

“They’re Doing WHAT on Facebook?”

Social Media and the Workplace

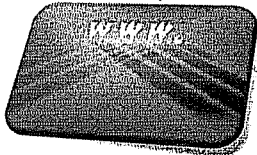
Megan J. Erickson
Dickinson, Mackaman, Tyler & Hagen, P.C.
www.socialnetworkinglawblog.com

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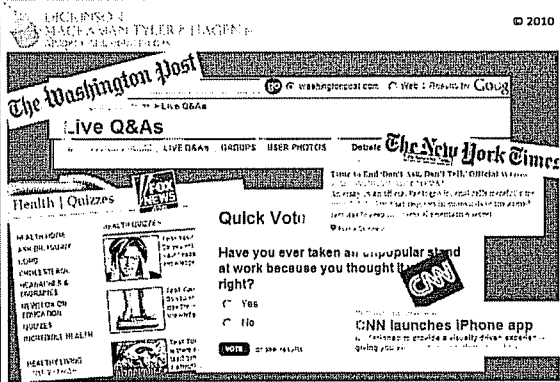
Web 2.0

- “Second generation” of Internet
- New (and ever-changing) trends in Internet and technology



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Live Q&As

Quick Vote!

Have you ever taken an unpopular stand at work because you thought it was right?

Yes

No

VOTE 27 300 74 100%

CNN launches iPhone app

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
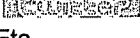
Web 2.0



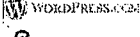

- User-generated content and interactive media
 - Social networking web sites
 - Online communities
 - Information-sharing platforms
 - Web logs ("Blogs")
 - RSS feeds
 - Wikis
 - Video-sharing sites
 - Geolocation services

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Web 2.0 – Specific Examples

- 
- 
- 
- 
- Etc ...

- 
- 
- 
- 

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Statistics . . . Always Changing!

- Facebook – Founded in 2004, and now more than 400 million active Facebook users.
 - As of February 2010:
 - Average user spends 55+ minutes a day on Facebook
 - More than 3 billion photos uploaded each month
 - More than 60 million status updates posted each day
- Twitter - Founded in 2006 (incorporated in 2007), protective about user statistics.
 - Explosive growth last year (some sources claimed 1000+% growth in 2009)

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Social Networking Phenomenon


“T-M-I”

(Too Much Information!)

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People like to share . . .





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Real Tweets!

 C. Adriana: Nothing like having spontaneous sex at work!!!! Gives u that extra push finishing put the work day!!!!Ain't it just GREAT
about 27 minutes ago from iPhone #user

 tommycampbell1: it ditching work (hope my boss is not on Twitter!)
about 1 hour ago from APP

 FlouncesV: Online net sex at work
about 14 hours ago from web


 tired_andy: My boss is a dumb bitch.
37 minutes ago from UberTwitter

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Dramatic Shifts Affect the Workplace

- Fundamental change in the way people use and understand:
 - Information,
 - Technology, and
 - Interaction.
- Necessarily affects:
 - Social lives, and
 - Work lives




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Employment Law Red Flag →



Web 2.0 and Social / Work Interplay

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The Bottom Line

- Problems associated with blurred lines between social/work lives are nothing new
 - But Web 2.0 offers new ways to blur those lines
 - May lead to more frequent line blurring
- Web 2.0 may significantly change the factual background, but the applicable legal framework remains largely the same.
 - But paradoxically, that's often what poses the challenge.
 - And we may see a few new laws come into play

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Responding to Employees' Online Activities



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Social Networking Sites in General

- Users maintain profiles
- Users must login with password
- Share information and communicate
 - Status updates
 - Wall posts
 - List favorites (i.e., movies, books, quotes, hobbies)
 - Political affiliation
 - Relationship status
 - Online chatting capabilities
 - Post photos or video
 - Affiliate with groups or networks

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Employees' Online Activities


- Employees' online activity may
 - Harm employer's reputation
 - Disparage managers, co-workers, etc.
 - Disclose confidential information
 - Result in vicarious liability
 - Misuse or waste company assets
 - Violate new FTC guidelines
 - Otherwise violate company policy or law
- Issues may arise on or off duty, and whether using personal or company technology

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Responding to Employees' Online Activity




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Responding to Employees' Online Activity

- General rule: At-will employment.
 - Private sector employers may generally discipline or fire at-will employees
- "Dooxing" = Termination due to online activity




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Employees' Personal Online Activities

- Violation of company policy
- Microsoft employee snapped this picture of Apple computers being unloaded at his workplace.
- Microsoft fired him for security violation



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Employees' Personal Online Activities

- Catching an employee in a lie . . .

-----Original Message-----
From: Kevin Colvin (mailto:kevin.colvin@merickson.com)
Sent: Wednesday, October 31, 2007 3:55 PM
To: Jill Thompson (North America)
Cc: Paul Davis (North America)
Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,
 Kevin

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Employees' Personal Online Activities


- Family emergency?
- Kevin's boss sent him an email response
- And attached a photo of Kevin at a Halloween party he apparently missed work to attend (found by a co-worker)
- The picture had been freshly posted on Facebook

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Employees' Personal Online Activities



Kevin,
 Thanks for letting us know—hope everything is ok in New York.
 (cool wand)
 Cheers,
 PCD

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Responding to Employees' Online Activity

So . . .

- General rule: private sector employment is generally at-will, and employers have freedom to discipline or fire employees.
- BUT, some legal (and practical) limitations exist for even at-will employers

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Adverse Action for Employee Online Activity

- Employment Contracts or Union Agreements

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Adverse Action for Employee Online Activity

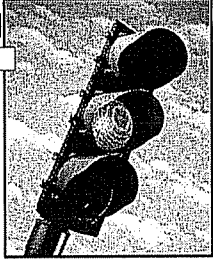
- Employment Contracts or Union Agreements
- Discrimination

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Types of Info on Profiles





- Member of Baptist Ministry
- "I'm pregnant"
- Episcopalian
- Scientologist
- Korean
- Marines
- Union organizing
- Member of Baptist Ministry
- "Support gay rights"
- Sex: Female
- Photos of user in wheelchair
- Sex: Male
- Hispanic
- Navy
- Member of Baptist Ministry
- "I'm pregnant"
- Episcopalian
- Scientologist
- Korean
- Marines
- Union organizing

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Fly the (way too) friendly skies?



- Flight attendant posted these photos of herself in company uniform on her blog
- Employer fired her
- She sued

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Adverse Action for Employee Online Activity

- Employment Contracts or Union Agreements
- Discrimination
- Retaliation

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Adverse Action for Employee Online Activity

- Employment Contracts or Union Agreements
- Discrimination
- Retaliation
- Labor Laws

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Adverse Action for Employee Online Activity


- Employment Contracts or Union Agreements
- Discrimination
- Retaliation
- Labor Laws
- State or Local Laws (i.e., off-duty conduct statutes)

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Various State Laws

- For example:
 - State analogues to federal laws (or other state laws) offering different protections
 - Civil rights laws
 - Privacy laws
 - Labor laws
 - Off-duty conduct statutes



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Adverse Action for Employee Online Activity

- Employment Contracts or Union Agreements
- Discrimination
- Retaliation
- Labor Laws
- State or Local Laws (i.e., off-duty conduct statutes)
- Laws Unique to Public Employers (i.e., First Amendment)

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Adverse Action for Employee Online Activity

- Employment Contracts or Union Agreements
- Discrimination
- Retaliation
- Labor Laws
- State or Local Laws (i.e., off-duty conduct statutes)
- Laws Unique to Public Employers (i.e., First Amendment)
- Privacy Issues

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Privacy Issues

- Privacy laws are complex and potential for violations varied
- But consider one case . . .

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Hillstone Restaurant Group v. Pietrylo

- Issue No. 1: Stored Communications Act

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The Spectator included references to:

- Workplace violence
- Illicit drug use
- Offensive name-calling & sexual remarks
- Proprietary business information
- Derogatory comments about quality & standards of Houston's
- Disparaging remarks about its management

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Hillstone Restaurant Group v. Pietrylo

- One of their claims: Violation of Stored Communications Act (Title II of the ECPA)
- Authorized access?
 - Employee voluntarily turned over login info!
 - But she testified she did so reluctantly.
 - She was worried she "probably would have gotten in trouble" if she refused.
- *Jury could have decided the purported "authorization" was coerced or pressured.*


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Stored Communications Act

Generally recommend that employers should avoid using false information or someone else's login and password to gain access to any online profiles or groups.



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Invasion of Privacy: Intrusion Upon Seclusion

(1) Intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns,
(2) Which a reasonable person would find highly offensive.

Can online content ever be considered a place of solitude or seclusion or a private affair?

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Invasion of Privacy: Intrusion Upon Seclusion

- Oversee or overhear private affairs
- Liable only when invading a private seclusion the plaintiff throws about his person or affairs
- Generally, if not a private place, no invasion
- But Iowa Supreme Court has said: Even in public places, there may be some matters that aren't exhibited to public gaze, and there may still be invasion of privacy when there is intrusion into these matters.

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Hillstone Restaurant Verdict Form

II. Invasion of Privacy

With respect to Plaintiffs' claim that Houston's intentionally invaded their right to privacy, answer the following questions based upon your findings by a preponderance of the evidence:

3. Was 'The Spectator' a place of solitude and seclusion which was designed to protect the Plaintiffs' private affairs and concerns?

Yes No

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Invasion of Privacy

- **Privacy Controls**
 - Even if it's online, did user take steps to restrict access?
- **Intended Audience**
 - Even if it's restricted to pre-approved list, how many are on that list?
- **Manner Accessed**
 - Deception suggests unauthorized access
 - Violating terms of use = also bad


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Adverse Action for Employee Online Activity

Other considerations:

- Inaccurate Information
- Practical Implications




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Social Media: Recruitment, Screening, & Hiring

- One study: 79% of hiring managers and recruiters considered online info about job applicants as part of hiring process.
- Of those, 70% rejected candidates based on what they found.




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Social Media: Recruitment, Screening, & Hiring

- Benefits:
 - Wealth of information
 - Convenient / Easy
 - Free
 - Potentially identify misrepresentations
 - Avoid negligent hiring claims



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Social Media: Recruitment, Screening, & Hiring

- Risks
 - **Discrimination.** Access to information about candidate's protected status.
 - **Privacy.** Depending on circumstances, potential invasion of privacy.
 - **State or local laws.** *i.e.*, off-duty conduct statutes or civil rights laws.
 - **Fair credit reporting laws.** State or federal laws.

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foursquare Geolocation Services
(All information on this screenshot has been edited to protect identities)

John S.
Princeton, NJ
1000+ friends

77 1634 0 6

TOP 12 TO DO

1. @ The Dining Society: Food & Drink
2. @ The Garden Park Museum: Family & Home
3. @ The Dining Society: Food & Drink
- 4.
- 5.
- 6.

GADGES

MAJORITYSHIP

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Remember them?

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Geolocation Services

People v. Weaver, 909 N.E.2d 1195, 1199-1200 (N.Y. 2009):

"... Disclosed in the data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations . . . and of the pattern of our professional and avocational pursuits. . ."

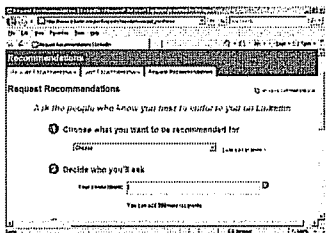
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Professional Networking Sites

- A few LinkedIn issues, for example.

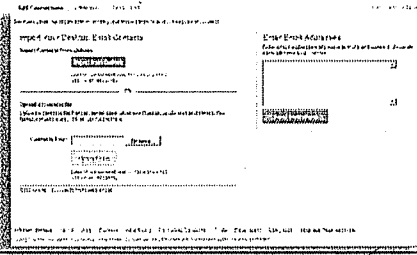


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Professional Networking Sites i.e., LinkedIn



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Defamation


- Online defamation – usually libel
 - Libel = written
 - Slander = spoken
- Communication to others of a false, defamatory statement about plaintiff, which results in injury to plaintiff
 - Actual malice required for public officials or limited public figures
 - Defamation *per se* = damage presumed

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Defamation

- Potential for significant damages.
- But, online defamation is often anonymous (or uses pseudonyms), making it difficult to challenge.




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Defamation

- Consider your company's use of social media, company blogs, etc.
- Be aware your company may be held liable for defamatory statements by employees.
- Be careful not to republish another's defamatory Statement.



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Communications Decency Act

- Communications Decency Act essentially immunizes online "service providers" against liability based on the actions of users of the service providers' system
- No protection if acting as content provider (i.e., if company or its own employees/agents created or posted the info)

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Intellectual Property

- Lots of infringement on social media sites!
- Be sure you aren't infringing on others' rights.
 - Obtain necessary licensing, consents, and IP rights to material posted online.
- Be sure others aren't infringing on your rights.
- Digital Millennium Copyright Act

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Federal Trade Commission

- FTC has jurisdiction to investigate unfair and deceptive trade practices.
- FTC recently released new guidelines relating to online endorsements or testimonials.
- If making online statements in support of their companies, employees or owners generally must disclose their affiliation

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Securities Regulations

- Potential liability for investor reliance on online communications.
- SEC and FINRA regulations impose certain disclosure, recordkeeping, and supervisory duties.

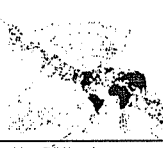
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Conclusion

- New area, little guidance.
- Be proactive!
- Consider implementing or updating written policies based on your company's unique business interests, needs, goals, and expectations.



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