

The Complete Tweet: Developments in Social Networking and Employment Law

Davis Wright Tremaine LLP
June 24, 2010

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.



Online Social Networking Exploding

- **facebook**

- >400 million users worldwide
- 2009 revenue: >\$550 million
- 8 billion minutes spent on Facebook each day
- Increasing corporate marketing use

- **twitter**

- “Tweets” – max. of 140 characters
- Celebrity usage – Lance Armstrong, Brittany Spears
- Corporate use growing exponentially
- Over 55 million users / month and growing

Online Social Networking Exploding

■ **LinkedIn**

- Facebook for professionals
- Over 50 million registered users

■ **myspace.**

- Similar to Facebook
- Less than half the users at over 100 million

■ YouTube

- Online videos

■ Blogs

- The original social networking tool

What is Social Networking?

- Broad range of internet activities
 - Texting
 - Chat rooms
 - Emails
 - Blogging
 - Videos

- Easily accessible
 - Work computers
 - Home computers
 - Mobile smartphones and other devices

- Inherent risks
 - Immediacy
 - Global reach
 - Searchable
 - “Email is Forever”

Employee (Mis-)Use of Social Networks

- For personal purposes, at work
- For personal purposes, impacting your business
 - Bad-mouthing the company
 - Trade secrets theft
 - Harassment
- At work, for business purposes
 - Monitoring comments on company products
 - Answering consumer questions
 - Promoting products / services
 - Research

Employer Use of Social Networks

- Hiring and firing staff
 - Use as screening tool?
 - “Googling” job candidates
 - Risk of uncovering information not relevant to the hiring decision
 - Possible discrimination claims
- Corporate communications and marketing
 - Internally with employees
 - Externally with customers / potential customers
 - 1.5 million business home pages on Facebook

Facebook for Companies

facebook

1 16

Search

Home Profile Account



Add to My Page's Favorites

Suggest to Friends

Brewed to stoke. Stoked to brew.

Information

Founded:
1987

3,229 People Like This



Chris Gow Sheina Sim Bruce Campbell



Kristin Kruger Brian Walrath Dee Powell

Favorite Pages

5 Pages See All

Full Sail Brewing Company Like

Wall Info Photos Boxes Events Video >>



Beer Buckle Full Sail Brewing to attend the Boulder Brew and Music Festival on May 1st at the FOX Theatre in Boulder, CO! www.BoulderBrewFest.com for tickets!



Home - Boulder Brew and Music Festival
www.BoulderBrewFest.com

2010 Boulder Brew and Music Festival at the FOX Theatre May 1, 2010. Over 50+ beers and live music all day and night.

2 hours ago · Share · Report



Full Sail Brewing Company Let's just say that we take craft beer seriously in Oregon. Check out the abundance of festivals, tastivals, parades and parties happening around the state this year.



The year in beer | OregonLive.com

blog.oregonlive.com

Beer fans who've been on vacation or business trips to that howling beer wilderness beyond the gates of the city know how good we have it here in Portland, which is by any measure one of the best beer ...

4 hours ago · Share

3 people like this.



Paul C Paz Thanks!
We "shared" the link with our network.
WaltersWorld

The goal of WaltersWorld is to elevate the status of waiters in America to a legitimate professional career of choice in an industry of choice, Restaurant and Hospitality, that offers unlimited opportunity....

See More
11 minutes ago · Report



Tasha Duckering love you guys!! Old Rasputin is delish! Still tryin to get my hands on your Top Sail bourbon imperial!! Oh i bet thats great!

Yesterday at 5:47pm · Report



Full Sail Brewing Company Hey Tasha. thanks! Although

Create an Ad

175,000,000/day! ×



The #1 Trust Mark on the Internet is now available for your small business.

Like

designtheory ×



10% off all pearls, diamonds, and european botanicals through Mother's Day, just mention this ad when you come in!

Jennifer Stenhouse likes designtheory.

Like

Baby Samples in your Mail ×



Get free samples of baby products. E-mail and your baby's birthday required.

Like Chat (6)

Twitter for Companies



Home Profile Find People Settings Help Sign out



AlaskaAir

+ Follow

Lists



@andreachaplin Are you using a Mac or PC?

about 21 hours ago via CoTweet in reply to andreachaplin

@andreachaplin We're looking into it. Thanks for letting us know. If you have any further issues, please call reservations 1800ALASKAAIR.

about 21 hours ago via CoTweet in reply to andreachaplin

@andreachaplin We've been having some issues. What are you trying to do? book? Check-in?

about 22 hours ago via CoTweet in reply to andreachaplin

@MollieinSeattle Our bag fee is among the lowest in the industry. We're also the ONLY airline to guarantee your bag. <http://bit.ly/bbsbY1>

about 23 hours ago via CoTweet in reply to MollieinSeattle

Some background on how **@AlaskaAir** dealt with Mt. Redoubt eruption /via WSJ **@MiddleSeat**: <http://j.mp/bcbNIY> #ashtag

about 24 hours ago via CoTweet

@floraandflying No, but you will be able to cancel your reservation up to 24 hours after purchase & refund to original form of payment.

10:42 AM Apr 22nd via CoTweet in reply to floraandflying

@xSuperGirlx Starting 6/15, we're lowering it to 20 min.

10:18 AM Apr 22nd via CoTweet in reply to xSuperGirlx

@HorizonAir also announced new service: 4 daily flights between

Name Alaska Airlines
Location Seattle, WA
Web <http://www.alaska...>
Bio Tweets powered by the genuine and caring service of Alaska Airlines and its employees. Currently listening: @elliottp

7,045 following 17,246 followers 922 listed

Tweets 1,350

Favorites

Actions

block AlaskaAir
report for spam

Following



View all...

RSS feed of AlaskaAir's tweets

Twitter for Companies

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

Get short, timely messages from Chateau Ste Michelle. 

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 **@SteMichelle**.

[Give it a try](#) 

 Get updates via SMS by texting follow SteMichelle to 40404 in the United States. Codes for other countries

 **SteMichelle** 

Getting ready for **#Rieslingtweetup** with **@SteMichelleBob**; \$5 for 3 tastes, \$10 meat & Cheese trays on 7/1 RSVP <http://ow.ly/22tXy> **#Wine**

about 20 hours ago via HootSuite

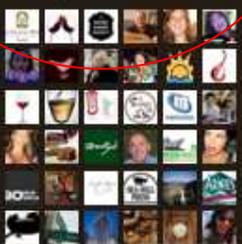
Looking forward to meeting wine bloggers of **@WBCorBUST** at this morning's tasting & food pairing. Welcome to WA! See you in a few. **#wbc10**

9:45 AM Jun 23rd via web

As part of our sustainable efforts, we built nesting boxes for American Kestrels at Canoe Ridge Estate Vineyard. T <http://twitpic.com/1z2va0>

1:37 PM Jun 22nd via Twitpic

Name Chateau Ste Michelle
Location Woodinville, Washington USA
Web <http://www.stemichelle.com>
Bio Tradition, innovation, and the highest winemaking standards form the essence of Chateau Ste. Michelle.
Joined January 2009
988 2,029 255
Tweets 303
Following





Why Employers Should Care

- 61% of employees say that even if employers are monitoring their social networking activities, they won't alter behavior
- 74% of employees believe it is easy to damage a brand's reputation via social networking sites
- 53% of employees say "social networking pages are none of an employer's business."

**Per Deloitte's 2009 Ethics & Workplace Survey*

Why Employers Should Care

- Only 17% of companies have programs in place to monitor and mitigate reputational risks
- Only 22% of employers have formal social networking policies

**Per Deloitte's 2009 Ethics & Workplace Survey*

Employer Injury

yelp
Real people. Real reviews.™

Search for (e.g. taco, cheap dinner, Max's) Near (Address, City, State or Zip) Search

Welcome About Me Write a Review **Find Reviews** Invite Friends Messaging Talk Member Search

Introducing Chase RealCash™ Debit Card. Earn up to 3% cash back. CHASE

Bradley Ogden

4.5 stars 105 reviews Rating Details

Category: American (New)

Caesars Palace
3570 Las Vegas Blvd
Las Vegas, NV 89109

(702) 731-7415
www.larkcreek.com/boiv.htm

Price Range: \$\$\$
Accepts Credit Cards: Yes
Parking: Garage, Valet
Attire: Dressy
Good for Groups: Yes

Good for Kids: No
Takes Reservations: Yes
Delivery: No
Take-out: No
Walter Service: Yes

Wheelchair Accessible: Yes
Outdoor Seating: No
Good for: Dinner
Alcohol: Full Bar

Map showing location near Caesars Palace and The Forum Shops.

AAA Official Site
Join AAA Today. Now More Than Ever, It's Time to Get AAA Discounts.
www.AAA.com

Encore at Wynn from \$189
Book Online to get a \$100 Resort Credit! Enjoy Rates from \$169 Now.
www.EncoreLasVegas.com

105 reviews for Bradley Ogden Search Reviews

Review Highlights: What's this?

- "The blue cheese souffle matched with the figs was fabulous." (in 25 reviews)
- "The dessert was a buttery, rich pudding with snickerdoodle cookies." (in 25 reviews)

Related Special Offers: Yard House, Charlie Palmer Steak

People Who Viewed This Also Viewed... Nobiliti Tavern, Restaurant Guy Savoy, Michael Mina

Employer Injury

- Injury to corporate reputation
 - Employee "venting" transmitted instantly to ever-growing audience
- Disclosure of trade secrets/proprietary information
 - New product plans
 - Financial results
 - Customer information

Libel Plaintiff Must Prove

1. Defamatory meaning
2. Substantially false statement
3. Of fact
4. Published or disseminated by defendant
5. Of and concerning plaintiff
6. Published with requisite degree of fault
7. Damages

Libel

False and unprivileged publication which exposes a person to contempt, or which causes a person to be shunned or avoided or which has a tendency to injure a person in his or her occupation. Cal. Civ. Code §45

Section 230 (47 U.S.C. Section 230 (c)(1)) Provides:

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Representative Comments Held To Be Protected Opinion

- “I scooped out guacamole with my fork and dug in. One taste told me what I had feared: this pale green stuff was definitely not the real deal.”

Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 710, 57 P.3d 82 (2002).

Representative Comments Held To Be Protected Opinion

- “The people who own the place are unconscionably rude and vulgar people. And the attitude that they communicate is awful. . . .The food is fine, the people who run it are PIGS.”

Pritsker v. Brudnoy, 389 Mass. 776, 777-78, 452 N.E.2d 227 (1983).

Representative Comments Held To Be Protected Opinion

- “The gumbo that they have up there tastes like its yesterday’s slop. . . .[It’s] these kind of restaurateurs that give people in the profession a bad name.”

S & W Seafoods Company v. Jacor Broadcasting of Atlanta, 194 Ga. App. 233, 234, 390 S.E.2d 228 (1990).

Representative Comments Held To Be Protected Opinion

- “[I]t is impossible to have the basic condiments . . . on the table. The sweet and sour pork contained more dough (badly cooked) than meat. . . . [The] pancakes [were] the size of a saucer and the thickness of a finger. . . . We do not know where [the owner] recruits his cooks, but he would do well to send them for instruction”

Mr. Chow of New York v. Ste. Jour Azur S.A.,
759 F.2d 219, 221-22 (2nd Cir. 1984).

Representative Comments Held To Be Protected Opinion

- “[T]he fish on the Key West platter tasted like old ski boots, the scallops were no more than fair, and the ‘beer-boiled shrimp’ were barely worth peeling. . . . The ‘coquilles St. Jacques’ was outrageously bad. . . . To call this atrocity what they do is misleading.”

Greer v. Columbus Monthly Publishing Corp.,
4 Ohio App.3d 235, 236, 448 N.E.2d 157
(1982).

Representative Comments Held To Be Protected Opinion

- “Bring a can of Raid if you plan to eat here. And paint your neck red, looks like a truck stop. You’ll regret everything you eat here, especially the BLTs.”

Havalunch, Inc. v. Mazza, 170 W.Va 268, 270, 294 S.E.2d 70 (1981).

Representative Comments Held To Be Protected Opinion

- “I don’t know how much real talent in cooking is hidden under the mélange of hideous sauces which make this food and the menu a travesty of pretentious amateurism. . . . [The duck] is not an improvement it is a travesty of taste. . . . [The] poached trout under a crawfish sauce [should have been] named trout a la green plague. . . . [T]his restaurant is an irremediably ghastly mistake.”

Mashburn v. Collin, 355 So.2d 879, 887-88 (La. 1977).

Employer Liability

- Possible liability for employee postings
 - Defamation
 - Copyright infringement
 - False advertising claims
 - Discrimination/harassment
 - Medical information (HIPPA/GINA)

Employer Liability

- Electronic discovery issues
 - A new kind of “electronically stored information” (ESI)
 - Social media data is typically not stored on employer’s network or system
- National Labor Relations Act issues
 - Can be “protected, concerted activity”
 - Blogging about unfair employer policies
 - Applies to all employees, not just unionized workers

Employer Liability

- First Amendment issues
 - Primarily for public employers
 - Possibly state constitutional issues for private employers
- Privacy Concerns
 - *Pietrylo v. Hillstone Restaurant Group*
 - Managers accessing private MySpace page of employee group
 - *City of Ontario, California, v. Quon*
 - U.S. Supreme Court Issues Decision on June 17, 2010, Relating to an Employer's Ability to Review its Employees' Electronic Communications

What Should Employers Do?

- Develop a policy **now** – don't wait for the crisis
- Convene working group to draft:
 - HR
 - Legal
 - IT
 - Marketing
 - PR/Corporate Communications
 - Employee users

Social Media Policy Considerations

- What is your company's culture?
 - Separate or integrated policy?
 - Allow or block access to social media websites?
 - Distinguish between company use and personal use?
 - Extent to which company equipment and networks can be used for social media?
- What are your company's needs?
 - Use of social networking to generate business?
 - Use of social networking in hiring / firing process?

Social Media Policy Considerations

- Duty to bargain with unions regarding policy?
- Cross-reference in other policies?
 - Anti-harassment and nondiscrimination
 - Trade secret/confidentiality
 - Codes of ethics
- Legal review of proposed employee terminations for social networking activity

“Common Sense” Policy Components

- **HR ISSUES:**

- Discriminatory or harassing conduct
- Notification that company uses social media
- Source for answers to questions about policy interpretation
- No oral modification of policy
- Cross reference to related policies

- **IP PROTECTION:**

- Trade secrets/proprietary information disclosures
- References to clients/customers

- **THIRD PARTY LIABILITY:**

- Disclaimers that opinions are the employee's
- Confidential medical information
- Defamatory or derogatory comments

Finally

- Clearly communicate policy to employees
- Training of employees as appropriate
- Revisit policy annually to keep up with technological changes
- Remind employees regularly