Harassment and Social Media

Presented by:
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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
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 Dooced
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
• Important whether:
  -- Reasonable expectation of privacy
  -- Nexus to job/college
• 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).)
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?
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.
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.
• 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.
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?
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?
• The college has issued its employees cellular telephones. May it monitor emails and text messages received and sent on the cellular phones?

MAYBE
Tools

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