animus through manager's web page
- “What’s wrong with women these days?” & “Chicks seem to have more issues these days than Jet Magazine and keep up more drama than daytime TV and Jerry Springer combined.”
 - *Derrick v. Met. Gov’t. of Nashville & Davidson Co.*
(M.D. Ten. Dec. 17, 2007)

New Ways to Harass?

- Potential claims lurking on social networking websites
 - “Sexting” with a co-worker
 - Getting “poked” by the boss on Facebook
 - Individual discussing medical condition/disability on Facebook
- Sexual harassment complaints filed with EEOC grew 11% in 2007 and experts state that tech-based harassment claims are contributing to the increase

A Few Horror Stories:

**How Employees Caused Their
Employers Other Problems**

Public Relations Nightmare



- Two employees in Conover, NC filmed themselves doing “disgusting” things to food that they claimed was going out to customers and posted it on YouTube. The 2 employees were identified, fired and arrested.



Public Relations Nightmare



- An employee took a bath in the burger chain's sink. Someone filmed it and posted the video to MySpace. Local Health Department authorities were not amused.



Using The Internet Can Be Risky

- State and federal computer crimes laws
- Common law invasion of privacy (or other torts)
- Fair Credit Reporting Act
- Stored Communications Act
- Wiretap Act
- Title VII and other discrimination laws
- GINA
- NLRA

State Privacy-Related Tort Claims

- Key to tort expectation is proof of expectation of privacy
- Establishment of a policy regarding use of company-owned devices is critical



State Privacy-Related Tort Claims

- State laws may require notice of monitoring
- Tort action for violation of privacy rights
 - Intrusion into privacy of another
 - Appropriation of one's name or likeness
 - Wrongful publication of private facts
 - False light publicity



Stored Communications Act

Pietrylo, et al. v. Hillstone Restaurant Group d/b/a Houston's

- Employees set up password-protected user group on MySpace to complain about management. It contained confidential information.
- Employer asked employee with access to give up her log-in and password.
- Management took action against employees based on the blog content.



Stored Communications Act

Pietrylo, et al. v. Hillstone Restaurant Group **d/b/a Houston's**

- The employees sued alleging violations of the Stored Communications Act. In particular, the employees alleged the log-in information had been provided to management under duress
- Jury found in favor of employees

Stored Communications Act

- *Pure Power Bootcamp*
 - Employer logged into Hotmail account departed employee had used during work hours and on work computer
 - Employee left username and password filed on computer
 - Court found violation of SCA



Wiretap Act

- Exceptions
 - Prior consent
 - Business extension
 - Provider interception
- Penalties
 - Felony punishable by fine and/or imprisonment
 - Civil cause of action



NLRA Protects Employees Engaged In “Protected Concerted Activities”

- Discipline may be inappropriate if employees are engaging in protected activity, such as
 - Sharing information about their pay
 - Complaining about employer policies or managers
 - Displaying union-related insignias/logos
 - Expressing support for a union
 - Attempting to organize a union

NLRB's 2009 Stance On Employers' Social Media Policies

- NLRB Advice Memorandum of December 4, 2009:
Sears Holdings
- “Carefully drafted” social media policy does not violate employees’ rights (under the National Labor Relations Act)

NLRB's Current Stance On Employers' Social Media Policies

- *Facebook Case*
 - An employee was fired for:
 - Calling her boss a “scumbag” and
 - Writing “love how the Company allows a 17 year old to be a supervisor”
 - NLRB issued a complaint on October 27,2010

American Medical Response of Connecticut

NLRB's Current Stance On Employers' Social Media Policies

- *Facebook Case*
 - Settled February 7, 2011
 - Employer agreed to:
 - Revise its Internet policy to allow employees to discuss wages, hours and working conditions
 - Not discipline employees for engaging in such discussions
 - Pay victim

American Medical Response of Connecticut (October 27, 2010)

EMPLOYEES

SETTLEMENT AGREEMENT
IAL DIRECTOR OF THE
ENCY OF THE UNITED STATES GOVERNMENT



Required employer to
revise:

- a. Blogging & Internet Posting Policy
- b. Standards of Conduct rules
- c. Solicitation and Distribution Policy

WE WILL revise the following rules that appear in our employee handbook, and advise you in writing of such revision:

"Blogging and Internet Posting Policy", which improperly restricts your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees and others;

"Standards of Conduct" rules, which improperly restrict your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees and others; and

"Solicitation and Distribution Policy", which improperly restricts your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees anywhere on company property during working hours.

WE WILL remove from our records any documents that you signed requiring you to abide by the above-described rules, and notify you in writing that this has been done and that such documents will not be used against you in any way in the future.

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.
(Employer)

DATED: _____ BY: _____
(Representative) (Title)

orce the National Labor Relations Act. It conducts secret-ballot elections to determine whether
y employers and unions. To find out more about your rights under the Act and how to file a
Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

450 Main Street, Suite 410
Hartford, CT 06103
(860) 240-3008

AND MUST NOT BE DEFACED BY ANYONE.

NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING
S COMPLIANCE OFFICER.

©Copyright 2011
All rights Reserved

NLRB's Current Stance On Employers' Social Media Policies

- *Karl Knauz Motors d/b/a Knauz BMW, NLRB Case No. 13-CA-46452*
 - BMW salesman made two posts about two incidents at dealership:
 - Hot dogs at “Ultimate Driving Event”
 - Photos of accident at Land Rover store
 - Employees of dealership commented on both
 - Salesman terminated
 - ALJ: Hot dog comment protected



Board Becoming More Reasonable?

- *Children's National Medical Center*
 - Respiratory therapist fired for updating Facebook on ambulance ride about co-employee “sucking her teeth”
 - NLRB General Counsel: No evidence to establish that she was acting in concert with other employees; merely airing personal complaint

Board Becoming More Reasonable?

- *TAW, Inc.*
 - Accountant fired for refusing to remove FB post suggesting that firm was engaged in fraudulent accounting practices
 - GC: Employee's insistence that post remain even when she knew it was false not protected under the NLRA

Board Becoming More Reasonable?

- *Copiah Bank*
 - Bank teller fired after off-duty FB posts complaining that employees at another branch had “narced” on her
 - GC: Employee did not post comment in furtherance of protected activity for mutual aid and protection; no evidence that she was looking to group action or was speaking on behalf of anyone else

Board Becoming More Reasonable?

- *Intermountain Specialized Abuse Treatment Center*
 - Therapist fired for posting negative comments about staff meeting and had “comments” interaction with co-worker in which each complained about work
 - GC: Original FB posting was individual gripe; no language suggesting she sought to encourage group action, and other co-worker commenting said post was not about trying to change anything at work

Unions Are Using Social Media

The screenshot shows the Facebook interface for the Teamsters union page. At the top, there is a blue navigation bar with the Facebook logo on the left and login fields for Email and Password on the right. Below the navigation bar, a green 'Sign Up' button is visible next to the text 'Teamsters is on Facebook' and 'Sign up for Facebook to connect with Teamsters.' The main content area features the Teamsters logo on the left, which includes a horse head and a wheel, and the word 'TEAMSTERS' in large white letters on a blue background. To the right of the logo, there are navigation tabs for 'Wall', 'Info', 'RSS/Blog', 'Polls', 'Photos', and 'Boxes'. Below these tabs, there are sub-tabs for 'Teamsters + Others', 'Teamsters', and 'Just Others'. The main content area displays two posts from the Teamsters page. The first post is titled 'Teamsters March In Reclaim The Dream Event' and describes a rally and march organized by Rev. Al Mixon, International Vice President and Secretary-Treasurer of Local 507, Cleveland, and Greg Floyd, President of Local 237, New York. The post was published on 30 August 2010 at 5:33 am. The second post is titled 'Employees File Suit Against Coke for Cancelling Their Health Care' and mentions five plaintiffs named in a class action ERISA lawsuit. The post was published on 28 August 2010 at 11:52 am. Both posts include options to 'Read more stories', 'Subscribe to stories from this Page', and 'Visit Fan Page'. There is also a notification that the post was shared via Social RSS and that John Gresk, Tom Marchetti, and 2 others liked it.

Unions Are Using Social Media

The screenshot shows the Twitter profile for TeamsterPower. At the top, there is a blue header with the Twitter logo and a sign-in link. Below this is a promotional banner for Teamsters, encouraging users to follow @TeamsterPower for short, timely messages. A yellow 'Sign Up' button is visible. The profile information for TeamsterPower includes a logo, the name 'TeamsterPower', location 'UT: 42.245335,-83.338185', and bio 'International Brotherhood of Teamsters'. Statistics show 382 following, 801 followers, and 77 listed. The main content area displays three tweets: one about a tentative agreement for 7,600 fleet service workers, one about a Toxic Toys R Us report, and one about Hoffa's leadership. A 'Following' list is visible on the right side of the profile.

twitter Have an account? [Sign in](#)

Get short, timely messages from Teamsters.
Twitter is a rich source of instantly updated information. It's easy to stay updated on an incredibly wide variety of topics. [Join today](#) and [follow @TeamsterPower](#).

[Sign Up](#) Get updates via SMS by texting [follow TeamsterPower](#) to 40404 in the United States. Codes for other countries.

 **TeamsterPower**

Name Teamsters
Location UT: 42.245335,-83.338185
Web [http://http://www...](http://www...)
Bio International Brotherhood of Teamsters

382 following 801 followers 77 listed

Tweets 160

Favorites

Following

Teamsters and Continental reach tentative agreement for 7,600 fleet service workers. Secures wage hikes, job security <http://bit.ly/e2NF4Q>
12:07 PM Nov 29th via web

Toys R Us is selling toxic toys this holiday season. Read the Toxic Toys R Us Report to find out more. [#blackfriday](http://bit.ly/9I5EK0) <http://bit.ly/9I5EK0>
10:47 AM Nov 18th via HootSuite

[#Hoffa](#) joins other [#transportation](#) experts in National Journal to thank Rep. [#Oberstar](#) for his years of leadership. <http://bit.ly/a7h7XD>
12:31 PM Nov 16th via web

[#Teamsters](#) Urge Congress to Stand Up to [#FedEx](#) and Pass [#FAA](#) Reauthorization <http://ow.ly/2Ksp3>
8:05 AM Sep 27th via HootSuite

Internet 100%

Benefits of Social Networking

- Many employers have embraced the growth of net-based activity and the popularity of social networking sites to develop a corporate presence in cyberspace.
- Social networking websites offer employers an opportunity to improve the community presence of the company, launch new marketing campaigns, and improve customer access to information.



Benefits of Social Networking

- Sites such as Facebook and MySpace offer employees opportunities to interact with individuals in the same field, to exchange knowledge and ideas, and network.
- Completely banning or significantly limiting employee use of social networking websites, outside of work, can negatively impact employee morale and be injurious to the business.



Policy on Social Networking Sites

- Remind employees:
 - online sites are in the public domain
 - off-duty actions can result in discharge
 - be respectful
 - use privacy controls
 - productivity counts
- Require compliance with existing policies
- Prohibit defamation and fraud
- Prohibit references to customers
- Ban use of protected logos or trademarks
- Require employees to use disclaimers



Policy on Social Networking Sites

- If you limit use of the network to business purposes only, remind employees of the policy and that the company reserves the right to monitor use of electronic resources, without notice to employees, and employees have no reasonable expectation of privacy in the use of the company's electronic resources.



Other Related Policies

- EEO & No Harassment
- Medical Information
- Electronic Communications
- Confidential Information & Trade Secrets
- Cell Phones
- Use of Blackberries or PDAs

Final Questions?

Presented by:

Stephen J. Roppolo

Phone: (713)292-5601

Email: sroppolo@laborlawyers.com

Session Evaluation



Scan or Visit TheHLC.co