

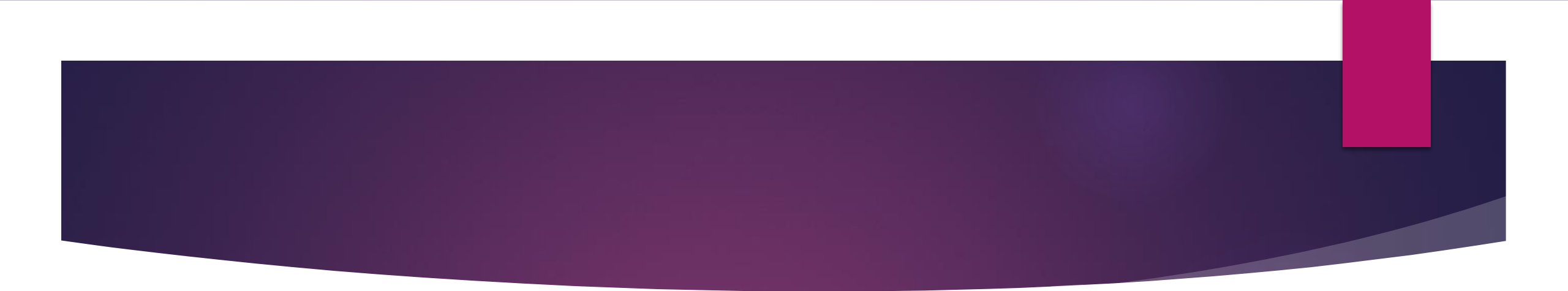


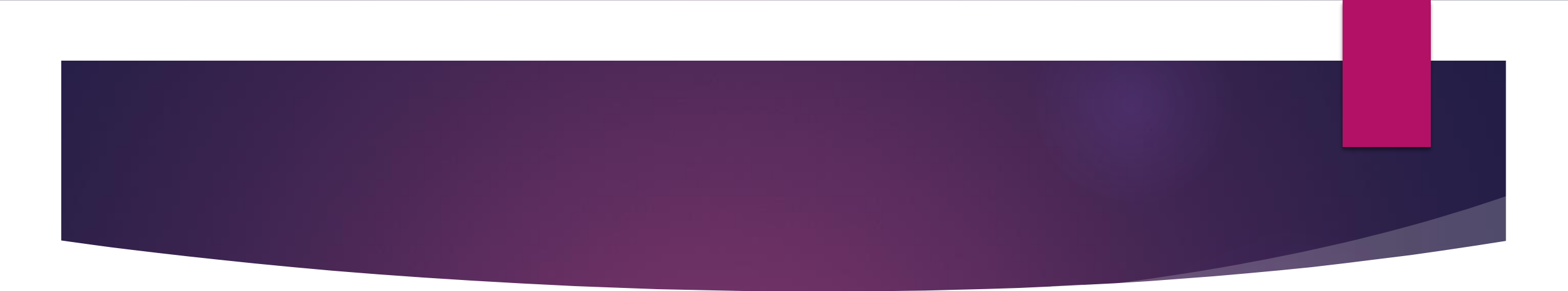
SOCIAL MEDIA TRAINING

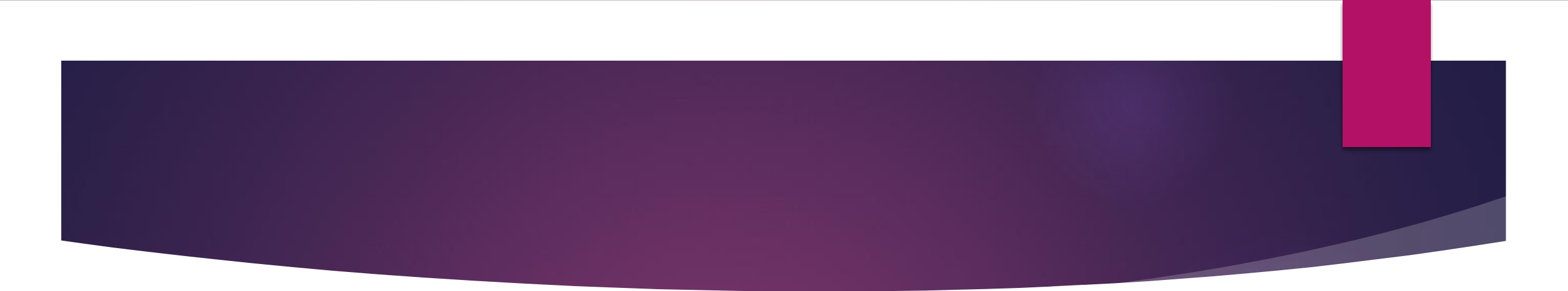
Alison F. Smith, Esq.

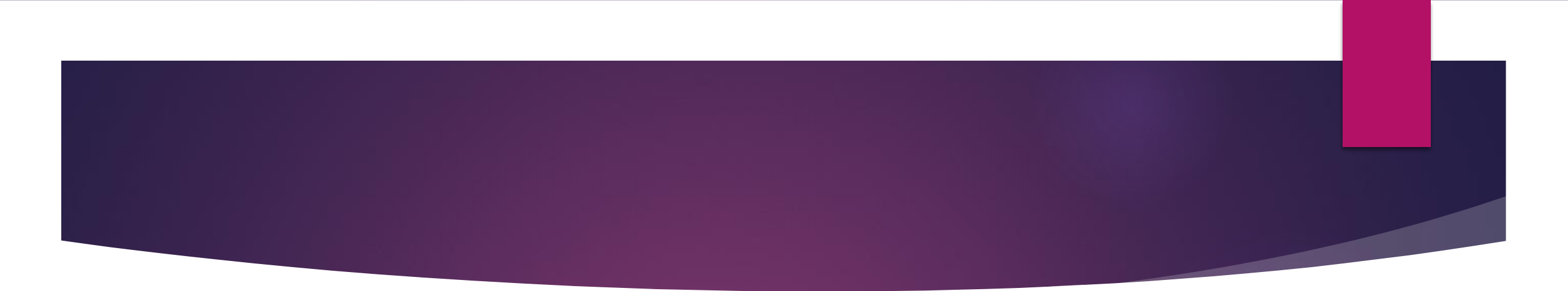
WHY SHOULD EMPLOYERS CARE ABOUT EMPLOYEES' USE OF SOCIAL MEDIA?

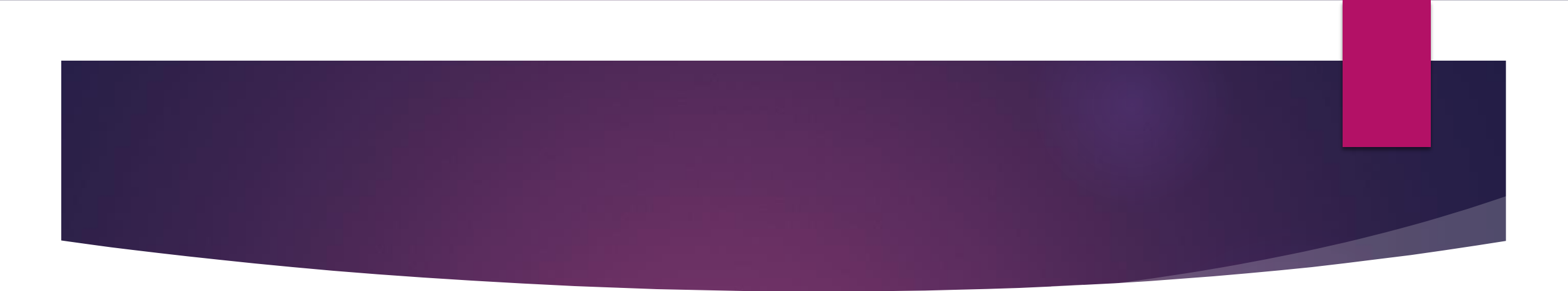
- ▶ Disclosure of confidential, trademarked or other private information
- ▶ Intellectual property infringement
- ▶ Employer defamation
- ▶ Disruptive to the workplace
- ▶ Liability for statements by employees
- ▶ Potentially discoverable in litigation

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- ▶ **Francesca's CFO Fired for Use of Social Media**
 - ▶ **CFO revealed company information**
 - ▶ On March 7, 2012 six days before Francesca's announced its quarterly earnings, the CFO wrote: "Board meeting. Good numbers=Happy Board."
 - ▶ In December 2012, the CFO wrote: "Cramming for earnings call like a final. I thought I had outgrown that."
 - ▶ In January, he boasted to his friends: "Roadshow completed. Sold \$275 million of secondary shares. Earned my pay this week."

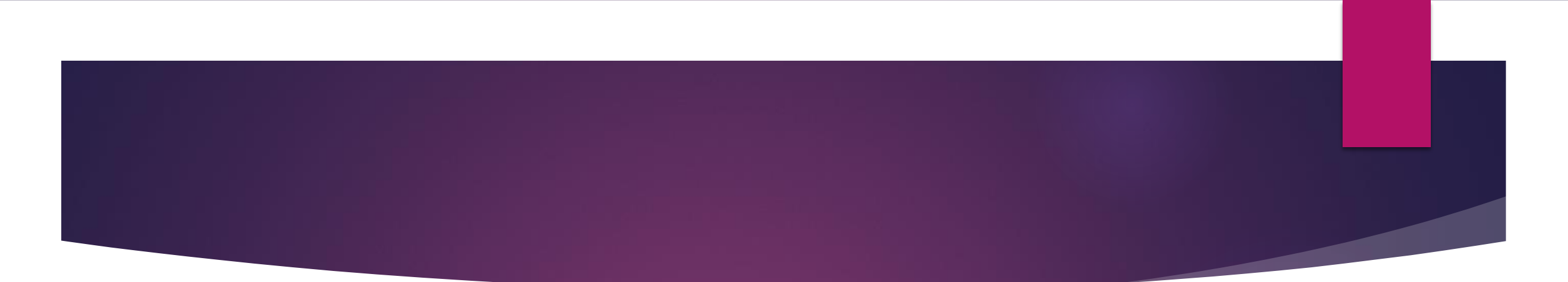
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- ▶ In December 2013, senior director of corporate communications at IAC, Justine Sacco tweeted about going to South Africa. She tweeted: and “hoping she [didn’t] get AIDS” but saying of course she would not because she’s white.
 - ▶ She tweeted: “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!”
 - ▶ At the time of her tweet, she had only 170 twitter followers.

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- ▶ She went on an 11 hour flight from London to Cape Town.
 - ▶ When she landed she was the #1 trending topic on Twitter.
 - ▶ A hashtag began to trend worldwide: #HasJustineLandedYet.
 - ▶ She got tens of thousands of angry tweets and was fired.

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- ▶ **Honeybaked Ham asked for employees' social media content related to their employment and/or separation from HBH (employees had sued for harassment and discrimination)**
 - ▶ **Court held that any social media postings were the equivalent of “everything about me” and had been voluntarily shared with others and was thus discoverable.**

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- ▶ **Court did impose protection by having forensic expert review responsive information prior to production. Court would also review information in camera and provide it to the EEOC for any objections to items deemed responsive.**

- ▶ In April 2018, a police officer was terminated in Daytona Beach Shores for what was deemed a racially charged selfie.
- ▶ During Black History Month, the officer posted a picture of him with an afro and black beard scribbled onto his face, with a gun, bloody syringe and police car and said “this is how I celebrate Black History Month.”
- ▶ https://www.google.com/search?q=matthew+moriarty+daytona+beach&rlz=1C1EODB_enUS559US595&tbm=isch&source=lnms&sa=X&ved=0ahUKEwjpr-uV9sPbAhVPwFkKHT4iDKkQ_AUICigB&biw=1920&bih=974&dpr=1

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- ▶ In May 2018, a Coconut Creek police officer wrote comments in response to a news story regarding a protest at Publix led by David Hogg in response to the Stoneman Douglas shootings.
 - ▶ In the comment section, he stated that he hoped: “some old lady loses [sic] control of her car in that lot. Jus sayin....,”
 - ▶ He was suspended for five days without pay.

HOW DOES THE Company ADDRESS EMPLOYEE USE OF SOCIAL MEDIA?

- ▶ Create a social media policy
- ▶ Distribute the policy
- ▶ Train employees on the policy
 - ▶ Having a policy allows you to impose discipline even-handedly
 - ▶ Block social media sites like Instagram and Facebook

WHAT IS IMPORTANT BEFORE IMPLEMENTING A POLICY!

- ▶ Consider the National Labor Relations Act, 29 U.S.C. §157 (“NLRA”)
- ▶ Section 7 of the NLRA protects union and non-union employees who form, join and assist labor unions, participate in collective bargaining, and engage in **other concerted activities for mutual aid or protection**
- ▶ Concerted activity has been defined by NLRB to include instances where employees collectively complain about the terms and conditions of employment in an effort to improve them

IMPLEMENTING A POLICY

- ▶ Consider free speech protections.
- ▶ Consider privacy issues.
- ▶ Ensure that policies are drafted in a way to avoid a claim that employees are being prevented from engaging in concerted activity to improve their terms and conditions of employment.

THE COMPANY'S SOCIAL MEDIA POLICY

- ▶ **Policy prohibits employees from engaging in discriminatory or harassing conduct using social media**
- ▶ **Policy prohibits any behavior that is prohibited by the Employer's rules and regulations (including department/division rules/procedures)**

THE COMPANY'S SOCIAL MEDIA POLICY

▶ Prohibited Conduct

- ▶ Employees are prohibited from accessing Department social network accounts during working hours without prior authorization from their Department Head or his/her designee.

THE COMPANY'S SOCIAL MEDIA POLICY

▶ Prohibited Conduct

- ▶ Employees are prohibited from posting confidential information on Department social network accounts. Confidential information includes, but is not limited to: employee personal health or financial information; statements or pictures containing home addresses, phone numbers, family information, proprietary data, etc. If in doubt as to whether content is confidential in nature, prior to posting such information, employees must consult with their Department Head or his/her designee.

THE COMPANY'S SOCIAL MEDIA POLICY

▶ Prohibited Conduct

- ▶ For private employers this includes a myriad of records such as organizational charts, department titles and staff charts, job titles, department budgets, telephone directories, e-mail lists, formulas, marketing strategies, etc.

THE COMPANY'S SOCIAL MEDIA POLICY

▶ Prohibited Conduct

- ▶ When in doubt as to the confidential or proprietary nature of information, employees must consult with their Department Head or his/her designee prior to posting such information.

THE COMPANY'S SOCIAL MEDIA POLICY

- ▶ Prohibited Conduct (Departmental Sites)



- ▶ Employees are prohibited from posting content that constitutes a copyright or trademark infringement.

- ▶ The Employer's intellectual property is protected (e.g., products, designs).

THE COMPANY'S SOCIAL MEDIA POLICY

- ▶ Prohibited Conduct (Departmental Sites)



- ▶ Employees are prohibited from utilizing their private social network accounts to post, transmit, discuss or otherwise disseminate any information to which they have access by virtue of their employment with the Company.

THE COMPANY'S SOCIAL MEDIA POLICY

- ▶ Prohibited Conduct (Departmental Sites)



- ▶ Employees are prohibited from engaging in political activity or private business on any Department social network account.
- ▶ Employees are prohibited from stating that their views represent those of the Department or the Company, unless they are given prior written authorization by their Department Head or his/her designee to do so.

THE COMPANY'S SOCIAL MEDIA POLICY

▶ Prohibited Conduct (Personal Social Networks)



- ▶ Employees are prohibited from utilizing their private social network accounts to engage in speech which is defamatory, obscene, threatening, or constitutes extortion or bribery.
- ▶ Employees are prohibited from utilizing language on their private social network accounts which creates a real threat of immediate disruption in the workplace. Such language includes harassing, abusive or insulting language.

THE COMPANY'S SOCIAL MEDIA POLICY

▶ Prohibited Conduct (Personal Social Networks)



- ▶ Employees are prohibited from utilizing Department computers to access social media without prior written authorization from the Department Head or his/her designee.
- ▶ Employees are prohibited from utilizing their personal communication devices to access social media during working hours without prior authorization from the Department Head or his/her designee.

THE COMPANY'S SOCIAL MEDIA POLICY

▶ Prohibited Conduct (Personal Social Networks)



- ▶ Some policies prohibit employees from displaying Department logos, uniforms or any similar identifying items on their private social media pages without prior written authorization from the Department Head or his/her designee.
- ▶ However, the NLRB has held that employees can use company logos in social media posts discussing workplace issues

Discipline for improper use

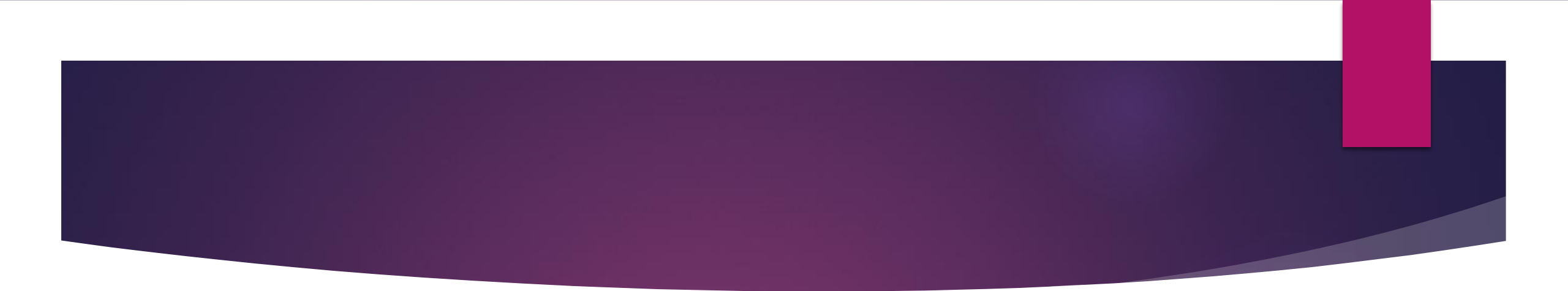
- ▶ How did the Company learn of the activity?
- ▶ What does the social media policy say?
- ▶ Carefully analyze the posting(s) to see if the behavior is protected (examples below)
 - ▶ Consider if the comment relates to work (may be concerted activity)
- ▶ Investigate the facts surrounding the posting(s)

TO FRIEND OR NOT TO FRIEND?

- ▶ Should you be friends with your subordinate employees on Facebook?
- ▶ Consider if the request is being sent from a male superior to a female employee.
- ▶ What does your social media policy say?
- ▶ Best to inform employees that they are not required to interact with supervisors on personal social media and will not be retaliated against for refusing to interact with supervisors.

SOCIAL MEDIA CAN BE USED TO CONDUCT BACKGROUND CHECKS OF JOB APPLICANTS

- ▶ Social Media sites can be mined for potentially damaging personal and professional information
- ▶ If you use social media for background screening when making hiring decisions, be careful!
- ▶ Not everything is accurate
- ▶ Make sure your hiring documentation reveals that you review applicants' social media accounts
- ▶ Ensure that employment decisions are consistent to avoid discrimination claims

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- ▶ Consider the Fair Credit Reporting Act (“FCRA”) if a third party is used for online background checks
 - ▶ Provide FCRA disclosure and obtain FCRA authorization



QUESTIONS??