

Twibel

The Funny-Sounding Social Media Claim That's Not a Laughing Matter

By Sara H. Jodka, Attorney, Porter Wright

Most companies have some familiarity with the legal issues that can arise from employees using social media, such as firings when employers have terminated employees for using social media to air workplace grievances.

Online speech does not come with a get-out-of-jail-free card. Courts are increasingly being asked to review online speech and have been willing to give those harmed a sympathetic ear, the same as if the speech had been conveyed more traditionally in a newspaper.

However, with online speech, the stakes can be higher, as the risk that a controversial comment will be mass distributed very quickly is great. The speed at which the comment can be distributed makes these communications difficult to stop, increasing the risk of reputational and monetary harm to the victim or to the employer. Twitter has made the risks of these potentially harmful viral communications more eminent.

What is Twibel?

Simply put, Twitter + libel = Twibel. It describes libel actions based on comments made via Twitter. Legally speaking, libel is defamation by written or printed words, pictures, or in any form other than by spoken words that harms the reputation of another. Twibel, therefore, is a modern spin on an old issue.

Twitter is Highly Susceptible to Twibel Lawsuits.

Twitter is more susceptible to social media libel suits for a few reasons. First, access to Twitter is easy. Most Twitter users' profiles are public, and a tweet can be seen by anyone with a Twitter account. Twitter users cannot control who follows them — although they can block a follower later — and they cannot

limit their distribution list. This is different from Facebook, where users have control over who can see what.

Second, Twitter users are limited to 140 characters, but they can post links to Internet sites or photos. This allows them to say a lot, but not enough to fully explain. This lack of clarity can lead to misinterpretation, and ultimately, liability.

Last, a controversial tweet is likely

to go viral. Just ask the (former) public relations executive who posted this insensitive and misguided tweet before boarding a flight: "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!" Not only did the tweet go to all the executive's followers, but the tweet was heavily reposted and commented on. By the time the executive landed in Africa, the tweet had gone viral and the executive was terminated.



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With access to public Twitter accounts largely unabated, it is no wonder that controversial tweets raise the stakes for companies. No company is immune. Even the biggest companies have horror stories to share. Here are a few.

- @KitchenAidUsa: “Obamas gma even knew it was going to be bad! She died 3 days b4 he became president.”
- @ChryslerAutos: “I find it ironic that Detroit is known as the #motorcity and yet no one here knows how to f**king drive.”
- @RedCross: “Ryan found two more 4 bottle packs of Dogfish Head’s Midas Touch beer... when we drink we do it right #gettingslizzerd.”

Twibel Lawsuits

With these examples, it was only a matter of time before Twibel lawsuits became real. In 2009, Courtney Love became the first person to be sued for tweeting nasty things about a designer after a business dispute went awry. A week before the libel trial, Love settled the claim for \$450,000. That is an expensive tweet.

Love was also sued by her former attorney for insinuating in a tweet that the lawyer had been bought off. “I was f**king devastated [sic] when Rhonda J. Holmes esq. of San Diego was bought off.” Holmes, whose occupation depends on her reputation, took the tweet seriously and sued Love for libel.

The case proceeded to a seven-day trial. The jury deemed Holmes a public figure (she was a high-profile lawyer who had represented Love in regard to Curt Cobain’s estate) and, for a public figure, the tweet did not rise to defamation. It is not clear what would have happened if Holmes had been deemed a private person because the burden of proof in defamation cases depends on the public/private nature of the victim.

In the most recent Twibel case, *Feld v. Conway*, a district court ruled the following tweet was not defamatory: “Mara Feld aka Gina Holt — you are f**king crazy!” The case concerned a failed business relationship. The

debate became heated and spilled over onto Twitter. Feld sued the tweeter for defamation. The court refused to review the tweet by itself and looked at the entire debate in context. The court found the offensive tweet, when read by a reasonable person, was intended as an opinion, not as a statement of fact.

The question now is where to draw the line between opinion, even arguably drunken, childish spouting-off-at-the-mouth opinion, and actionable defamation. So, while defamation is not new, applying existing legal standards to modern forms of communication is.

What Can a Company Can Do?

Ill-conceived social media posts by employees can cause businesses a host of problems, such as libeling a competitor, insulting a customer, disseminating confidential company, product, or customer information, inviting workplace harassment or violence, and registering protected complaints.

Companies must be proactive and stay current as this area evolves. To begin, create a social media policy that outlines for employees — including managers — what is appropriate on social media and what is not. Companies can also consider limiting social media activity to noncompensable time and prohibiting or blocking such activity on company computers and devices. The policy should also define the consequences of inappropriate posts. Use the social media policy to remind employees of the consequences of their social media conduct, that it can generally be viewed by the public, reposted and reprinted, and that, even though it may be off-duty conduct, what they do on social media may have workplace repercussions.

Also offer training to be proactive. Effective training includes specific examples of the business and employment issues caused by inappropriate tweets and other social media posts. Use the examples above and incorporate other types of social media posts that could harm the company’s reputation, including:

- Sexually suggestive posts, pictures

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or comments

- Comments about coworkers that could be viewed as violating the company’s discrimination/harassment/workplace bullying prohibitions
- Photos of employees engaging in illegal activity, vandalism, public intoxication, etc.
- Comments or posts that imply violent tendencies
- Disclosure of the company’s confidential information
- Negative or derogatory comments about the company’s competitors

Lastly, companies with social media accounts should have employees who have access to those accounts sign usage and guidance contracts that set forth what they can and cannot say on the company’s behalf.

It is time to add the word “Twibel” your company’s vocabulary and, more important, your overall social media strategy. 🌐

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