Don’t Be Blinded By The Sun:
SOCIAL MEDIA IN THE PUBLIC SECTOR

TODAY’S PRESENTERS

Traci I. Park
Partner, Los Angeles
e: tpark@bwslaw.com
t: 213.236.2833

Kelly A. Trainer
Partner, Orange County
e: ktrainer@bwslaw.com
t: 949.265.3416
SESSION OVERVIEW

1. Overview of Social Media
2. Privacy & Social Media
3. Cyber-Vetting & Recruitment
4. Free Speech and Workplace Discipline
5. Social Media as Evidence
6. Best Practices & Policy Development

OVERVIEW OF SOCIAL MEDIA
What Happens In An Internet Minute?

Twitter Statistics

- Active Twitter Users: 320 million
- Daily Active Users: 100 million
- Unique Monthly Visitors: 120 million

- Average of 350 billion tweets per day; 46% of Twitter users tweet at least once a day
- 700 YouTube links shared on Twitter every minute
- Average users spend 170 minutes on Twitter per month
FACEBOOK STATISTICS

- 2 Billion active users worldwide (15% increase from 2015)
- 1,090,000,000 users logon daily (16% increase from 2015)
- 5 new profiles are created every second
- 4,500,000,000 "likes" per day
- 10,000,000 Facebook apps available

- Facebook accounts for 1 in 5 page views on the Internet in the U.S.
- 23% of users check account more than 5 times a day; average time per visit = 20 minutes
- 72% of Americans are active on Facebook – 91% of millennials

PRIVACY & SOCIAL MEDIA
SOCIAL MEDIA USERS LOVE TO SHARE!

- Birthdate
- Place of Employment
- Relationship Status
- Family Members
- Places Visited
- Home and Email Addresses and Phone Numbers
- Photos
- Schools Attended
- Life Events
- Political, Religious, Social Viewpoints and Causes
- Clubs, Civic Activities, Networking Groups
- How Much They Hate Their Boss
- Offensive Costumes and Remarks
- How They Plan to Ruin Their Ex's Life
- What They Did on the Day They Called in Sick
- How Much They Drank Over the Weekend

BUT, I HAVE PRIVACY SETTINGS!

Moreno v. Hanford Stentinel, Inc. (CA 2009)
No reasonable person who takes the affirmative act of posting information on a social media website has an expectation of privacy.

State v. Harris (NY 2012)
One has no reasonable expectation of privacy in information intentionally broadcasted to the world on Twitter.

Romano v. Steelcase, Inc. (NY 2010)
The sharing of personal information is the very nature and purpose of social networking sites, else they would cease to exist.
SOCIAL MEDIA & CYBER VETTING

- 70% of employers report using social media in the hiring process to investigate applicants
- 54% of hiring managers have not hired someone based on information found on-line
  - 50% provocative photos
  - 48% excessive drinking/drugs
  - 33% badmouthing prior employer
  - 30% poor communication skills
  - 28% discriminatory comments
  - 24% lying about qualifications

(2017 Consumer Reports Study)
RISKS OF USING SOCIAL MEDIA IN HIRING

• High Risk Big Data:
  – Protected Categories (Association and “Perceived As”)
  – FMLA or other protected leave status
  – Military or veteran status
  – Criminal records
  – Concerted activity
• Finding information that is not relevant to whether the candidate is the best fit for the organization
• Distrust of the veracity of information on social media sites
• EEOC actively prosecuting applicant cases

FOR EXAMPLE...

• Gaskell v. Univ. of Kentucky (E.D. Ky. 2010)
  – Employment denied after employer learned candidate published an article about the Bible and astronomy.
• Neiman v. Grange Mutual Casualty (C.D. Ill. 2012)
  – Employee alleged that using age obtained from his LinkedIn profile violated the ADEA.
• Sweet v. LinkedIn (N.D. Cal. 2015)
  – Class action by rejected applicants claiming LinkedIn’s “Reference Searches” caused them to lose employment opportunities
FREE SPEECH & DISCIPLINE

COMMON FACT PATTERNS

• Employee misuse of sick and protected leaves of absence
• Disparaging remarks about supervisors, co-workers, vendors, clients, etc.
• Harassment by co-workers
• Inappropriate comments or content that implicate the workplace
• Breach of confidentiality and other employer policies
IS IT PROTECTED SPEECH?

01 Was the employee speaking as a private citizen on a matter of public concern?

02 Did the employee's free speech interest outweigh the employer's efficiency interests?

03 Did the speech impair discipline or harmony among co-workers?

04 Did the speech have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary?

05 Did the speech interfere with the normal operation of the employer's business?

PUBLIC EMPLOYEE DISCIPLINE IN THE MEDIA

01 A Nashville, Tennessee, police officer was fired after an investigation into a Facebook comment he made about how he would have shot motorist Philando Castile five times instead of four. Castile died after a St. Paul, Minnesota, officer shot him four times during a traffic stop.

02 A fire captain in Austin, Texas, was suspended after posting inflammatory political opinions regarding Hillary Clinton and President Barack Obama on Facebook.

03 A Mount Vernon, New York, fire lieutenant was suspended for an Instagram post expressing support for Micah Johnson, who killed five Dallas police officers and wounded seven others in a sniper attack.

04 A New Rochelle, New York, police sergeant was suspended because of a Facebook post criticizing the Black Lives Matter movement and protesters.
An employee in Northern Virginia was fired shortly after she flipped off the Trump motorcade as it passed her on her morning bicycle route. She is now suing the government contractor who fired her, which claims it feared retaliation from the current administration if it did not fire her.

Roseanne TV show cancelled in response to public outcry following Roseanne's insensitive Tweet about Valerie Jarrett, which followed her insensitive Tweet about Parkland shooting survivor David Hogg.

CBS summarily fired its VP/Senior Counsel for questionable Facebook commentary on Las Vegas shooting: “I'm actually not even sympathetic bc country music fans are often republican gun toters.”

Google fired an engineer who claimed in an internal online forum that biological differences were behind gender inequality in the tech industry. He is now suing in a proposed class action claiming he was discriminated against as a white male who supports Trump.

Social media has become a vital platform for speech of all kinds. Indeed, social media many now be “the most important” modern forum “for the exchange of views.”

Police officer's online selling of sexually explicit videos made while in uniform was not protected under the First Amendment

City of San Diego v. Roe (2004) 125 S. Ct. 521

Social worker's critical Facebook posts about community members she served was not protected

Shephard v. McGee (D. Ore. 2013)
Fire Department's interest in managing its internal affairs outweighs a fire captain's right to post “offensive” online statements.

Grutzmacher v. Howard County (4th Cir. March 20, 2017)

Implied cyber-threats against co-worker can justify termination.

Elonis v. United States (Supreme Court 2015)
USES DURING LITIGATION

- Social Media evidence is regularly being used in all aspects of litigation:
  - Impeachment of parties and key witnesses
  - Photos as evidence
  - Solicitation of class members
  - Jury selection and voir dire
  - On-line misconduct during trial to overturn a jury verdict or secure an appeal
EMERGING DISCOVERY ISSUES

• Litigant and attorney sanctioned for “spoliation” of social media evidence after lawyer advised client to “clean up” his Facebook page. *Lester v. Allied Concrete* (VA 2013)

• Court ordered plaintiff to turn over Facebook login information to defense counsel for 21 days so opponent could inspect the content. *Largent v. Reid* (PA 2011)

• Federal judge ordered employee to produce unredacted copy of his *entire* Facebook page and Facebook messages. *Crowe v. Marquette Transp. Co.* (LA 2015)

BROWN V. CITY OF FERGUSON (2017)

• Facebook Messenger exchanges between family members of Michael Brown ordered disclosed in wrongful death lawsuit:
  – No right to privacy in notes sent through Facebook Messenger
  – Likened to a “personal diary”
  – Relevant to show relationships with the deceased, to calculate pain, suffering, and psychological damages
  – City could use to impeach or show bias
  – Limited timeframe and subject to a protective order
LIMIT ACCESS
Consider blocking access to social media websites from agency equipment

YOUR VOICE
Designate employee responsible for Agency presence and provide time + tools to manage it

CELL PHONES
Evaluate the use of agency-owned equipment, including cell phones
TROLLING APPLICANTS
Prohibit managers from trolling the internet for intel on applicants, or establish a procedure to do it

GIVE KNOWLEDGE
Train all employees and officials

DEVELOP POLICIES
Develop, update and enforce policies

POLICY DEVELOPMENT

• A policy can limit an employee’s reasonable expectation of privacy

• Employees have the right to discuss their wages, hours and working conditions

• Thus, a social media policy should be narrowly tailored
POLICY DEVELOPMENT

- Two issues to be addressed in policies:
  - Regulating employees’ activities on social media
    - Employees have the right to discuss their wages, hours and working conditions. Thus, a social media policy should be narrowly tailored.
  - Regulating the Agency’s social media presence
    - Free speech and related issues are being actively litigated right now

KEY PROVISIONS IN A POLICY

- No expectation of privacy
- Advise employees that what they say on social media can be used in disciplinary, administrative and legal proceedings
- Maintain the right to search, monitor and disclose all electronic communications on public devices or sent using public internet services
- Prohibit playing computer or cell phone games at work
- Depending on the job, prohibit cell phone use at work
POLICY DEVELOPMENT

- Obtain an employee's signed acknowledgement of receipt, understanding the policy and limitation on their reasonable expectation of privacy
- Revise policies when new laws, court decisions, or technologies and platforms emerge
- Involve (at least) IT, HR, and Legal in the review
- Get a new acknowledgement for every revision