

Social Media & the Workplace : Emerging Case Law



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Corporate Counsel Section Meeting
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Social Media Revolution

<http://www.youtube.com/watch?v=IFZ0z5Fm-Ng>

The Domino's Debacle

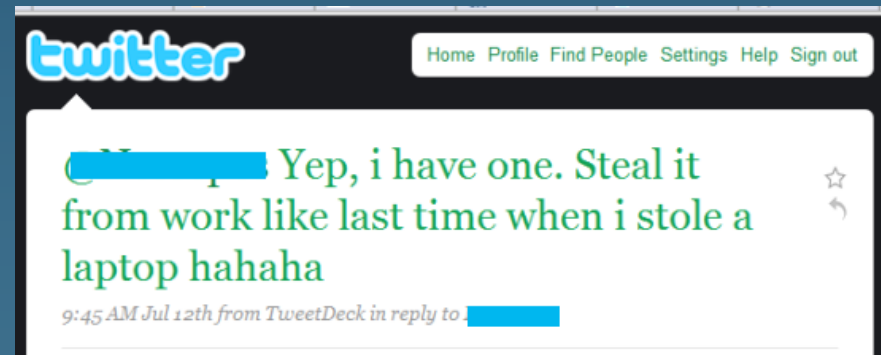
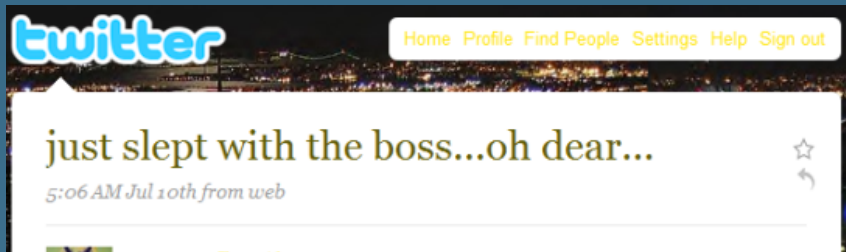
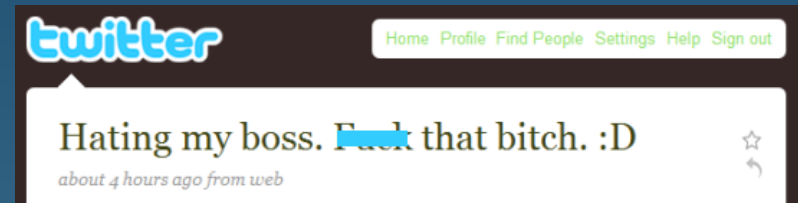
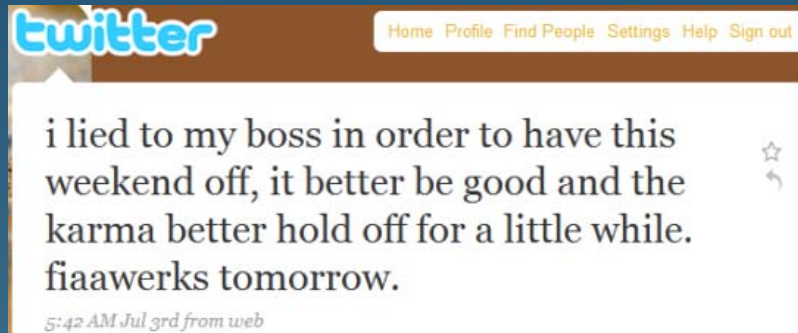
- Two Domino's employees post YouTube video of them defiling a customer's order.



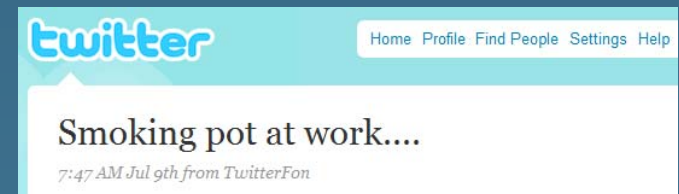
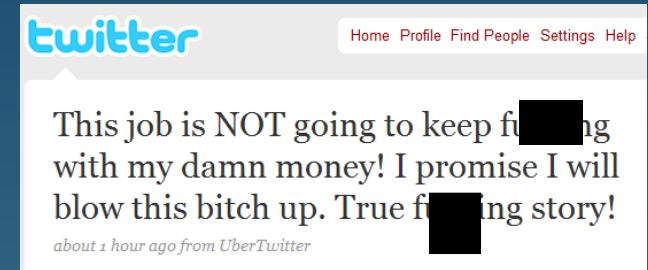
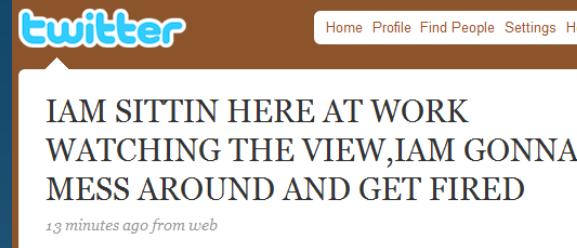
- Video went viral.
- Domino's President Publicly Apologizes.
- Store closed.



What are employees saying?



More examples...



Pietrylo v. Hillstone Restaurant Group

EMPLOYEE USE OF SOCIAL MEDIA— RISKS AND IMPACTS



RISK

IMPACT

Use of personal MySpace Account to post confidential and derogatory comments about restaurant management.

Excessive use of social media in the workplace

- Network utilization issues
- Loss of productivity
- Increased risk of exposure to viruses and malware

Use of company-supplied mobile devices (such as smartphones) to access social networking sites

- Infection of mobile devices
- Data theft from mobile devices
- Data leakage
- Bypassed enterprise controls

Pietrylo v. Hillstone Restaurant Group

EMPLOYEE USE OF SOCIAL MEDIA— RISKS AND IMPACTS		
RISK	IMPACT	
Use of personal accounts to communicate work-related information	<ul style="list-style-type: none">• Privacy violations• Corporate reputation damage• Loss of competitive advantage	
Posting of photographs or information that link users to their employers	<ul style="list-style-type: none">• Brand damage• Corporate reputation damage	
	<ul style="list-style-type: none">• Network utilization issues	

Terminated employees bring claims for invasion of privacy/violation of SCA.

Jury returns verdict for employees – back pay and punitive damages.



TEKSystems v. Hammernick

(U.S. Dist. Ct, Mn; Trial - August 2011)

TEKSystems v. Hammernick

- Tom—

Hey! Let me know if you are still looking for opportunities! I would love to have you come visit my new office and hear about some of the stuff we are working on!

Let me know your thoughts!

Brelyn

- Hi Brelyn,

Indeed I am still looking. I have time!

Lets get together. Where are you working these days? Your profile still has you working at TEK Systems. BTW - my email address is xyz@gmail.com. If you would prefer the non-LinkedIn route.

Tom

TEKSystems v. Hammernick

- Does this type of conduct violate a restrictive covenant that does not *specifically* reference solicitation or disclosure via social media?
- Does the medium matter, or just the message?
- Would such communication be treated the same as e-mail, or does “social media” require its own standard?

City of Ontario v. Quon

- The City of Ontario, California had a written policy expressly warning employees not to expect any privacy in electronic communications on City equipment.
- Ontario SWAT team member Sgt. Quon used his Department-issued text-messaging pager to exchange hundreds of personal messages—many sexually explicit—with, among others, his wife, his girlfriend, and a fellow SWAT sergeant, while he's on duty.
- After the Department reviewed transcripts of the text messages, Quon and his text-messaging partners sue the police chief and the City, alleging a Fourth Amendment violation and Arch Wireless for violating the Stored Communications Act.

City of Ontario v. Quon (June 17, 2010)

- Does a member of a city's SWAT team have a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department issued an official no-privacy policy?
- Does it make a difference that the policy did not expressly mention pagers?
- Does it make a difference that a non-policymaking lieutenant announced an "informal policy" of allowing some personal use of the pagers?
- Should the police department have used "less intrusive methods" of reviewing text messages transmitted by the SWAT team member on his SWAT pager?

The Supreme Court Holds:

- The Court assumes, but does not decide, that Quon had a reasonable expectation of privacy.
- *"Prudence counsels caution before . . . Establish[ing] far-reaching premises that define the existence, and extent of privacy expectations enjoyed by employees when using employer-provided communication devices."*

- Because the search of Quon's text messages was reasonable, the City of Ontario did not violate his Fourth Amendment rights.
- The City's warrantless review of Quon's pager transcript was reasonable because:
 - (1) it was motivated by a legitimate work-related purpose, and
 - (2) it was not excessive in scope.

STENGART v. LOVING CARE (N.J. 2010)

- Employee sent emails to attorney using employer's computer, but sent on employee's personal password protected email account
- Employer had policy stating that it could audit, review, intercept, access all matters on the company's media systems – but did not specifically address sending emails on a personal account (gmail)

STENGART v. LOVING CARE (N.J. 2010)

- Employee had reasonable expectation of privacy in the emails
- Emails were protected by attorney-client privilege

Social Media as Evidence

- *Bass v. Miss Porter's School* (D. Conn. 2009)
- *Ledbetter v. Wal-Mart Stores, Inc.* (D. Colo. 2009)

Questions?