#bad day at work
An analysis of the incorporation of Social Media in the Workforce

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With the enormous growth of social media websites over the last ten years, people are on the Internet more now than ever before. As of January of 2014, 87 percent of American adults use the Internet compared to 63 percent just ten years ago. And as of February of 2014, 72 percent of online Internet users are now active on social media,
such as Facebook, Twitter, LinkedIn, and Google+. These social media websites, along with thousands of blogs, forums, and comment boards can be utilized for both professional and casual purposes. There is a fine line between those two purposes however, and when they bleed across that line into one another, it creates one of the most problematic unresolved controversies of the Internet age. There is a war when it comes to laws regarding social media in the workforce and how it affects employees and the businesses they work for. It is often overlooked how many cases where an employee has lost his or her job due to social media, how much authority employers have in gaining access to social media accounts and passwords, and how social media has become a critical factor in the hiring process. Many victims to these situations have called it discrimination, violations of their right to express opinions, privacy, and the separation of work and life at home. Since the Internet is a public forum, people who post what they will are responsible for what they post and the consequences that may accompany it.

Is MySpace really…my space?

The catalyst of this entire quarrel is the question: what social media speech is protected and what isn’t? The most recent and most helpful line of defense for employees has been the National Labor Relations Board, and provisions from the National Labor Relations Act, passed in 1935, can be applied to terms of social media. Under Section 7 of the National Labor Relations Act, all employees, not only the ones unionized, have the right to “engage in…concerted activities for the purpose of collective bargaining or mutual aid or protection” (Dolghih, 2013, para. 3). Any discouragement of workers from their right to communicate with one another with the aim of improving wages, benefits or
working conditions, are likely to be in violation of Section 7. Such is the case of *Hispanics United of Buffalo Inc. and Carlos Ortiz*, 03-CA-027872. Hispanics United of Buffalo is a nonprofit social services provider in New York State. In 2010, a caseworker threatened to complain to the boss that others were not working hard enough. A fellow worker, Mariana Cole-Rivera, later posted a message on Facebook asking, “Lydia Cruz, a coworker feels that we don’t help our clients enough at [Respondent]. I about had it! My fellow coworkers how do u feel?” (Greenhouse, 2013, para. 11). Several other workers from the company posted harsh responses, one co-worker saying “What the hell, we don’t have a life as is.” Hispanics United fired Cole-Rivera and four other caseworkers on the grounds that their remarks constituted “bullying and harassment” of a coworker and violated the respondent’s “zero tolerance” policy prohibiting such conduct. In December 2012, the labor board ruled in favor of the fired personnel by a 3-1 decision, stating that the Facebook posts were a type of “concerted activity,” meaning an activity that workers may partake in without fear of employer retaliation, for “mutual aid” (Greenhouse, 2013, para. 14).

That being said, the NLRB also stresses that personal venting or rants are not protected, and an employer can legally fire an employee for offensive and inappropriate comments or activity that do not involve concerted activity. In the case of *Advice Memorandum to Arizona Daily Star*, 28-CA-23267, a police reporter for the *Arizona Daily Star* posted inappropriate comments on Twitter related to homicidal incidents in Tucson, Arizona. One tweet read, “What?!?!?! No overnight homicide…You’re slacking, Tucson,” and another read, “You stay homicidal, Tucson” (Greenhouse, 2013, para. 17). The reporter was fired and the labor board seconded, arguing that the tweets were
“offensive, not concerted activity and not about working conditions.” In the case of a bartender from Illinois, after becoming upset from not receiving a pay raise in five years, he posted on Facebook, calling his customers “rednecks” and saying that “he hoped the choked on glass as they drove home drunk” (Greenhouse, 2013, para. 19). The NLRB decided that his post was a direct vent and did not correlate productively with attempting to improve wages or working conditions.

The NLRB does not protect disclosure of confidential information, trade secrets, or use of colorful language, expletives, distasteful remarks, and harassing, violent, abusive, or malicious statements (Dolghih, 2013, para. 9). However, the latter must be narrowly tailored to prevent a chilling effect on the protected activity, as the board encourages rational opinions on work-related problems to come to surface, “as long as the purpose of a social media discussion is to come to a collective understanding or action,” even if the opinion is proven factually incorrect (Dolghih, 2013, para. 7).

One of the sensitive areas of regulations on employee expression of opinion is speech that can be argued to be discriminative. It is this area where the labor board partners with the Equal Opportunity Commission (EEOC.) Earlier in 2014, an air traffic controller at a Dallas airport made an office “food run” to Chick-fil-A. Upon returning, a co-worker posted on Facebook saying he “would make the next food run to a racist restaurant and see if his Black ass wants to complain. If he does, I will laugh in his face” (Dolghih, 2013, para. 10). It was implied by other co-workers that the Facebook post was directed to Chik-fil-A because of its purported anti-gay reputation. The victim later alleged that he had been reassigned to a trainer who was friends with the Facebook harasser and was “mocked, verbally disrespected, his training was sabotaged/undermined,
and his career was destroyed,” according to documents during the victim’s EEOC appeal (Moore, 2014, para. 13). Initially, the EEOC denied that the Facebook post was sufficient evidence of a hostile work environment, but the EEOC reversed, claiming that “the negative work atmosphere the employee alleged—including the harassment during his training—was part of a series of incidents dating to the initial Facebook post.” (Moore, 2014, para. 14).

The EEOC is also responsible for recently studying into employers screening of social media profiles of possible candidates before conducting interviews. In March of 2014, the EEOC met with employment law experts to discuss the overwhelming incorporation of social media with the workplace, especially during the hiring process. There is no federal law prohibiting an employer to check social media profiles when considering hiring, and a 2013 CareerBuilder survey shows that many employers do. In the survey, “39 percent of responding managers reported checking social media when recruiting. Among those, 43 percent said they had discovered information that caused them to pass on a candidate, while 19 percent said they had found something that caused them to hire” (Gonzalez, para. 2) Along with casual non-work related subjects such as drinking, drugs, and inappropriateness in social media posts and pictures, there is a growing concern that employer screening can be discriminatory. Age, gender, sexual orientation, ethnicity, or religion, character traits that are available on social media profiles, might be factors in the employer’s choice of hiring.

A Carnegie Mellon University experiment involving dummy résumés and social- media profiles, found that between 10% and a third of U.S. firms searched social networks for job applicants’ information early in the hiring process. In those cases, candidates whose public Facebook profiles indicated they were Muslim were less likely to be called for interviews than Christian applicants. (Valentino-Devries, 2013, para. 2).
These are only a handful of the issues that arise from the technological innovation over the past decade and they need to be addressed as social media continues to further saturate today’s society and the business world.

**Social Media and Work Laws Going Viral**

In the case of social media postings interfering with the workplace, the First Amendment right to free speech is not a liable defense for firing employees based on social media content. Private companies and private employers reserve the right to restrict free speech of employers within reason when it relies to company issues. This is the same with schools and universities when regarding its students. There are numerous labor regulations that protect employees, one of the most important being off-duty conduct laws. These are laws that prohibit employers from disciplining or firing employees for activities they pursue off-site, on their own time. In a case in Michigan, employees of an advertising agency complained about a web site trainer who also wrote “racy” short stories that he had posted on the Internet. The National Workrights Institute is another organization that has been fighting for employee rights regarding social media. In response to the Michigan agency case, the organization’s president, Lewis L. Maltby, said that “no one should be fired for anything they post that’s legal, off-duty and not job-related.” (Greenhouse, 2013, para. 29) arguing that the website trainer’s content of his stories were fiction and did not correlate to work or the advertising agency at all. The issue that businesses have with off-conduct duty laws is that the NLRB has taken rules and regulations set almost a hundred years ago and applying them to digital means in the
modern world. To combat that, states have taken legislative action to protect employees from social media elements that reveal their un-professionalism on their own time, such as Facebook pictures of an employer having a drink at a bar. As of March 2014, the National Conference of State Legislatures reports that “29 states have off-duty conduct laws prohibiting employers from disciplining employees for such behavior. The laws offer different levels of protection: 18 are limited to tobacco use while eight cover use of any lawful product, and four cover all lawful conduct” (Gonzalez, 2014, para. 6).

The social media policy of General Motors states that “offensive, demeaning, abusive, or inappropriate remarks are as out of place online as they are offline.” Perhaps more than anything, the National Labor Relations Board has been helping defend employees with work-related social media cases by acting directly to reform company regulations as necessary, and “tells companies that it is illegal to adopt broad social media policies—like bans on ‘disrespectful’ comments or posts that criticize the employer The National Workrights Institute saw this statement in General Motors’ policy as unlawful due to its vagueness, stating “this provision proscribes a broad spectrum of communications that would include protected criticisms of the employer’s labor policies or treatment of employees.” (Greenhouse, 2013, para. 22). After several meetings with the National Workrights Institute, Wal-Mart has revised its once overly broad social media policy. The current detailed policy states the prohibition of “inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct.” (Greenhouse, 2013, para. 23).

While the rights regarding social media presence for employees is being examined, there is also constant legislative action in many U.S. states and countries
around the globe that are addressing the policies of screening social media profiles before hiring. As stated earlier, there is no current federal law outlawing screening profiles to search for or examine recruiters in more detail. However, more and more companies are recognizing that employees see that method of tracking as controversial, and many use a third party to do early screenings and social media searches to avoid problems.

Employers have the right to access and regulate social media and electronic accounts of the company, but their right to do so is limited by the Federal Stored Communications Act. “The act limits an employer’s ability to access an employee’s electronic communication stored by a third party provider without the employee’s consent.” (Gonzalez, 2014, para. 10). There are growing movements in other parts of the world to enforce stricter negligence of private social media profiles when hiring. The United Kingdom’s Information Commissioner’s Office has issued guidelines “recommending that employers only view applicant social media profiles when the employer faces particular risks and has notified the applicant.” (Locklear, 2012, para. 6). Germany has actually drafted, but has yet to adopt, a law that would prohibit employers from using personal social networking sites to screen applicants, with the exception of business-focused websites, such as LinkedIn.

There has been a string of legislation in employer’s access to passwords and codes to employee and possible employee social media accounts. In 2012, the Social Networking Online Protection Act was introduced in the House of Representatives by a New York congressman. The bill was stalled and was never passed. “One month later, Maryland enacted its own law prohibiting employers from requesting that employees or applicants disclose their usernames, passwords, or other personal account information for
social networking sites.” (Locklear, 2012, para. 13). As of April 10, 2014, 13 U.S. states have password protection laws and such laws are under consideration in 28 states. Wisconsin is the first state in 2014 to enact such laws. Other places in North America have begun to follow suit. “Nova Scotia so far is the only Canadian province to amend its Labour Standards Code to prohibit employers from demanding passwords, account information, or access to employee and applicant social media accounts” (Saylin & Horrocks, 2013, para. 21). Many European nations have strong employee privacy acts and are now beginning to focus more on those that incorporate social media.

What’s Trending on My Blog

Social media involved with the work force has often called the “new water cooler,” indicating a central location that employees discuss various things, including affairs that are happening at work or that are about work. Social media in the workplace has erupted as such an issue because there is a wide array of employees and social media users in general that genuinely believe that their information and personal statements, opinions, photographs, and videos they post online are a private manner when it comes to their jobs. This is not lawful in any circumstance, including those related to one’s occupation. The Internet and social media platforms are classified as public forums and any information a user posts on any social media website becomes public record. If documentation is public record, there can be no violation of privacy as the user released their personal information at their own free will. In fact, the George Washington International Law Review reasons that the very reason social media became so appealing
and drew such a large audience in a short amount of time is because of its ability to share information with other people.

“Social networking sites exploded in popularity because they allow individual users to make their social networks visible to others. The default privacy setting on these sites varies from requiring the user to have a paid account to see other members, to simply asking the user if she would like a public or “Friends only” profile.” (Saylin & Horrocks (2013).

Social media allows people of all ages to have not only a voice, but a potentially large audience. That large audience appeal naturally makes someone want to share something about their life or a bit of their thoughts because they know that someone somewhere out there will see it and maybe “like it.” This large audience however, is the double-edged sword, as part of that audience can and very well may be future employers or other authoritative figures. Yet the system around it seems to be criticized heavily for it when it is nothing new in the sense of presentation in a new type of medium. Someone would be “bleeped” out on live television and perhaps could ruin their reputation if they spoke on air using inappropriate language or obscenity or other related topic, and they would be held accountable for it. If a politician makes a statement about smoking marijuana in his youth and a newspaper publishes it, that politician would be held accountable for it. It is and should be the same for social media sites as both media would have most of the same audience and expect an audience.

Though it is a constitutional right to speak freely in a public place, there are things that people don’t want to hear because the content may be offensive, threatening, violent, or morally unjustifiable, among others. These emotions, whether intentional or not, might
violate the constitutional rights of others, which is an unconstitutional act. One of the best ways to observe this is in the case of *Hispanics United of Buffalo Inc. and Carlos Ortiz*. The victim faces mocking and hounding after the harasser’s Facebook post about Chick-fil-A spreads throughout the workplace, which interferes with his training and ultimately, hurts his career. This is why the harasser’s firing was justified. The harasser’s comment was made in a public place, which the harasser recognized as his personal opinion, and not work-related. But the audience who saw the post correlated it into the work force and therefore, it resulted in a hostile work environment, which is unlawful. People who use social media, employees alike, should be instructed and made it clearly known to them, that they should withstand posting, on social media websites, content that criticizes or makes harassing comments about coworkers, portrayed as being racist or sexist, or reveal trade secrets or confidential information. These restrictions should be known so as they do not chill employees from voicing their work-related concerns on social media pages.

In terms of screening those pages for hiring purposes, Germany’s proposed law of prohibiting non-professional social websites and capitalizing on those like LinkedIn or those that pose professional material like Pressfolio, would ease the inevitable discrimination when performing such a task and focusing more on a job candidate’s work experience and abilities rather than be distracted from the color of his or her skin or sexual orientation. In a recent case, a person claimed that an employer discriminated against him based on his age. The site LinkedIn, which allows users to see who views their profile, actually served as a usual job-related site and it prevented discrimination. “In this instance, the applicant discovered that the employer had viewed his LinkedIn page, and he knew that the employer was able to determine his age from the site. This
knowledge, among other arguments, allowed the applicant to present a case for
discrimination and file a lawsuit” (Saylin & Horrocks, 2013). Viewing the subject’s
profile should be sufficient enough to gain information necessary for job hiring and
employers should only reserve the right to gain direct access to profiles barring the
company’s name, such as the company’s Facebook or Twitter page, upon request.

The thing that makes social media so different from several other types of
telecommunication technology over the last few years is the diverse audience. Social
media isn’t directed solely to computer science masters or writers or artists. It has a wide
appeal to all kinds of different people, and that’s why social media interacting with life at
work has become what it is. Fourteen-year-old girls, college students, elderly couples
who want to keep in touch with their grandchildren, and of course businesses, are all on
these social media websites, those groupings alone show the extreme diversity and
extreme difference in objection while using social media. What needs to be done is to
make sure everyone can use it to their own liking so that it doesn’t interfere with others
that are using it, much like no constitutional right can be expressed when violating
another’s constitutional right. Society can fix the ways social media interferes with
business and capitalize on the ways that it helps promote business, to benefit all who
click and sign in.

Works Cited Page

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