

DO IT FOR THE VINE! How This Week's Viral Social Media Trend Can Spark Legal Liability In The Workplace

November 11, 2015 | [Social Media And Technology, Currents - Employment Law](#)

Consider the following scenario: Sharon is the owner of a very successful restaurant in Florida. Sharon's establishment employs around 20 individuals. Most of her employees are between 18 and 22 years old. In May 2015, Sharon hired Joseph as a server. Joseph is a disabled 38 year old whose medical condition requires that he wear special orthopedic shoes. Sharon began noticing an annoying pattern of behavior during the first week of July. Several of her younger employees working in the back stock-room would frequently exclaim: "WHAT ARE THOSE?!?!!" – before bursting into laughter. Sharon did not understand the humor, but suspected it was nothing more than an inside joke. Sharon simply shrugged it off and went about her business. In mid-July Sharon was leafing through a stack of paperwork when she came across a mysterious envelope. Sharon opened the envelope and discovered a handwritten message from Joseph: "After enduring weeks of abuse I am resigning effective immediately. I can no longer tolerate the abusive atmosphere you have allowed your employees to cultivate. I am disabled. My disability is not a joke. I have rights under the Americans with Disabilities Act. I plan on discussing this matter further with my lawyer." Sharon was shocked. She never witnessed any of her employees engaging in abusive behavior. Was she completely missing something? In order to understand Sharon's situation, we need to go back to June 2015. During this timeframe, an Internet user uploaded a video to the social networking app Vine®. Vine® is a mobile video-recording application that allows users to create and upload six second video clips from their mobile devices. In this particular video, the user can be seen filming a police officer and shouting: "Officer, I just have one question for you. WHAT ARE THOSE?!?!!" The camera then pans down to the officer's clunky boots. It was an obvious attempt to poke fun at the officer. View the [original video](#). The user obviously has a very immature sense of humor. Surprisingly, however, thousands of Vine® users thought it was absolutely hilarious. The video has since amassed more than 32 million replays, 400 thousand "likes," and has resulted in thousands of parody re-creations. Here are just a few parody videos that were created by employees in the workplace: <https://vine.co/v/e6bYi1QZwZu> <https://vine.co/v/egLbW2vFwqr> <https://vine.co/v/eP6x9Tqrjro> Here are a couple other videos uploaded by Vine® users giving their own creative spin to the original video: <https://vine.co/v/e1Atn9EOIJH> <https://vine.co/v/eDPgq1eqFzb> Why is this relevant to Sharon's predicament? Like many Vine® users, several of Sharon's employees found these viral videos absolutely hilarious. They also thought it would be nothing short of comedic genius to walk up to Joseph, gesture to his orthopedic footwear, and exclaim: "What are those?!?!!" After all, it was just something they saw on Vine®, right? It's just a harmless joke. Obviously if Sharon had seen her employees engaging in this conduct she would have put a stop to it. But she only heard the employees' comments from a distance. She had no reason to think their banter was anything more than a stupid inside joke amongst friends. In hindsight, Sharon wishes she would have taken a few minutes to investigate

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the situation. **The Bigger Picture** Was this viral social media trend a one off? Absolutely not. A new piece of social media comedy goes viral every week. And discussion regarding these viral comedic posts is increasingly making their way into the workplace. For example, during November 2014, Chick-fil-A made headlines when a manager allegedly posted a notice banning a list of inside jokes and slang commonly used by his employees. Here is the [notice](#) courtesy of Business Insider. Most of the jokes and slang referenced in the notice are frequently thrown around on social media platforms like Vine®, Instagram® and Snapchat®. And a lot of the comedic banter gaining popularity on social media platforms is downright inappropriate. For example, the notice specifically calls out employees who mention being “legally blind.” That seems odd. Why would an employee think being legally blind is humorous? Social media provides the answer. The Internet went crazy this past year after a news interview surfaced with a suspected criminal. During the short interview, the suspect professed her innocence explaining that she could not have committed the crime because she is “legally blind.” The interview spawned thousands of parody videos with voice-overs. Here is a [parody](#) Vine® posted by what appears to be two on-duty firefighters. The “My name is Jeff” phenomenon is another well-known example. This trend followed the release of the recent film “22 Jump Street.” The Internet community went absolutely nuts when Channing Tatum spoke with a speech impediment while introducing himself as “Jeff” during the film. Here are two examples selected from the thousands of parody videos uploaded to Vine® making light of Mr. Tatum’s one-liner: <https://vine.co/v/OvtXWpV05TE> <https://vine.co/v/O1qViDH0aTW> Why is all this important? The focus is often on whether employees can be disciplined for their own social media posts. Employers, however, also have to keep something else in mind: Social media trends – particularly humor – often bleeds into everyday workplace interactions. The significance of the Internet’s “inside joke” of the week, however, may not be readily apparent to those who do not keep up with what is trending in cyber-space. Indeed, Sharon wasn’t on Vine® when the “what are those” videos went viral. She had no reason to think the phrase she heard had anything to do with Joseph’s disability. As a result, she simply brushed off her employees’ behavior without any investigation. Equally important, seemingly innocent references to inappropriate social media humor may also cause legal issues down the line. Sure, mimicking a popular Vine® video about being “legally blind” seems innocent enough. After all, everyone knows it’s just “Vine®” humor. And how harmful can it be? Thousands of people are doing it. But allowing employees to parrot what they see on social media can provide damaging evidence in a subsequent discrimination lawsuit. This is particularly true if such references are pervasive and supervisors also participate in the banter. Not convinced? Consider the following hypothetical: for about two weeks in 2015, a group of employees and managers circulated via email what they thought were the “funniest” “legally blind” Vine® parody videos. A few months later the employer happens to hire an individual who is, in fact, legally blind. Things don’t work out and the employer terminates the employee for poor performance. The former employee ends up filing a charge of discrimination and lawsuit alleging unlawful discrimination based on her vision impairment. A few of these emails end up surfacing and the employee points to them as evidence of a discriminatory animus. You better believe a plaintiff’s attorney will argue that the “it’s just something I saw on Vine®” defense shouldn’t cut it. Do we suggest that an employer should scour social media sites in order to determine whether office conversations are truly in compliance with its EEO policy? Absolutely not. But suppose you see an email from a supervisor to a

subordinate curiously titled: "Netflix and Chill?" You might just want to discretely look into what that *may* imply. A quick search on Vine® will provide more than enough information. Additionally, employers should be sure to take prompt remedial action if an employee is overheard parroting an inappropriate Internet comedic trend. Remember: a joke the Internet decides is no longer funny after two months will still be of evidentiary value in a lawsuit years later. For more information, contact the author at ptschanz@btlaw.com.