

Examining the Legal Consequences of Improper Use of Social Media Sites in the Workplace

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Abstract. Social media has made radical and revolutionary changes; from the previous evolution of email and instant messaging to newer forms of communications (i.e., Facebook, LinkedIn, Twitter, etc.). These changes have had a tremendous amount of influence on the way people function and behave. The advanced elements contained within social media have expanded the social constructs of society (i.e., businesses, etc.) in virtual horizons. Boyd and Ellison define a web-based social networking site as a service that allows users to: “(1) Construct a public or semi-public profile with a bounded system; (2) articulate a list of other users with whom they share a connection; and, (3) view and traverse their list of connections and those made by others within the system” [3, p. 211]. This paper will examine the legal consequences on the impact of social networking technologies use in employment. Focusing primarily on the following question: Are there any legal recourses from an employer/employee perspective if they are victims of improper or inappropriate use of social media sites?

Keywords: Social media · Legal consequences · Employment

1 Introduction

Social media systems have created a new platform that allows everyone to engage in several forms of online communications. Facebook, Twitter, Instagram, blogs, wikis are more, have become popular online tools used for web based communications. These forms of interactions are not limited in private contexts only; these types of communications are also very prevalent in public and professional forums. “Nearly two-thirds of American adults (79%) use social networking sites (i.e. Facebook), up from 7% when Pew Research Center began systematically tracking social media usage in 2005” [16]. Social media in general has effected not just communication, but work, politics, sources for news, politics and even stress [16].

Social media has immense possibilities because it serves as many tools at once, but these multifaceted features are also the reason why it poses many problems. Boyd and Ellison define a web-based social networking site as a service that allows users to: “(1) Construct a public or semi-public profile with a bounded system; (2) articulate a list of other users with whom they share a connection; and, (3) view and traverse their

list of connections and those made by others within the system” [3, p. 211]. The connectivity and social aspect of these tools allowing one to connect and interact with others encourages connecting with and “friending” other users. Social media tools allow for one to post many types of content such as text, images, video, hyperlinks while allowing other user’s to interact and view content (depending on the site and profile settings). There are some concerns however about the posting of such content and its availability when it is consumed out of context or by unintended users. Other concerns related to privacy and security of access and availability of content or certain posts. One also needs to examine privacy settings in relation to shared content with “friended” users. Whether it’s sending a get-well message to a friend or using social media for a more serious purpose, users must remember that in the legal sphere, social messaging is still an uncharted territory [8]. This paper will examine some of the legal consequences on the impact of social networking technologies, focusing on its use in employment. Focusing primarily on the following question: Are there any legal recourses from an employer/employee perspective if they are victims of improper or inappropriate use of social media sites?

2 The Impact of Social Media Sites in Employment

Smartphones and other portable devices such as iPads, tablets, and even internet hot-spots integrated into motor vehicles, have encouraged the blurring of work and personal time; almost manacleing people to their devices. It is becoming difficult to differentiate then the work day starts and ends or when one’s personal time begins. According to a recent survey, one-third of the workforce in the United States uses social media for at least an hour a day at work, and one-quarter of American workers would not take a job if their access to social media at work was cut off [8]. In some instances social media use is encouraged while at work to help engage with customers, promote materials and disseminate news and other resources. Although there are many noted benefits for its use in organizations, the overall implications are not fully understood. As noted by Treem and Leonardi, “Scholars have suggested that social media adoption in organizations is outpacing empirical understanding of the use of these technologies” [15]. Social media sites have become channels for public discourse about almost any issue, including complaints related to the workplace. Justifiably, employers are concerned about preventing negative posts, which have led to the development of social media policies to manage employees’ online activities. The central focus of these policies define how employees should identify their affiliation with the organization, the tone of language they should use, and margin on the type of information an employee may share [8, 10]. Creating effective policies intended to control employees’ online activities require an understanding of the current laws regarding social media and the knowledge of responsibilities associated with both employees and employers.

First, an employer has the legal recourse to reprimand employees for improper online behavior during working hours; as long there are stated policies in place that are clearly defined and communicated. Moreover, employers have a right and responsibility to monitor how employees are using social media during the work period. If

employers ignore their employee's social media activity, they may end up facing any number of serious problems (i.e., tension, morale problems and complaints within the organization), both internally and externally (i.e., lawsuits or regulatory action). However, some critics point out that most of what people post on social networks is private and perfectly harmless, and has no bearing on their work [11].

Second, an employer can, and must, intervene when an employee's online actions are placing the employer at legal risk, such as betraying confidential information, or infringement of the Federal Trade Commission's rules on endorsements of the company's products, or threatening or harassing a co-worker. The employee's misconduct would not have been discovered had the employer not conducted a thorough investigation. However, employers must be mindful to investigate responsibly.

There are instances when an employer cannot terminate an employee for expression of opinion, particularly regarding engagement in outside recreational activities. This is dependent however on jurisdiction and context. If engaging in social media is considered "off-duty" and conducted outside of the scope of one's employment as recreation, this may raise questions on how social media use is classified. For example, in the New York Labor Law § 201-d there are protections concerning the discrimination against engagement in certain activities. In summary, it is stated:

"Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of"

"c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property" [14].

Aside from job dismissal, social media posts can also result in lost employment opportunities. Employers can access additional information about applicants via their social media page. An example, CNNMoney.com reported the following incident: Connor Riley was offered a job at CISCO. After the offer, he sent the following tweet: *"Cisco offered me a job! Now I have to weigh the utility of a fatty paycheck against commute to San Jose and hating the work."* A CISCO employee, Tim Levad, saw the post and responded with his own tweet: *"Who is the hiring manager? I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the Web."* [17] Mr. Riley's employment offer was rescinded.

The First Amendment of the U.S. Constitution affords that every citizen has a right to freedom of speech. However, this right is not absolute and does not negate recourses. In a related legal case: *Immunomedics, Inc. v. Does* (2001), the plaintiff, Jean Doe aka moonshine posted a message in Yahoo! The message board was dedicated to postings regarding, Immunomedics, a publicly-held biopharmaceutical firm. Jean Doe stated in her postings that she was an employee and expressed her concerns about her employer. Immunomedics sued Jane Doe (moonshine), stating violation of confidentiality. In addition, Immunomedics served a subpoena on Yahoo! (to disclose the identity of moonshine). Yahoo responded by moving to stop the subpoena on the basis that moonshine has a First Amendment right of free speech and anonymous speech. The trial judge ruled in favor Immunomedics. The Appeals Court supported the trial judge's ruling [7].

2.1 The National Labor Relations Board (NLRB) and Social Network Systems

The NLRB is the federal agency that enforces the statutory rights of all employees covered by the NLRA (National Labor Relations Act). The NLRA covers prosecution of companies with policies that unduly interfere with employee communications about work matters such as wages, hours, and working conditions, even on social media [12]. “The NLRB is a unique agency that make critical decisions determined by five members that establish rules through mediation rather than rule making, offer answers too many pressing workplace questions arising from technological and legal advances” [6]. The case in the next section represents the legal repercussions from inappropriate usages and access of social media sites technology in the workplace.

NLRB v. American Medical Response of Connecticut (AMR). The National Labor Relations Board (NLRB) filed suit against an employer, American Medical Response of Connecticut (AMR), for the suspension and firing of an employee who posted negative comments about her supervisor on her Facebook page. NLRB alleged that the employer retaliated against the terminated employee for her postings and for requesting the presence of her union representative at an investigatory interview that led to discipline. Most importantly, NLRB maintained that the employer’s rules on blogging and internet posting, which included social media use, standards of conduct relating to discussing co-workers and superiors, and solicitation and distribution, were overbroad, interfering with employees’ right to engage in concerted activities for mutual aid and protection under section 7 of the National Labor Relations Act [12].

Soon after the suit was filed by the NLRB, AMR agreed to concede with NLRB, to modify its policies. The company settlement promised to grant employees’ requests for Union representation, and to revise its Internet and social media policies. In this case, the NLRB simply clarified that these generally permissible policies regulating free speech are not permissible if they interfere with employees’ rights to organize labor unions and engage in concerted activities [12].

2.2 The Federal Stored Communications Act and Social Network Systems

The Federal Stored Communications Act law, noted as, 18 U.S.C. Chapter 12 §§ 2701–2712, was enacted to broaden the scope of the Fourth Amendment. The Fourth Amendment did not include language to cover the protection of privacy regarding online content. This act defined, in conjunction, with online/electronic communications, in the following areas: (a) Offense, where it is basically defined as access without authorization of a facility; (b) Punishment, where it defines the penalties associated with said offense; and (c) Exceptions, which basically states that this act does not apply to suppliers of online/electronic communications found under Sects. 2703, 2704 or 2518.

The following cases represent the legal repercussions and application(s) of the Federal Store Communications Act showing inappropriate access of social media technology in the workplace.

Pietrylo v. Hillstone Restaurant Group. In a case settled in 2009, two restaurant workers sued their employer in federal court in New Jersey after they were fired for violating the company’s core values. According to court documents, their supervisors gained access to postings on a password-protected MySpace page meant for employees but not managers. The jury found that the employer, Hillstone Restaurant Group, had violated the Federal Stored Communications Act and the equivalent New Jersey law, and awarded the employees \$3,403 in back pay and \$13,600 in punitive damages. The restaurant company appealed before the two parties reached an undisclosed settlement, said Fred J. Pisani, the workers’ attorney. Hillstone said, “We’re pleased that the matter was resolved and the plaintiffs have gone their separate way [2].”

Ashley Payne v. Barrow County School District. In August 2009, the Barrow County School District allegedly forced Apalachee High School English teacher to resign, after receiving an anonymous tip about photos posted on her personal Facebook page. In these photos, the teacher was shown holding alcoholic beverages. The school found the photos from teacher’s vacation to Europe showing her holding wine and beer, as well as, a posting indicating that she was “headed out to play Crazy Bitch Bingo” at a local bar. The school stated that it was acting in response to a complaint from a parent but, according to the teacher, her Facebook page was private and she hadn’t “friended” any of her students. The teacher subsequently sued the school district, alleging violations of state labor law [4, 10, 17].

In the lawsuit, Payne accused the school system of unlawful termination, and a Piedmont Circuit judge David Motes issued a summary judgment in April that the Barrow County School System had not acted illegally, and he couldn’t force the school district to give Payne her job back. It should be noted that the State of Georgia does not required websites or state portals to incorporate privacy policies. Therefore, Borrow County did not have a social medial policy in place for their employees. Payne’s lawyers filed a notice of appeal with the Georgia Court of Appeals.

2.3 International Case Involving Social Media Sites and Employment

Legal issues involving Social media posts and work place information, not only affects employees and employers in the U.S; but, in other countries as well. For example, in a related case in Ireland, an exam supervisor was terminated after he was found to have sent “tweets” from his phone while overseeing the Leaving Cert English. Supervisors are expected to give their entire attention during the examination. Another example in Hungary, a Vodafone employee in Hungary was also terminated after he made comments towards T-Mobile, a competing firm which was having network trouble. According to Vodafone, the employee’s online behavior was anti-competitive [10].

2.4 The Importance of Social Media Policy in Employment

Depending on the context of social media use, having policies in place can serve as helpful guidelines in establishing expectations, particularly in an employment setting. Employees should be made aware of policies that may impact their employment status.

If an employer is expecting its employees to act in accordance to particular policies, then this must be made clear. There are certain guidelines that can be helpful when creating guidelines, and should establish behaviors for interacting with the content of others and for posting all types of content (i.e., pictures, comments, videos, links and more). The following items are addressed when creating a social media policy:

1. It creates a safe space for employees to share their concerns before going online.
2. It outlines what's considered confidential information.
3. It is clear about the consequences of your employees' actions online.
4. It designates a company spokesperson responsible for answering questions about your company on social media.
5. It discusses the proper way to engage with others online.
6. It discusses what's considered illegal.
7. It reflects the company's culture.
8. It educates employees. [1]

Keep in mind that some content is clearly allowed to be discussed and shared online, but establishing clear boundaries can protect both employer and employee. For instance in regarding confidential information, employees should not discuss private business matters, customer information and other nonpublic data in a public social media forum. Even in the case where the information is assumed to be private, safeguards on social media may not prevent that information from being unintentionally disseminated more publicly. As an example, examining the social media policy for the large electronic corporation, BestBuy they have included the following as part of their social media policy [2]:

What You Should Do:

- **Disclose your Affiliation:** If you talk about work related matters that are within your area of job responsibility you must disclose your affiliation with Best Buy.
- **State That It's YOUR Opinion:** When commenting on the business. Unless authorized to speak on behalf of Best Buy, you must state that the views expressed are your own. Hourly employees should not speak on behalf of Best Buy when they are off the clock.
- **Protect Yourself:** Be careful about what personal information you share online.
- **Act responsibly and ethically:** When participating in online communities, do not misrepresent yourself. If you are not a vice president, don't say you are.
- **Honor Our Differences:** Live the values. Best Buy will not tolerate discrimination (including age, sex, race, color, creed, religion, ethnicity, sexual orientation, gender identity, national origin, citizenship, disability, or marital status or any other legally recognized protected basis under federal, state, or local laws, regulations or ordinances).
- **Offers and Contests:** Follow the normal legal review process. If you are in the store, offers must be approved through the retail marketing toolkit.

Although these guidelines are specific to Best Buy, they serve to illustrate some very important guidelines.

3 Discussion on the Cases

Among the three cases involving social media and employment, it seems that all the employees suffered punitive repercussions from the employers for the misuses or violations of policies. It can be stated, based on the legal outcomes of the cases, that the employers and employees were not aware of the following: (1) Employers – Communicating their policies and procedures on the use of social media sites to their employees; and, (2) Employees – Not aware of or understanding existing social media site policies. There are other legal considerations that employers must be aware of in addition to the misuse social media policies and procedures. Along with various suits that have grabbed media attention, the potential for further litigation is broad, lawyers' caution. For example, a worker could file a sexual-harassment suit after a manager repeatedly tries to "friend" her on Facebook. Or an applicant might accuse a hiring manager of renegeing on a job offer after learning the candidate's religious affiliation on Twitter [2].

In evaluation, there are those who believe that "social media is about communicating all the no-nos of office life, such as political views", says Shanti Atkins. Shanti Atkins is an attorney who is chief executive of ELT Inc., a San Francisco firm selling online training services in workplace-compliance areas such as social media. While others believe as Philip L. Gordon, the Denver-based chairman of the privacy and data-protection practice group at law firm Littler Mendelson PC believes that "the intersection of social media and the office is a potential minefield." Even when a company prevails in such legal actions, "there are reputational risks," Mr. Gordon added. "The company can become a poster child for a particular type of employment claims" [2].

Every employee needs to be informed that whatever they post on social media is bound to be seen by their employers or even prospective employers. Social media post are loaded with personal information that gives insight to their character, behavior and attitude of the social media account. Experts say an employer's best defense against legal action is to establish a social-media policy that outlines what is and isn't appropriate in social media, and then educate employees about the policy. Brian D. Hall, an employment-law partner at Porter Wright Morris & Arthur LLP in Columbus, Ohio, estimates that fewer than half of U.S. companies have a social-media policy. Mr. Hall and others say the amount of legal action resulting from employer missteps in social media is likely to rise at least until more case law is established [8].

4 Conclusion

Posting to social media sites can raise numerous legal challenges and is subject to vast potential liability. Social media sites are no different in this capacity than any other communications technologies (i.e., phone). As these sites continue to gain popularity; they will continually to evolve and create moving targets that can be difficult to control and monitor. Despite the risks, organizations and individuals will continue to use social media. It would be beneficial to organizations to train their managers to navigate social

media issues just as they train managers to use other tools. To understand both views of employee and as an employer there are several questions to consider:

- Is the facility mentioned by name?
- Can the employer otherwise be identified?
- Does the post violate the organization's social media policy?
- Is the post offensive? Is it insubordinate?
- Should the organization respond to the post? If so, how and who should respond?
- Should the manager act against the employee? If so, what action is appropriate?
- Is the employee's speech protected?
- Can the poster claim other legal protections?
- What, if anything, should be done about the employees who liked the post?

These are just a few questions that should be considered when an organization is drafting a policy or is made aware of posts by employees.

Much has been written about what motivates people to post information about their employers online. Although some discussions focus on attention-seeking, a large section of the literature focuses on the frustration felt by staff members when they believe they have no other way to express their grievances to their employers. A communication strategy that actively seeks input of and feedback from employees may be the most effective strategy in the prevention of negative postings. A well-drafted social media strategy and policy supported by a culture that values open communication about issues concerning employees cannot be overemphasized as an effective approach for minimizing the risk of employees posting negative comments. But if an organization finds itself the subject of such postings, a response plan should be in place.

It seems when it comes to social media, the best defense is still a good offense. So if an organization does not have a policy in place or one that is concerned about blocking social media in the workplace, now is the time to create such a social media policy. There is always help to address the legal issues regarding the relationships between employers and employees. With the help of the NLRB, companies can prepare their staff for training in legal issues, because they offer answers to many pressing workplace questions arising from technological and legal advances.

It's not complicated to initiate social media policies for the workplace. Employers and employees benefit from education, communication, and expectation of policies. These policies can be implemented by incorporating several different methods and venues. Those assigned to drafting policies should research and use resources that are appropriate for their specific organizational culture. Moreover, employers should also look at how often their organization's policies are reviewed. For example, many hospitals review policies on a 3-year rotation (Mayo Clinic Center for Social Media, n. d.). Given the fluidity with which the landscape changes, social media policies should be reviewed at least annually [9, 16].

5 Future Work

When considering the area of social media, there are many variables involved. This paper mainly looked at the policies of these technologies. As part of our future work, the authors will continue to study the impacts of social media in the workplace. We also are interested in analyzing a large number of social media policies implemented by large corporations, small businesses, educational, governmental institutions and non-profits for an in-depth comparison. In addition, we want to study how social media policies impact other groups/segments of society (i.e., students, age, income, etc.). The authors feel that it would be beneficial to expand this study by including a quantitative/qualitative component to further investigate the perceptions of social media policies in employment. These future studies will also include investigating the legal and ethical impacts of these policies.

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