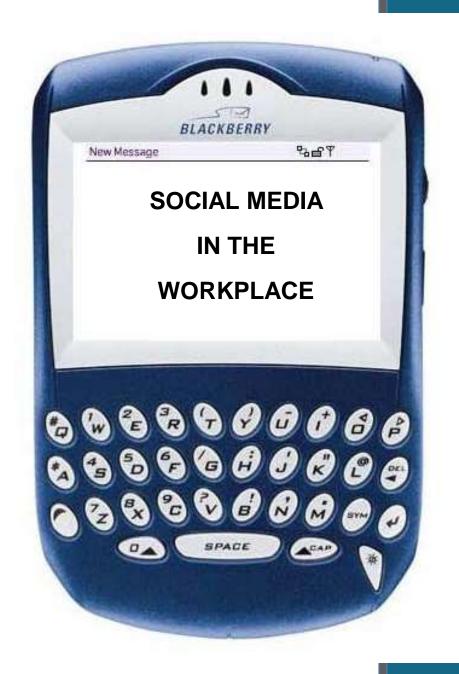


THE COLLISION OF MYSPACE, YOUR SPACE AND OUR SPACE

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

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



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



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

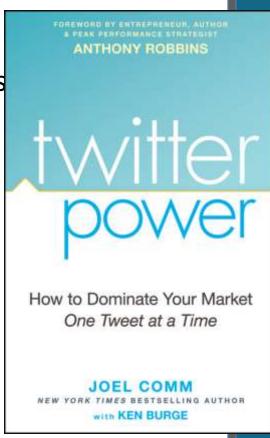


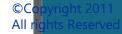


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• Twitter:

- 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 intexticated
- 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 Webpublished 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 Kacskos referred questions to a state System of Higher Education spokesman, who declined comment.

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





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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!!"

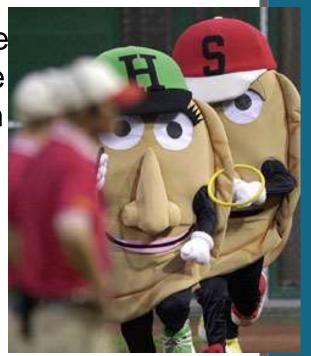


http://pacdudegames.com/blog/dan-leone-the-philadelphia-eagles-and-the-art-of-tact/



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



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

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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

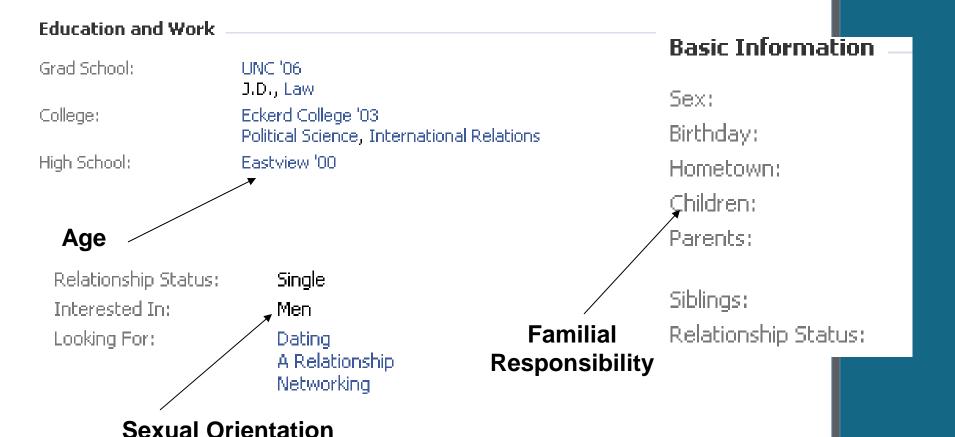
Employment Screening Tool?

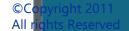






Other Forms of Discrimination





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 <u>any</u>, check <u>all</u> 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 techbased 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.

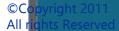


Public Relations Nightman



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

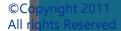
- State and federal computer crimes laws
- Common law invasion of privacy (or other torts)
- Fair Credit Reporting Act
- Stored Communications Act
- Wiretap Act
- Title VII and other discrimination laws
- GINA
- NLRA



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

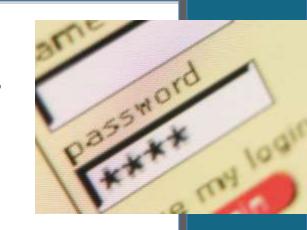
- State laws may require notice of monitoring
- Tort action for violation of privacy rights
 - Intrusion into privacy of another
 - Appropriation of one's name or likeness
 - Wrongful publication of private facts
 - False light publicity



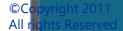
Stored Communications Act

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

 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

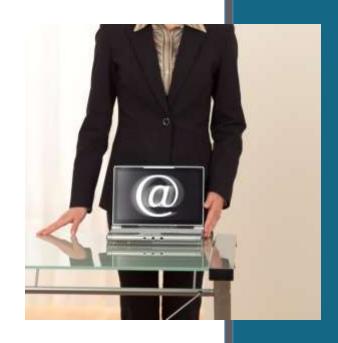
<u>Pietrylo, et al. v. Hillstone Restaurant Group</u> <u>d/b/a Houston's</u>

 The employees sued alleging violations of the Stored Communications Act. In particular, the employees alleged the login 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

- NRLB 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)



Required employer to revise:

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

EMPLOYEES

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



Hartford, CT 06103

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

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

'Blogging and Internet Posting Policy', which improperly restricts your

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

roe the National Labor Relations Act. It conducts secret-ballot elections to determine whether by employers and unions. To find out more about your rights under the Act and how to file a Diffice set forth below. You may also obtain information from the Board's website: www.nitb.gov.450 Main Street, Suite 410

AND MUST NOT BE DEFACED BY ANYONE.

I NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING 25 COMPLIANCE OFFICER.



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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



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

- 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

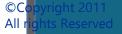
Copiah Bank

- 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

- 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

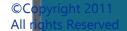






Unions Are Using Social Media







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.



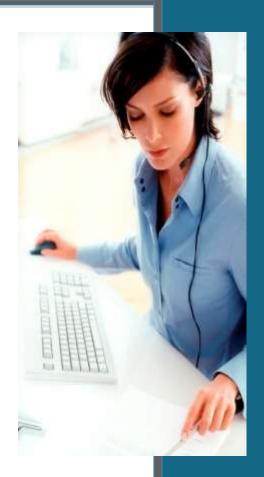
Benefits of Social Networking

- 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

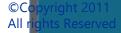
- Remind employees:
 - online sites are in the public domain
 - off-duty actions can result in discharge
 - be respectful
 - use privacy controls
 - productivity counts
- Require compliance with existing policies
- Prohibit defamation and fraud
- Prohibit references to customers
- Ban use of protected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

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Session Evaluation



