Snell & Wilmer

Facebook and Twitter Are So Yesterday

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Household Names in Social Media

- *Facebook*
- *Twitter*
- *Instagram*
- *Vine*
- *Snapchat*
- *Pinterest*
- *Google+*
- *LinkedIn*
- *Myspace*

Emerging Platforms

- *Reddit*
- *Imgur*
- *Tinder*
- *Ello*
- *Ask.Fm*
- *WhatsApp*
- *Glide*

Anonymous Platforms

- *Yikyak*
- *Confide*
- *Whisper*
- *Secret*
- *Hot or Not*

Legal Issues in the Workplace

- Labor Law
- Confidentiality and Restrictive Covenants
- Discrimination, Harassment, and Bullying
- Defamation and Invasion of Privacy
- Copyright and Trademark

Labor Law

- Social media posts, including "likes" and one-click interactions, are protected concerted activity.
  - *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 14, 2012) (employee's Facebook post, "my fellow employees, how do u feel?" was protected activity)
  - *Three D, LLC*, 361 NLRB No. 31 (Aug. 22, 2014) ("like" on Facebook is protected activity.)

Labor Law (cont'd)

- Overbroad social media policies may illegally chill protected activity
  - *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012) (employer cannot maintain policy prohibiting employees from making "damaging" statements about the company)
  - *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012) (car dealer cannot maintain "courtesy rule" prohibiting damaging online statements about the company . . . **but** can fire employee for posting a picture of a wrecked car at the dealership with the caption "this is your car on drugs.")
  - *Design Tech. Grp., LLC d/b/a Bettie Page Clothing & Dtg California Mgmt., LLC d/b/a Bettie Page Clothing, A Single Employer & Vanessa Morris*, 359 NLRB No. 96 (Apr. 19, 2013) (clothing store cannot prohibit employees from discussing their employment online **even though** employees bragged online about provoking employer into committing a ULP).

Labor Law (cont'd)

- 2012 NLRB General Counsel's Advice Memorandum
  - Employers must be aware of employment policies that illegally chill employee's Section 7 rights online, including
    - Restrictions on discussing employment terms and conditions online or criticizing the employer generally
    - Penalties for failing to report co-workers' online activities or online solicitations by third parties
    - Penalties for "friending" co-workers online
- Employers risk legal action by drafting overbroad policies governing employees' online activities.

Confidentiality and Restrictive Covenants

- Confidentiality agreements *absolutely* apply to social media postings
  - In *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045, 1046 (Fla. Dist. Ct. App. 2014), an employee's daughter cost him an $80K settlement when she posted "[Employer] is now officially paying for my vacation in Europe this summer. SUCK IT" in violation of the parties' confidentiality agreement.
  - The Court was not moved by evidence that the family did not, in fact, vacation in Europe.

Confidentiality and Restrictive Covenants (cont'd)

- Social media contacts and "friend lists" are potentially trade secrets
  - *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1074-76 (D. Colo. 2012) (Nightclub founder stated a claim for theft of trade secret against former employee who stole the club's Myspace contact list)
  - *Cellular Accessories for Less, Inc. v. Trinitas LLC*, No. CV 12-06736 DDP SHX, 2014 WL 4627090, at *1-2 (C.D. Cal. Sept. 16, 2014) (employer stated claim for trade secret misappropriation where employee continued to use his work LinkedIn page after leaving the company).
- Even "status update" posts may constitute solicitation depending on context
  - *Pre-Paid Legal Servs., Inc. v. Cahill*, 924 F. Supp. 2d 1281, 1291-94 (E.D. Okla. 2013) ("Facebook announcements" on a person's publicly available profile page may constitute solicitations in violation of non-solicitation agreement if they are "explicitly inviting")

Discrimination, Harassment, and Bullying

- Using social media to "screen" prospective employees may reveal protected characteristics
  - *Nieman v. Grange Mut. Cas. Co.*, No. 11-3404, 2012 WL 1467562, at *1 (C.D. Ill. Apr. 27, 2012) (plaintiff in age discrimination case may allege that employer knew his age because employer viewed his LinkedIn page and saw his graduation year).
- The best practice here is to have a third party screen new hires after initial interviews and redact any protected class information.

Discrimination, Harassment, and Bullying (cont'd)

- Adverse employment action following social media posts *by employees* may constitute retaliation
  - *Deneau v. Orkin, LLC*, No. CIV.A. 11-00455-B, 2013 WL 2178045, at *16 (S.D. Ala. May 20, 2013) (plaintiff stated a prima facie case of retaliation where she was fired less than one week after posting on Facebook that she "needed an EEOC lawyer")
- Similarly, an *employer's* social media posts may color an employee's retaliation claim
  - *Stewart v. CUS Nashville, LLC*, No. 3:11-CV-0342, 2013 WL 456482, at *8-9 (M.D. Tenn. Feb. 6, 2013) (employees stated FLSA retaliation claims where, after joining a suit against the employer, the employer made threatening comments about them in a Facebook rant).

Discrimination, Harassment, and Bullying (cont'd)

- Social media postings by co-workers may contribute to a hostile work environment claim
  - *Stacey L. Knowlton, Jr., Complainant*, EEOC DOC 0120121642, 2012 WL 2356829 (June 15, 2012) (co-worker's rant about complainant's race on Facebook post contributed to creation of a racially hostile work environment).

Discrimination, Harassment, and Bullying (cont'd)

- To date, 13 states have passed "password protection" bills prohibiting employers from requesting employees' usernames and passwords on social media accounts
  - http://www.eeoc.gov/eeoc/meetings/3-12-14/jackson.cfm
- While Congress has yet to pass a federal password protection law, courts have already held that the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq*., prohibits employers from accessing employees' social media
  - *Maremont v. Susan Fredman Design Grp., Ltd.*, No. 10 C 7811, 2014 WL 812401, at *6 (N.D. Ill. Mar. 3, 2014) (denying summary judgment under the SCA where employer accessed employee's Facebook and Twitter accounts without authorization)
  - *Pietrylo v. Hillstone Rest. Grp.*, No. CIV.06-5754(FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009) (holding employer violated the SCA by accessing employees' password-protected Myspace chat group without authorization)

Defamation and Invasion of Privacy

- Courts around the world have seen a massive influx of defamation claims over social media posts in recent years.
  - *Twitter* has become an infamous new vehicle for libel cases – prompting commentators to coin the term "Twibel" for such actions
    - Patrick H. Hunt, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 La. L. Rev. 559 (2013)
  - The United Kingdom made headlines as social media cases caused a 300% increase in libel actions in a single year.
- Twibel disputes remain long after the tweet is deleted:
  - In 2009, rocker Courtney Love became the first defendant to be sued for libelous tweets—a rant about a $4,000 business dispute cost Love $430,000 in out-of-court settlement costs.
  - Love's current twibel case – *Gordon & Holmes v. Love*, is currently pending in California.
    - http://www.poynter.org/news/mediawire/235728/how-courtney-love-and-u-s-s-first-twitter-libel-trial-could-impact-journalists/

Defamation and Invasion of Privacy (cont'd)

- Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c), provides some protection for social media providers from invasion of privacy-related tort claims based on posts by third-party users
- This protection may be limited, however, if the provider developed the offending post in some manner by, for example, creating questions that users must answer in order to create their online profiles.
  - *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (Section 230 did not immunize roommate matching website from liability under the Fair Housing Act and state laws because it caused offending information to be posted via new user questionnaire).

Copyright and Trademark

- Section 512(c) of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c), provides a safe harbor for social media providers where users post infringing content so long as the provider does not derive a financial benefit
- To qualify, the social media provider must have a "notice and take down" policy in place, whereby the provider will take the infringing post down upon notice by the copyright owner.
- Platforms that primarily enable users to post image and video content, such as *Youtube* and *Imgur* therefore have a strong incentive to develop easily accessible notice and take down pages
    - *Youtube* - https://support.google.com/youtube/answer/2807622?hl=en
    - *Imgur* - http://imgur.com/removalrequest
  - *See also Mavrix Photographs LLC v. LiveJournal, Inc.*, No. SACV 13-00517-CJC, 2014 WL 6450094, at *1 (S.D. Cal. Sept. 19, 2014) (granting summary judgment on copyright infringement claim for blog host where host properly established notice and take down procedure for infringing pictures posted by users)

Copyright and Trademark (cont'd)

- It is often difficult to pursue trademark actions against social media *users* because a great deal of unauthorized mark uses online are not used to sell products.
- With regard to social media *providers*, there is sparse case law developing passive secondary liability for infringing content posted on social media pages.
  - *See Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 107 (2d Cir. 2010) ("For contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods.")
- The provider's own terms of service are therefore a litigant's best first resort for removing infringing material

Copyright and Trademark (cont'd)

- "Using a company or business name, logo, or other trademark-protected materials in a manner that may mislead or confuse others with regard to its brand or business affiliation may be considered a trademark policy violation."
  - Twitter TM policy (https://support.twitter.com/articles/18367-trademark-policy#)
- "If you post any content that actually belongs to someone else and they get annoyed (or even call in their lawyers), we are not in the firing line. You have to take responsibility for what you post."
  - Hot or Not "Policy" http://hotornot.com/terms/

EMPLOYERS' EMAIL SYSTEM

- Old Rule: *Register Guard,* 351 NLRB 1110 (2007)
  - Employees have no right to use Employers' email systems for Section 7 purposes.
- New Rule: *Purple Communications, Inc., 361 NLRB No. 126 (Dec. 11, 2014)*
  - Overrules *Register Guard* and permits Employee use of email on non-working time.

PURPLE COMMUNICATIONS

ISSUE: Do employees have a right under § 7 of the NLRA to communicate via email with one another at work regarding self-organization and other conditions of employment?

HOLDING: Employees may use email on non-working time if employers have given email access to employees.

Purple Communications

- Applies only to those already granted access to an employer's email system; does not require an employer to grant access to employees.
- Employer may ban non-work use of email, including § 7 use of non-working time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline.
- Does not address email access by non-employees.
- Does not apply to other electronic communications systems.

Purple Communications

- Dispute over employer's property rights versus employees' core right to communicate in the workplace; email is the new natural gathering place.
- Email systems differ from other equipment; not a bulletin board or phone, and harm to employer appears minimal.
- Did not treat email as solicitation or distribution.

Purple Communications

- May be solicitation, distribution (literature or information) or neither of the two but still protected communications.
- Declined to define email systems as work areas or non-work areas — more of a mixed-use area.
- Can establish uniform and consistently enforced restrictions, prohibiting large attachments or A/V content, if interfere with efficient functioning.