

Harassment and Social Media

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AGENDA

Overview:

- What is Harassment?
- What are Social Media?
- Case Studies
- Protection from Liability



HARASSING CONDUCT

- NOT just having a bad day
- Conduct based on protected status such as:
 - Race
 - Religion
 - National Origin
 - Disability
 - Marital status
 - Sex
 - Age
 - Sexual orientation



TERMS

Social Networking

- Web-based services allowing users to construct profile (some public, others private)
- Provide list of individuals linked to profile
- May be supported by communication tools such as email, Instant Messenger, video stream



TERMS

- Social Media:
 - Blogging
 - Video Sharing
 - Social Networking
 - *Twitter*
 - *MySpace*
 - *Facebook*
 - Getting Dooiced



FREE SPEECH LAW

- U.S. Constitution

“Congress shall make no law . . . abridging the freedom of speech, or of the press.” (Amend. I)

- California Constitution

“Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” (Art. I, section 2(a))



FREE SPEECH LAW

- Important whether:
 - Speech is in a public forum
 - Restriction is reasonable
 - Restriction has viewpoint neutrality



FREE SPEECH LAW

- High protection for:
 - Political speech
 - Public interest
 - Ideas

- No protection for
 - Defamation
 - Obscenity
 - “Fighting words”
 - True threats



STUDENT FREE SPEECH

- Also has First Amendment protection
- Same Public Forum principles apply
- Can restrict to advance legitimate educational concerns
- But voluminous free speech in colleges expected



STUDENT FREE SPEECH

- Speech in Public High Schools Regulated by Several Lines of Cases
 - *Tinker* – “material and substantial disruption”
 - *Fraser* – “plainly offensive speech,” which is “inconsistent with basic educational mission”
 - *Morse* – promotes illegal drug use
- In Colleges, students rights greater because adults – high school standards still instructive



PRIVACY LAW

- U.S. Constitution

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”
(Amend. IV)

- California Constitution

“All people are by nature free and independent and have inalienable rights. Among these are
privacy.” (Art. I, section 1)

- Important whether:

- Reasonable expectation of privacy
- Nexus to job/college



PRIVACY LAW

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FREE SPEECH – “REDUX”

- California law adds to student speech rights:
“Neither . . . the governing board of a community college district, nor an administrator of any campus of those institutions, shall make or enforce a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.” (Cal. Educ. Code § 66301(a).)



CASE STUDY #1

- The College limits use of its library internet service to “educational” purposes by students. A student George spends extensive time on social websites. One day, a librarian asks him to surrender his library computer terminal to those who need to study. George sues, challenging the “educational” restriction as improperly limiting free speech. He argues Ed. Code section 66301 allows him to look at literally anything he can view at home.
- Will George win his lawsuit?



CASE STUDY #2

Eric received a bad grade on a philosophy paper from Professor Jones. Eric was upset with the tone of the Professor's criticism, and with the grade.



CASE STUDY #2

Eric created a false personal profile of Professor Jones on *Facebook*. The account and profile were created on Eric's personal computer at his home. The profile did not identify Jones by name, but it did identify him as a philosophy professor at the college and included Jones' picture which had been taken from the college website. The profile described Sam as a forty-five year old married, bisexual man whose hobbies included engaging in illicit sexual acts with minors.



CASE STUDY #2

Several employees and students discover the “Professor Jones” Facebook profile. Soon they are talking about it on campus.

Jones, and several students, come to Human Resources and demand a response, including discipline of the student.



CASE STUDY #2

- What do you do?
- Would the false profile be considered a form of workplace harassment?
- Can Eric be disciplined for creating the false *Facebook* profile?



CASE STUDY #3

Mike and Stacy are both administrators at the College. After years of dating they break up. Stacy creates a fake *MySpace* page for Mike and posts sexually explicit and derogatory information about him. Stacy also posts intimate pictures and videos she took of Mike during their relationship. Stacy uses no company time or equipment in creating the web page. The *MySpace* page is password protected.



CASE STUDY #3

In addition to the *MySpace* page, Stacy begins to email Mike. Her messages declare her love for him or insult him... sometimes it's not clear which. Stacy initiates the communications from home and uses her personal computer and email address after work hours.



CASE STUDY #3

Mike forwards over 50 emails he has received from Stacy to the college's H.R. department and complains about the *MySpace* page. When the H.R. director meets with Stacy, she accuses the College of violating her privacy and meddling in her business.

- What should the college do?
- Is it significant that the *MySpace* page is password protected?



CASE STUDY #4

The economy is picking up and the College is hiring new Professors. The H.R. Director decides to use *Google*, *MySpace*, and *Facebook* to check out applicants.

- What types of problems could arise from such a search or background check?



CASE STUDY #4



facebook

home search browse invite help logout

Profile

Search

- My Profile edit
- My Friends
- My Photos
- My Notes
- My Groups
- My Events
- My Messages
- My Account
- My Privacy

FREE PHONE

With V CAST and Navigation System capabilities



when you buy one for **\$49.99**

WITH NEW 2 YR. ACTIVATION PER PHONE

NO ACTIVATION FEE
FREE SHIPPING

Michelle's Profile

Sex: Female
Interested In: Men
Relationship Status: Married
Birthday: [Redacted]
Hometown: PA
Political Views: Very Conservative

Mini-Feed
Displaying 7 stories. See All

Yesterday

- Michelle edited Interested In in her profile. 12:09pm
- Michelle and [Redacted] now friends. 12:08pm
- Michelle and [Redacted] are now friends. 12:08pm

September 27

- Michelle edited Residence, Hometown, Interests, Interested In, Activities, Political Views and Music in her profile. 4:16pm
- Michelle is married. 4:16pm
- Michelle joined the South Jersey, NJ network. 4:11pm
- Michelle joined Facebook. 4:11pm

Information

Contact Info
Email: [Redacted]

Personal Info
Activities: Blogging
Interests: White supremacy, Asian guilt, being white, blatant racism
Favorite Music: WHITE POWER!!

The Wall
No wall posts. Write Something

Nobody has said anything... yet.



TRUE, FALSE OR MAYBE

- The college has issued its employees cellular telephones. May it monitor emails and text messages received and sent on the cellular phones?

MAYBE



HARASSMENT POLICY

Tools

- Anti-Harassment Policy
- Anti Workplace/Campus Violence policy
- Electronic Communications Resources Policy
- Personnel rules
- If needed, seek restraining order



HARASSMENT POLICY

- California Code of Civil Procedure section 527.8 provides an employer with authority to seek a temporary restraining order on behalf of an employee.



HARASSMENT POLICY – FREE SPEECH

- Very Important Caveat for Student Speech
- Free Speech Concerns with Overly Broad Policy
 - E.g., may be overbroad if policy written to prohibit speech on gender roles, homosexuality, and other matters “offensive” to others
 - Policy probably only safe if proscribes such speech that is *severe* and *pervasive*
 - Can have policy proviso that purely academic speech is outside policy



CASE STUDY #5

- Harold is a student at the College who maintains a widely read personal blog. Mid-way through the fall semester, Harold discloses his religious views, including his views against gay marriage. On his blog, he makes a number of statements very antagonistic to homosexuals. A day later, five students (some gay, some not) complain that the posting has disrupted the campus and led to confrontations. They insist that the college discipline Harold for harassment.
- Can the school discipline Harold?



CASE STUDY #6

- A number of College students at a late-night diner off campus decide to make a video of themselves making sexual, religious, national origin and other harsh comments about another student Lisa in one of their classes. The next morning, one of the group, Michael, posts the video on YouTube and invites other students to view it. The next morning Lisa comes into the Student Services offices crying and unable to attend her classes.
- Can the College discipline Stuart?



OUTER LIMITS

- Student “Sexting” – sexual conduct through text message, e.g., verbal, provocative, or sending nude photos of self or others
- Substantial risks:
 - Sexual harassment
 - Invasion of privacy
 - Criminal conduct if it involves minor students of college



CONCLUSIONS

- Social Networking a rapidly developing area of the law
- Disciplining students for harassment must account for
 - Free speech concerns (viewpoint-neutral college rule, generally not political or cultural commentary, unlawful conduct)
 - Privacy concerns (student expectations of privacy, connection to campus)



CONCLUSION

QUESTIONS?

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