

Voicemails, Emails, Text Messaging and Social Media – The Lions and Tigers and Bears of Trials

By Chris J. Trebatoski

Fortunately for most individuals and businesses, being a party to a lawsuit either as the plaintiff or the defendant happens only once or very infrequently. Individuals and businesses in that position are exactly the type of litigant most susceptible to the pitfalls of contemporary communication forms and social media. Large companies who are involved in litigation have tightly drafted policies and police those policies carefully when it comes to matters like email, voicemail and social media. Of course, even those companies do not catch everything and there are always violations of every rule. But for those who have not considered employee awareness training and policies with respect to these forms of communication and social media usage, the impact when a lawsuit is filed is often surprising and can create significant challenges for obtaining a successful result.

The issue is becoming a greater and greater problem as the pressures for immediate communication become compelling and as the population of employees becomes more and more tech savvy and comfortable with communication based upon something other than telephone conversations or face to face meetings. Being a father of a teenager and a college sophomore it never ceases to amaze me how much communication occurs through the use of text messages, social media, and emails that would have been communicated via the telephone or face to face just a

few years ago. With the advent of text messaging and twitter, the desire for shorthand communication has normalized repetitive use of letter combinations that contain profanities that would never have been included in a letter, less likely used in a voice mail, but now have crept into both social media, email and texting.

*Once something is
posted on the
Internet—someone
will find it*

These shorthand phrases and the reliance upon written communication create an embarrassing and sometimes dangerous mix if you are sued and a request for emails, text messages and social media is made. The level of comfort with the communication forms and the significant use of short hand phrases, that to the communicator are more like punctuation than a statement of shock or surprise, are likely not to be viewed the same way by a jury. Imagine this scenario, you have been sued and an email complaining about the situation surfaces between two employees who are having problems either with suppliers or the party suing you. Said email ends with the common short hand: "WT__". (You will note that I politely refrained from including the offending letter in the phrase even for the purposes of illustration in this article.) It is a certainty that the other side in litigation will use that phrase for shock

value, to embarrass or indeed to advance an argument that your company failed to meet its obligations. Not an insurmountable problem, but the effort taken to explain away the communication could as likely emphasize the opponents' point as explain the off the cuff nature of the communication.

This problem exists in voicemails, emails, text messages and social media and is not easily addressed in hindsight. Emails, text messages and social media cannot disappear or be cleansed after the fact. Indeed, courts considering efforts to cleanse the problem have sanctioned parties engaging in the conduct with sanctions as significant as striking of an answer, dismissing a claim and awards of attorney's fees. Recently a Maryland court issued significant sanctions against a client and an attorney who told an employee to remove what they believed to be offensive social media posts. The problem in every instance is that, once the document exists, once something is posted on the Internet in social media, some person or lawyer will either already have the communication in hand or find it.

What is the practical solution? 1. Training of employees to understand the need for professional communication in all forms of communication involving your business. 2. Training for employees on the impact of social media posts on both a personal and professional level. 3. Policies that prohibit the use of profanity in communications within the office. 4. If you get sued, do not destroy the



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communications or ask employees to remove items from social media. You should consult your lawyer in connection with the development of materials for use in training and any policies you wish to develop, as there are First Amendment and labor relations implications that need to be avoided in the training and policies.

With a combination of training and policy, risk can be reduced. It can never be totally avoided but then no risk can be completely eliminated from our business or personal lives. **WBB**

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Business Planning—Developing An Emergency Plan

By Steven M. Szymanski



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Recently, I attended a business function. The main speaker at the function was a business owner who owned and operated his successful business for over thirty years. However, in the thirty years of operation, the speaker never considered how the business would operate if something happened to him. The speaker had an epiphany when his close friend passed away suddenly. The close friend also was a successful business owner and when he passed away, there was little management to operate the business because the business was highly dependent on its owner. The spouse of the close friend was in the unfortunate position of trying to own and manage a business with which she was unfamiliar.

The death of the speaker's close friend changed the

way the speaker managed his business. He had a special meeting with his staff and asked them how the business would successfully operate if he was no longer around. At first the staff did not have an answer, but after some thought and planning with the owner, the group developed an emergency plan for the business. The speaker gained some sense of comfort knowing that if he was no longer involved in the business, there was a plan in place to protect him, his family, his employees and their families.

Unfortunately, many business owners do not plan for the situation in which they are unable to operate their businesses, whether by illness, death, disability or otherwise. However, having an emergency plan can be an important tool in protecting the owner, the owner's family, the employees of the business and their families. Here are some thoughts to consider in developing an emergency plan for your business:

First, consider the management structure of your business. Are you the only business manager in your business or do you have management team? Does the management team make decisions or does it report to you for decision making? Many small business owners are limited in the resources they can commit to management. In such a case, a small business owner might consider

creating an emergency team of trusted advisors who have met with the owner, understand the business and the owner's goals, and participated with the owner in developing a plan to be executed should an emergency occur.

Second, consider whether your business' information is organized so that it is reasonably accessible and understandable by others in the case of an emergency. When an emergency occurs it is important that the business continue seamlessly and that information necessary to operate the business is reasonably accessible and understandable by others. Information regarding customers, suppliers and vendors, including contact information, orders and outstanding contracts, should be organized so that it is available and understandable by the people who will be managing the business in your absence. In the event that it is necessary to sell the business, this information may be asked for by the buyer in its investigation of the business. The easier it is to access and understand the information, the better.

Third, if your emergency plan addresses a sale of the business as an alternative, have possible buyers for the business considered, e.g., internal management, strategic buyers? Have possible business brokers been considered to assist

in selling the business? Has a possible purchase price for the business been considered? The answers to each of these questions can be reviewed by the owner in advance, memorialized by the owner in a letter of direction or discussed with trusted advisors.

Fourth, a business owner should consider the message that will be given to the employees of the business. Employees are an integral part of maintaining continuity in the business and they will be expecting some guidance should an emergency occur. An emergency plan may be able to provide continuing management with that guidance.

Developing an emergency plan can be a helpful tool in assisting a business owner plan for unexpected situations. It can also assist the business owner in identifying strengths and weaknesses in the current business that can be adjusted to make the business more successful in the near and long term. **WBB**

Religion In The Workplace

By Michael M. Berzowski

These are strange times in which we find ourselves. On one hand, there appears to be a movement designed to remove all traces of religion in the public sector. At the same time, there appears to be a movement afoot to promote or advance or, at a minimum, protect religious expression in the private sector. Both approaches appear to be consistent with the First Amendment.

The challenge with regard to religion in the workplace is striking a balance between an employee's right to practice faith at work versus the employer's right to operate its business. An offshoot is the employer's right to practice versus the employee's right to be left alone.

There are both federal and state laws regarding discrimination. Generally speaking, federal rules become operative if there are fifteen or more employees; Wisconsin requires only one.

Religion and religious beliefs have been so broadly defined as to basically defy any argument to the effect that religion is not involved with regard to a certain course of conduct. All that is required is a sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by God.

Usually problems involving religion are easy to spot. For example, conflicts between work requirements

and holy day observance, religious garb, religious grooming, proselytizing, conflicts between faith and specific duty assignments, obligations to pray at certain times, dietary restrictions, resistance to union membership, disregard of the right to be left alone and the presence of or the right to introduce signs, posters, charts, artifacts, books, buttons, badges and jewelry.

Consider having in place a reasonable accommodation action plan.

Guidelines for employers include not treating employees or applicants more or less favorably because of religious beliefs or practices, except to the extent an accommodation is warranted, not forcing employees to participate in or not participate in a religious activity as a condition of employment, not allowing religious harassment of employees and absent an undue hardship for the employer's business interests, accommodating employees' sincerely held religious practices and allowing them to engage in religious expression.

The general rule is that an employer must propose a reasonable accommodation unless it can prove that all reasonable accommodations would entail an

undue hardship. The employee must cooperate. Some examples are voluntary substitution or swaps of work assignments, flexible scheduling of work hours, breaks and holiday leave, lateral transfers to different assignments of location and relaxation of closing requirements.

Undue hardship will generally trump the accommodation request if the accommodation requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employee job rights or benefits, impairs workforce safety, causes coworkers to carry accommodated employee's share of potentially hazardous or burdensome work or if it conflicts with other laws or regulations. The size of the employer and costs are extremely important.

An employer interested in warding off religious discrimination claims should have in place a reasonable accommodation action plan, the substance of which is to commit to writing the entire accommodation process to include requiring employees to indicate in writing what the religion requires they do with respect to work and exactly what they are requesting as an accommodation.

The business owner with an aggrieved applicant or present or former employee can expect to hear from the EEOC or the Wisconsin



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Department of Workforce Development or both. Assuming liability, remedies in these cases can include back pay, hiring, promotion, reinstatement and other efforts to make the individual whole. To exacerbate matters, they may include attorney's fees, witness and court costs as well as compensatory and punitive damages in cases involving intentional discrimination.

In summary, it would be a good idea to review policies with regard to religion and religious discrimination, as well as other potential Title VII claims. With a little effort, planning and foresight, an employer can protect itself from problems developing in the first place. **WBB**



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Comments? We'd like to hear from you. Please send an email to the editor: Megan Wiseman at reporter@wbb-law.com.

AT THE FIRM...

Weiss Berzowski Brady LLP is pleased to be announce the addition of **Neal Krokosky** to the firm. Neal joins the firm with experience defending a variety of claims, including: breach of contract; discrimination; asbestos; and, general liability. His practice centers in commercial and employment law and will be a welcome addition to our litigation team.

Bon voyage! The firm bids farewell to **Andrew Bednall**, Chief Operating Officer for Weiss Berzowski Brady. He joined the team in 2005 and is now moving on to enjoy the wonderful world of retirement. We wish him luck in his next adventure!

Please see the dates for our 2013 Conferences in the right hand column. With the exception of the Real Estate and Business Conference, which will be held at Westmoor Country Club in Brookfield, conferences will be held at the Wisconsin Club at 900 W. Wisconsin Avenue.

For more information or to register, go to our website. Or contact Megan Wiseman, 414-270-2559 (mkw@wbb-law.com)

2013 Schedule of Events

REAL ESTATE & BUSINESS CONFERENCE
April 17, 2013

ESTATE PLANNING CONFERENCE
June 5, 2013

31st ANNUAL TAX & BUSINESS SEMINAR
September 18, 2013

EMPLOYMENT LAW CONFERENCE
October 16, 2013

Please check our website (wbb-law.com) for more event information.