

# Social Media Defamation: What You Tweet Can Get You Sued

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## Today's Topics

- ▶ Overview of Defamation under New York Law
- ▶ Application to Social Media
- ▶ Tweeting and Retweeting
- ▶ Recent "Twibel" Cases
- ▶ Defamation Claims and Other Social Media Platforms
- ▶ Mitigation

## Social Media Use\*

- ▶ Facebook: 1.55 billion monthly active users<sup>1</sup>
- ▶ Twitter: 320 million monthly active users<sup>2</sup>
- ▶ LinkedIn: 396 million members & an average 100 million unique visiting members per month<sup>3</sup>
- ▶ Instagram: 400 million monthly active users<sup>4</sup>

\*At least some of these numbers are approximations.

<sup>1</sup> <http://newsroom.fb.com/company-info/> (as of Sept. 30, 2015)

<sup>2</sup> <https://about.twitter.com/company> (as of Sept. 30, 2015)

<sup>3</sup> <https://press.linkedin.com/site-resources/news-releases/2015/linkedin-announces-third-quarter-2015-results> (as of Sept. 30, 2015)

<sup>4</sup> <https://instagram.com/press/> (as of Sept. 2015)

## Defamation Defined

- ▶ “the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society”

*Foster v. Churchill*, 665 N.E.2d 153, 157 (N.Y. 1996) (citation and internal quotation marks omitted); *Stepanov v. Dow Jones & Co., Inc.*, 987 N.Y.S.2d 37, 41 (App. Div. 2014) (quoting *Foster*)

## Elements of a Defamation Claim

- ▶ **False** statement
- ▶ Published to a third party without authorization or privilege
- ▶ With fault as judged under the applicable standard
  - At least a negligence standard
- ▶ And either constituting defamation *per se* or causing special harm

## Potential Defenses

- ▶ Truth
- ▶ Privilege
- ▶ Consent
- ▶ § 230 of the Communications Decency Act of 1996
- ▶ Lack of personal jurisdiction
- ▶ Statute of limitations

## Actionable Fact v. Non-actionable Opinion

- ▶ Three-factor inquiry
  1. Do the specific words at issue have “a precise meaning” that is “readily understood”?
  2. Are the statements “capable of being proven true or false”?
  3. Does “the full context of the communication . . . or the broader social context and surrounding circumstances” signal to listeners or readers that what is being heard or read “is likely to be opinion, not fact”?

E.g., *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 718 (S.D.N.Y. 2014)

## Application to Social Media

- ▶ “[D]ecisions from courts in this Circuit suggest that defamatory statements published on Facebook and Twitter . . . could indeed be actionable in defamation suits.”

*Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 724 (S.D.N.Y. 2014) (emphasis added) (citing cases)

## Tweeting and Retweeting

- ▶ 140-character limit
- ▶ @username
- ▶ #/hashtags



<https://support.twitter.com/groups/50-welcome-to-twitter/topics/203-faqs/articles/13920-new-user-faqs#> (last visited Nov. 20, 2015)  
<https://support.twitter.com/articles/49309#> (last visited Nov. 20, 2015)

## Excerpt from Twitter's Privacy Policy

- ▶ **“Tip:** What you say on the Twitter Services may be viewed all around the world instantly. You are what you Tweet!”

<https://twitter.com/privacy?lang=en> (internal quotation mark omitted) (last visited Nov. 20, 2015)

## Recent “Twibel” Cases

- ▶ *Gordon & Holmes v. Love*,  
No. BC462438 (Cal. Super. Ct. Jan. 24, 2014)
- ▶ *Feld v. Conway*,  
16 F. Supp. 3d 1 (D. Mass. 2014)
- ▶ *Restis v. Am. Coal. Against Nuclear Iran, Inc.*,  
53 F. Supp. 3d 705 (S.D.N.Y. 2014)

## Defamation Claims and Other Social Media Platforms

- ▶ *Restis v. Am. Coal. Against Nuclear Iran, Inc.*,  
53 F. Supp. 3d 705 (S.D.N.Y. 2014)
- ▶ *Binion v. O’Neal*,  
No. 14-13454, 2015 WL 3544518 (E.D. Mich. Apr. 2, 2015)
- ▶ *Bouveng v. NYG Capital LLC*,  
No. 14 Civ. 5474(PGG), 2015 WL 3503947 (S.D.N.Y. June 2, 2015)

## Mitigation?

- ▶ N.Y. Civ. Rights Law § 78
  - Retraction?
  - Correction?
  - Removal?

- ▶ “Communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time.”

*Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002).

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