

RISKY BUSINESS: THE LEGAL IMPLICATIONS OF SOCIAL MEDIA'S INCREASING ROLE IN EMPLOYMENT DECISIONS

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I. INTRODUCTION

In Greek mythology, the second of the twelve labors of Hercules was to slay the Hydra, a giant snake who lived in a swamp and a creature fabled to have as many as one hundred heads (or as few as five, depending on the version of the myth).¹ His task was truly herculean because, as the myth instructs, for each Hydra head Hercules cut off, two more grew in its place. And so it is with the legal risks of social media use in the workplace. For each legal issue raised and resolved, two more pop up. It is the many-headed legal Hydra of our times.

The increasing use of social media as a determinative factor in employment decisions has resulted in litigation and, in certain instances, legislative enactments. Courts and legislatures alike are wrestling with the rights and responsibilities arising under federal and state law when social media is involved in employment-related disputes. The legal landscape is dotted with a wide array of issues ranging from the evidentiary admissibility of social media postings; the use of social media histories, both public and password-protected, to screen prospective candidates; the termination of employees for Twitter and Facebook posts; the unauthorized access by employers to private social media accounts; ownership disputes between employers and employees over social media accounts; and the protections surrounding social media postings under various federal laws. This article explores this legal landscape, providing a broad overview of the emerging trends in the law and identifying the legal challenges faced by employers and employees when disputes erupt in the workplace over social media use.

II. SOCIAL MEDIA DEFINED

Though ubiquitous in its use today, the first known use of the term “social media” occurred less than a decade ago, in 2004.² Social media has been defined as:

forms of electronic communication (as web sites for social networking and micro blogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).³

A November 2011 Pew Research Center report titled, *Why Americans Use Social Media*, defined social media users as individuals who “use a social

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¹ ENCYCLOPEDIA, Encyclopedia.com, *Hydra (Mythology)*, (last visited July 24, 2012)

² MERRIAM-WEBSTER, <http://www.merriam-webster.com>,

³ MERRIAM-WEBSTER, <http://www.merriam-webster.com>,

networking site like MySpace, Facebook or LinkedIn.”⁴ The Pew Center report concluded that 65% of online adults use these social networking sites; 13% of online adults use Twitter.⁵ According to the Pew Research Center, the primary motivation behind social media use for two-thirds of users is to stay in touch with family and current friends; half of these users cite connecting with old friends as a major impetus for their social media use.⁶ Other motivations for social media use include connecting with those who share a hobby or interest and connecting with public figures, which is more popular among Twitter users.⁷ A small percentage of social media users cite finding potential romantic partners as a motivation.⁸ In July 2012, *The New York Times* reported on this surge in social media use: “Social media is flourishing; a billion Facebook and 500 million Twitter users would vouch for that.”⁹

The multiple rationales behind individuals’ social media use and the substantial percentage of online adults frequenting social media networking sites inevitably led to the emergence of social media use as a workplace issue. The legal issues accompanying this development are significant; there are risks associated with resolving a social media dispute arising in the employment context for both the employer and the employee and the law itself is unsettled and emerging.

III. SOCIAL MEDIA’S RISING RELEVANCE IN EMPLOYMENT DECISIONS

Data demonstrates that social media use and misuse is increasingly related to employment decisions. Social media monitoring is a tool in the employer’s tool belt frequently used to screen job applicants whose online behavior may raise red flags. Social media misuse by current employees has triggered employee disciplinary actions, including employee firings. But social media is viewed also as a powerful, positive and, in some instances, profitable aspect of employment-related decisions. Recruiters cite social media networking sites as useful and important vehicles to identify and recruit prospective job candidates for employment openings, and a prospective or current employee’s social media connectivity and influence may position the employee above other employees jockeying for a career opening or advancement. These employment trends confirm social media’s relevance in

⁴ Aaron Smith, *Why Americans Use Social Media*; Pew Internet and American Life Project, PEW RESEARCH CTR. (Nov. 15, 2011) at 2, no. 1, <http://pewinternet.org/Reports/2011/Why-Americans-Use-Social-Media/Main-report.aspx>.

⁵ *Id.* at 2.

⁶ *Id.* at 4.

⁷ *Id.* at 5.

⁸ *Id.* at 4, 5.

⁹ David Streitfeld & Evelyn M. Rusli, *In Sliding Stocks, Some Hear Echo of 2000*, N.Y. TIMES, Aug. 28, 2012, at B.1.

employment-related decisions ranging from Facebook firings and recruitment red flags to the clout of a high Klout score.

1. FACEBOOK FIRED

The surge in job firings triggered by employees' social media use has given birth to a new term used to describe such terminations: "Facebook Fired".¹⁰ Facebook firings are no longer considered "outliers" but are "the result of a serious crackdown by corporate America on tracking their employees' online activities."¹¹ In 2009, an internet security firm, Proofpoint, conducted a study of companies with 1,000 or more employees, tracking the companies' disciplinary actions for employee misuse of social media.¹² The Proofpoint study confirms the significance of employee social media use as a determinative factor in employment decisions. 17% of the companies studied reported having had issues with the social media use of employees, with 8% dismissing an employee for social media misconduct on sites such as LinkedIn or Facebook.¹³ 15% of these employers disciplined an employee for violating the company's social media policies or multimedia sharing policies and 17% of the employers in the study reported disciplining an employee for a violation of the company's message board or blog policies.¹⁴

Ruth Mantell of *The Wall Street Journal's MarketWatch* notes that while "some employers monitor social-media use, in many cases Facebook 'friends' and co-workers alert management" about offensive posts of fellow employees.¹⁵ Alerting management triggered the Facebook firing of a Georgia public school teacher, Ashley Payne, who traveled to Europe on her summer vacation and posted photographs on her private Facebook account of her holding a glass of wine.¹⁶ An individual claiming to be a concerned parent anonymously emailed Payne's employer, Apalachee High School.¹⁷ Payne sued the public school district, her employer, on the grounds that it denied her due process and unlawfully forced her to resign over the incident. Payne's lawsuit sought reinstatement and reimbursement for her legal fees. The Georgia Superior Court of the Piedmont Circuit dismissed her

¹⁰ Allison Way, *Are You At Risk for Getting "Facebook Fire"?* EXAMINER (Mar. 8, 2011), <http://www.examiner.com/article/are-you-at-risk-for-getting-facebook-fired>.

¹¹ Adam Ostrow, *Facebook Fired: 8% of US Companies Have Sacked Social Media Miscreants*, MASHABLE (Aug. 10, 2009), <http://mashable.com/2009/08/10/social-media-misuse>.

¹² *Id.*

¹³ *Id.*; Jennifer Van Grove, *CPK Server Fired for Tweets: Did He Deserve It?* MASHABLE (Sept. 15, 2009), <http://mashable.com/2009/09/15/cpk-server-fired>.

¹⁴ Adam Ostrow, *Facebook Fired: 8% of US Companies Have Sacked Social Media Miscreants*, MASHABLE (Aug. 10, 2009), <http://mashable.com/2009/08/10/social-media-misuse>.

¹⁵ Ruth Mantell, *Your Social-Media Posts Could Get You in Hot Water*, MARKETWATCH (Jun. 6, 2012), http://articles.marketwatch.com/2012-06-04/finance/31951218_1_facebook-page-social-media-policies-workers.

¹⁶ Jeanette Borzo, *Employers Tread a Minefield*, WALL ST. J., Jan. 21, 2011.

¹⁷ Dan Fastenberg, *Facebook Post Fallout Puts Georgia Teacher Out of A Job*, AMERICA ONLINE (Oct. 14, 2011), <http://jobs.aol.com/articles/2011/10/14/georgia-teacher-fired-for-posting-drinking-photos>.

lawsuit in October 2011, ruling that Payne's resignation should not be classified as an involuntary termination.¹⁸

California Pizza Kitchen fired its employee and Twitter user, Timothy DeLaGhetto, aka "@Traphik" who tweeted, "@calpizzakitchen black button ups are the lamest [expletive] ever!!!" The tweet referred to his employer's recent uniform change. The California Pizza Kitchen server's tweet prompted the company to trace the Twitter account to a Long Beach store. California Pizza Kitchen terminated Timothy for his tweet. Undeterred by his firing, Timothy took to the social media airwaves and posted a video on YouTube about his firing.¹⁹

A social media account mix-up cost an employee his job when he inadvertently tweeted on Chrysler's Twitter account, instead of his personal Twitter account.²⁰ The employee worked for New Media Strategies, a social media agency hired by Chrysler to assist in social media outreach. The employee's tweet on Chrysler's Twitter feed said: "I find it ironic that Detroit is known as the [hash] motor city and yet no one here knows how to [expletive] drive." New Media Strategies fired the employee responsible for the tweet mix-up and Chrysler fired New Media Strategies.²¹

High-level executives are not immune from employment discipline and even termination for social media misuse. The chief financial officer of Francesca's Holdings Corporation, a publicly traded company, was terminated for cause after the company's Board of Directors conducted an investigation, using the assistance of outside counsel. The investigation revealed that the chief financial officer, Gene Morphis, improperly divulged company information through social media in May 2012.²²

Increasingly, firms are creating social media policies to address both what is posted on social media (the content of the tweets, for instance) and when it is posted (the productivity slide when employees are posting and tweeting during work.)²³ These policies cover a range of issues arising from social media use in the workplace involving the following: privacy, intellectual property, protection of confidential,

¹⁸ *Id.*

¹⁹ Jennifer Van Grove, *CPK Server Fired for Tweets: Did He Deserve It?*, MASHABLE (Sept. 15, 2009), <http://mashable.com/2009/09/15/cpk-server-fired>.

²⁰ *Worker FIRED for F-Bomb Tweet on Chrysler Twitter Account*, HUFFINGTON POST (Aug. 10, 2012), http://www.huffingtonpost.com/2011/03/10/chrysler-twitter-f-bomb-tweet_n_834246.html.

²¹ *Id.*

²² Rachel Emma Silverman, *Facebook and Twitter Postings Cost CFO His Job*, <http://online.wsj.com/article/SB10001424052702303505504577404542168061590.html#printMode>.

²³ Ruth Mantell, *Your Social-Media Posts Could Get You in Hot Water*, MARKETWATCH (Jun. 6, 2012), http://articles.marketwatch.com/2012-06-04/finance/31951218_1_facebook-page-social-media-policies-workers.

non-public information, and contact with media or governmental agencies.²⁴ Despite the corporate trend towards instituting social media policies, many companies do not police social media sites, citing time, expense, and the intrusive aspect of such tactics.²⁵ Instead, employer investigations are launched when problems are flagged.

2. RECRUITMENT AND RED FLAGS

Social media sites are the train tracks on which the locomotive of job recruitment runs in the 21st Century. The *2012 Bullhorn Reach Rankings Report: An Inside Look at Social Recruiting in the U.S.A.*, tracks the use of social media sites by recruiters looking for potential candidates. In the United States, 77% of job openings posted by recruiters are posted on LinkedIn, 54% are posted on Twitter, and 25% are posted on Facebook. 55% of job openings can be found on two or more social media sites.²⁶

While both employers and employees use social media to connect skills and talents with career opportunities, these same sites are exploited and mined for information about prospective job candidates to determine whether a candidate's social media history should disqualify him or her from being considered for a position.

A survey conducted in 2009 by CareerBuilder.com found the use of social media sites by employers to screen job candidates had doubled from the previous year.²⁷ The Society for Human Resource Management conducted a survey of more than 500 of its members in October 2011 and concluded that 18% of employers who recruited job candidates used social network searches as a screening tool for these candidates.²⁸ This represented a 5% increase in social media screening by employers from a 2008 survey conducted on the same topic.²⁹

Employers routinely seek profiles of prospective candidates gleaned from social media histories (both public and password-protected) and from public records; half of recruiters surveyed recently by ExecuNet reported that they eliminated candidates based on information gathered from internet search engines.³⁰ The

²⁴ Tim Devaney, *Tweeting Workers 'Friended' by NLRB; Memo Warns of Restricting Rights*, WASH. TIMES, June 26, 2012.

²⁵ Ruth Mantell, *Your Social-Media Posts Could Get You in Hot Water*, MARKETWATCH (Jun. 6, 2012), http://articles.marketwatch.com/2012-06-04/finance/31951218_1_facebook-page-social-media-policies-workers.

²⁶ Robert Dominguez, *Social Climbers Recruiters Using Online Networks to Find Job Candidate*, N.Y. DAILY NEWS, June 6, 2012, at 37.

²⁷ Meredith Somers, *Employers Differ On Checking Online; ACLU Rips Use by State Police*, WASH. TIMES, Apr. 4, 2012, at A.16.

²⁸ Lini S. Kadaba, *What is Privacy? As Job-Seekers Are Judged By Their Tweets and Facebook Posts, Uncertainty Abounds*, PHILA. INQUIRER, May 2, 2012.

²⁹ *Id.*

³⁰ *Id.*

offending information ranged from criminal convictions to unethical work practices to blog posts showing “poor judgment”.³¹ For example, Cisco Systems rescinded an offer to hire Connor Riley based on her tweet: “Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”³²

Government data confirms these trends. The Equal Employment Opportunity Commission (“EEOC”) notes that 75% of recruiters are required by companies they contract with to perform online searches of prospective candidates, and 70% of recruiters in the United States reported rejecting a candidate based on such pre-employment screening.³³ Candidates consent to the screenings and are informed of any adverse information uncovered.³⁴ Importantly, these screenings attempt to sanitize the data gathered of any identifying information relating to a candidate’s religion, race, marital status, disability, or any other factor that might run afoul of employment discrimination laws.³⁵ If social media accounts are maintained as private accounts and are password protected, the hunt for information does not intrude on these accounts unless the password is requested.³⁶

The temptation to conduct social media screenings on pre-employment investigations is strong, according to Lester Rosen, Chief Executive Officer of a California-based firm that conducts employment screenings: “From an employer’s standpoint every hire is critical and there are huge potential risks. Given the investment, it is very inviting to go on-line and use this brand new shiny toy that allows you ostensibly to look under the hood and see what job candidates talk about and what they do outside of an interview.”³⁷ However, Max Drucker, an executive at Social Intelligence, a California company which performs online pre-employment screenings for employers, claims that less than a third of the data retrieved in such screenings by his firm comes from major social media platforms such as Facebook, Twitter and MySpace.³⁸ Still, confusion over privacy settings and terms of service agreements in social media platforms leave social media users vulnerable in job

³¹ *Id.*

³² <http://www.msnbc.com>.

³³ Jennifer Preston, *Letter, Resume, Facebook status ...; Employers Commission Social Media Checks in Vetting Job Candidates*, INT’L HERALD TRIBUNE, July 22, 2011, at 14; Jennifer Preston, *Social Media History Becomes a New Job Hurdle*, N.Y. TIMES, July 21, 2011, at B.1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Lini S. Kadaba, *What is Privacy? As Job-Seekers Are Judged By Their Tweets and Facebook Posts, Uncertainty Abounds*, PHILA. INQUIRER, May 2, 2012.

³⁷ Ron Scherer, *Facebook Privacy: Can Firms Legally Demand Password From Job Applicants?; On Friday Facebook Criticized the New Practice of Screening Job Applicants as ‘Alarming,’ and Some Employment Specialists Say It Could Expose Firms to Legal Landmines*, CHRISTIAN SCI. MONITOR, Mar. 23, 2012.

³⁸ Jennifer Preston, *Letter, Resume, Facebook status ...; Employers Commission Social Media Checks in Vetting Job Candidates*, INT’L HERALD TRIBUNE, July 22, 2011, at 14.

searches because users may be unaware that data has become publicly-available and the target of pre-employment information fishing expeditions.³⁹

3. THE CLOUT OF A KLOUT SCORE

The news is not all negative for active social media users who are seeking employment. Social media-savvy employers now view an employee's social media connectivity and influence as a potential value-added for the employer. Klout is a service that collects and scores an individual's social media connections, focusing not on the quantity of connections but rather on the quality or influence of the social media user. The number of re-tweets or repeated social media posts drives up the score. Increasingly, employers are interested in the Klout score of an employee or prospective employee because an influential social media employee can tout the employer's brand through LinkedIn, Twitter, YouTube, Pinterest, etc. This is a potential profit engine for the employer.⁴⁰ A prospective employee's high Klout score can signal to an employer that the job candidate is influential, plugged-in, and capable of using personal social media accounts to promote the employer's brand. A low Klout score may cost a job candidate the job. For example, Sam Fiorella, a candidate for a vice-presidency position at a large marketing firm in Toronto, had his interview terminated when the interviewer discovered his low Klout score. Fiorella was told he was terminated from the list of prospective candidates due to the low score.⁴¹

IV. THE SOCIAL MEDIA LITIGATION TRAP

The rising relevance of social media use in employment-related decisions has led to litigation over the rights and responsibilities of employers and employees arising under both federal and state law. The litigation brought by employers and employees has been multi-faceted; the legal claims are crafted under federal statutory law, state common law and, in rare instances, constitutional jurisprudence. The contexts in which these legal claims are pursued are unique and varied. Employers have charged employees with violations of intellectual property rights over LinkedIn accounts and employees have sued employers for privacy violations for MySpace eavesdropping. Courts grapple with the terminology and the technology surrounding social media use, and they wrestle with the application of social media workplace disputes to laws pre-dating social media's invention and arrival into the employment sphere.

³⁹ *Id.*

⁴⁰ Fiona Smith, *All You Need to Score is a Little Bit of Klout*, AUSTL. FIN. REV. (May 22, 2012), http://afr.com/p/national/work_space/how_much_klout_do_you_have_online_jDbKfToN0wIsITX8sNx2B P.

⁴¹ *Id.*

The litigation arising from social media use in the workplace encompasses a staggering array of legal issues. These include: (1) the discoverability and evidentiary admissibility of social media postings; (2) claims brought under federal and state discrimination laws; (3) violations of the federal labor laws; (4) federal statutory and constitutional claims as diverse as the Stored Communications Act, the Health Insurance Portability and Accountability Act, the Fair Credit Reporting Act, the First Amendment; and (5) intellectual property issues.

1. SOCIAL MEDIA POSTINGS' EVIDENTIARY ROLE

Before addressing the substantive legal claims surrounding social media disputes in the employment context, it should be noted that, procedurally, the courthouse doors are wide open to the use of social media postings for discovery and evidentiary purposes. Courts have deemed social media postings discoverable for evidentiary purposes in both civil and criminal cases.⁴² In 2012, a state court judge in Pennsylvania granted a plaintiff access to a defendant's Facebook page, ordering the defendant to refrain from altering the page for a period of time to allow the plaintiff an opportunity to review the Facebook page.⁴³ In April 2012, a New York state court judge ruled in a criminal action that a Twitter account could be subpoenaed.⁴⁴

In 2011, a Virginia state court judge issued sanctions against a lawyer representing a plaintiff in a personal injury case. The attorney was sanctioned for filing a baseless motion seeking to halt the defendant from introducing into evidence information about the plaintiff's alleged injuries. The information was gleaned from social media sites used by the plaintiff and her family, including MySpace, Facebook, and Google.⁴⁵ The Virginia court noted that the information obtained on the social media sites was posted on a public medium and available to anyone. The social media users had not designated the information as "non-public" and by failing to secure it as such, the information was readily accessible and usable by the defendant in his critique of plaintiff's claims. The court stated: "Social media and internet searches are regularly becoming a normal step in an attorney's matter [set] of public information."⁴⁶

⁴² Eric Meyer, *Court Allows Plaintiff Quick Peek Into Defendant's Facebook Account*, LITIGATION RESOURCE CTR. (Feb. 26, 2012), <http://www.lexisnexis.com/community/litigationresourcecenter/blogs/litigationblog/archive/2012/04/26/court-allows-plaintiff-quick-peek-into-defendant-s-facebook-account.aspx>; *People v. Harris*, Case No. 2011 NY 080152 (N.Y. Crim. Ct.) Apr. 20, 2012.

⁴³ Eric Meyer, *Court Allows Plaintiff Quick Peek Into Defendant's Facebook Account*, LITIGATION RESOURCE CTR. (Feb. 26, 2012), <http://www.lexisnexis.com/community/litigationresourcecenter/blogs/litigationblog/archive/2012/04/26/court-allows-plaintiff-quick-peek-into-defendant-s-facebook-account.aspx>.

⁴⁴ *People v. Harris*, Case No. 2011 NY 080152 (N.Y. Crim. Ct.) Apr. 20, 2012.

⁴⁵ *Womack v. Yeoman*, 2011 Va. Cir. LEXIS 143 (Va. Cir. Oct. 28, 2011).

⁴⁶ *Id.*

The logical implication of these evidentiary rulings is that an employer or an employee in a workplace dispute unrelated to social media use could use evidence found on social media sites. For example, an employee's social media accounts might be reviewed for evidence of employee misconduct, such as theft or misuse of company property. This magnifies the potential impact social media has on any employment-related dispute.

2. CHARGES OF DISCRIMINATION

Employers risk running afoul of employment discrimination laws by monitoring and screening of social media use. Current or prospective candidates may attack employers' pre-employment online screenings, including the screening of social media, as evidence of employment discrimination in violation of state and federal discrimination laws, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. The legal risks run the gamut from a job candidate accusing an employer of religious discrimination after learning of her religious affiliation on Twitter, to a current employee filing a charge of sexual harassment after a supervisor repeatedly tries to "friend" him on Facebook.⁴⁷

The EEOC reviewed numerous workplace discrimination claims in 2011 involving employers' use of social media screening of prospective employees as a hiring tool.⁴⁸ The legal risks of such online screening, which includes internet and social media searches, can be significant. For example, human resources consultant Jessica Miller-Merrell warns that the EEOC's use of the "unconscious bias" theory in discrimination lawsuits can easily be applied to social media cases where information about a disability, sexual preference, or pregnancy is uncovered by a recruiter or an employer through a social media search.⁴⁹ For example, the University of Kentucky is now a defendant in a lawsuit brought by an astronomy professor charging that he was discriminated against, based on his religious beliefs, when he was denied a promotion to department chair. The professor alleges that the University search committee's bias towards him arose when the committee found a link to an article on the professor's personal website that disclosed the professor's belief in creationism.⁵⁰

Additionally, a Library of Congress employee has alleged that he was harassed and subsequently fired after his employer discovered his homosexuality

⁴⁷ Jeanette Borzo, *Employers Tread a Minefield*, WALL ST. J., Jan. 21, 2011.

⁴⁸ Sylvia Hsieh, *2011 Employment Law News Wrap-Up*, LAWS. WKLY. USA. (2011).

⁴⁹ *Social Media Research May Expose Discrimination Claims*, COMMWEB (Apr. 20, 2011), <http://www.lexisnexis.com.precise.petronas.com.my/community/litigationresourcecenter/blogs/litigationblog/archive/2012/04/26/court-allows-plaintiff-quick-peek-into-defendant-s-facebook-account.aspx>.

⁵⁰ *Id.*

when the employee “liked” a Facebook page supporting gays and lesbians. The EEOC filed a discrimination claim against the Library of Congress on behalf of the dismissed employee.⁵¹ Ruth Mantell of *The Wall Street Journal’s Market Watch* notes, “These recent cases highlight an emerging reality about potential repercussions at work after engaging in social media: With Facebook users generating billions of ‘likes’ and comments every day, there is plenty of potential for workplace problems.”⁵²

3. THE FEDERAL LABOR LAWS

Workplace disputes involving social media use brought before the National Labor Relations Board (NLRB), the federal agency charged with administering the federal labor laws, have skyrocketed in the past several years. The NLRB has been deluged with complaints from workers who allege that employers unlawfully terminated them after reviewing Facebook posts, tweets, and YouTube videos.⁵³ It has issued multiple reports, memoranda, and, in certain cases, rulings in an effort to address the potential legal risks associated with disciplining or terminating employees for social media use.

In 2011, the NLRB issued a report clarifying the legal protections surrounding social media use under the federal labor laws as well as the legal risks associated with terminating employees for social media use.⁵⁴ Both union and nonunion employees enjoy federal law protection for discussions with each other involving their work conditions as well as efforts to lobby together to alter or improve those conditions. The NLRB made clear that such workplace discussions do not lose these legal protections simply because they occur on a social media site such as Twitter or Facebook. If Facebook or Twitter posts are made by an employee “with or on the authority of other employees, and not solely by and on behalf of the employee himself,” the social media use constitutes concerted activity protected under the federal labor laws.⁵⁵

Employer violations of federal labor laws cited by the NLRB include the unlawful firing of a luxury-car dealership salesman who posted on Facebook his disappointment over the quality of the food served at the dealership’s sales event. The NLRB determined that the salesman’s posts criticizing his employer related to workplace conditions and arose out of discussions among his co-workers who shared

⁵¹ Ruth Mantell, *Your Social-Media Posts Could Get You in Hot Water*, MARKETWATCH (Jun. 6, 2012), http://articles.marketwatch.com/2012-06-04/finance/31951218_1_facebook-page-social-media-policies-workers.

⁵² *Id.*

⁵³ Catherine Ho, *Businesses Abuzz About Workplace Rules on Social Media*, WASH. POST, Oct. 3, 2011, at A.15.

⁵⁴ Sarah Jane Shanaha, *Slow Trigger When Firing Over Twitter*, CFO Sept. 29, 2011, http://www3.cfo.com/article/2011/9/regulation_fired-over-twitter-facebook-nlr-social-media.

⁵⁵ *Id.*

his concerns.⁵⁶ If an employee is using social media post to vent individual complaints, however, and not using social media in a joint effort to communicate with other employees, termination of that employee would likely not constitute a federal labor law violation, according to the NLRB.⁵⁷ This may be true even if the employee's complaints relate to his or her supervisor.

A September 2011 case best characterized as “damned if you, damned if you don’t” involved a non-profit employer who fired employees for cyber-bullying a co-worker through Facebook. An NLRB administrative law judge ruled that the employer, a social services non-profit in New York, violated the National Labor Relations Act when it fired five workers because their Facebook posts constituted protected discussions of their working conditions.⁵⁸ The episode began when one employee posted on her Facebook page comments attributed to a co-worker in which the co-worker complained about her fellow employees not doing enough to assist the non-profit’s clients. The posting employee solicited feedback, via Facebook, from other employees about these comments. Feedback indeed followed and included profanity as well as posts about workplace conditions and staffing problems. The co-worker accused of making the comments critical of her fellow employees saw the posts and alleged that she was the victim of harassment and cyber-bullying. The social services non-profit fired the employees who engaged in the Facebook postings.⁵⁹

The NLRB administrative law judge ruled that the non-profit’s termination of these employees violated Section 7 of the National Labor Relations Act, which provides protections for workers who communicate with one another to improve working conditions and wages. Specifically, the judge found that the Facebook posts related to terms and conditions of employment, job performance, and staffing levels. These social media discussions were deemed workplace discussions protected under federal law. The remedy ordered was reinstatement and an award of back-pay for the five fired workers.⁶⁰

In another recent case, the NLRB ruled that an employee’s clicking of the “Like” button on a co-worker’s Facebook post about their employer’s error in the withholding of taxes constituted a protected discussion under the National Labor Relations Act. The employer’s discharge of the employee who clicked Facebook’s

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Catherine Ho, *Businesses Abuzz About Workplace Rules on Social Media*, WASH. POST, Oct. 3, 2011, at A.15; Michelle Singletary, *Can Complaining About Your Job on Facebook Get You Fired*, WASH. POST, Sept. 15, 2011, at A.14.

⁵⁹ Michelle Singletary, *Can Complaining About Your Job on Facebook Get You Fired*, WASH. POST, Sept. 15, 2011, at A.14.

⁶⁰ Catherine Ho, *Businesses Abuzz About Workplace Rules on Social Media*, WASH. POST, Oct. 3, 2011, at A.15; Michelle Singletary, *Can Complaining About Your Job on Facebook Get You Fired*, WASH. POST, Sept. 15, 2011, at A.14.

“Like” button was deemed unlawful and in violation of the federal labor laws.⁶¹ Similarly, the NLRB determined that an administrative assistant’s Facebook post was a communication protected under the federal labor laws because the administrative assistant was fired for complaining on Facebook that she was reprimanded by her employer for becoming involved in co-workers’ work-related problems.⁶² Conversely, the NLRB ruled that a pediatric hospital respiratory therapist’s Facebook posts in which she complained that a co-worker was “driving her nuts” and that she planned to “beat him with a ventilator” were not protected communications because the respiratory therapist’s rants did not include recommending that her employer take action against her “annoying” co-worker.⁶³

In May 2012, the NLRB issued its third memorandum on the topic of social media use and the federal labor laws, paying particular attention to social media policies adopted by employers to regulate employee social media use. The NLRB criticized six of seven corporate social media policies it reviewed for being either too vague for proper enforcement, or too intrusive of employees’ right to free expression on online sites.⁶⁴ At issue in these social media policies was the right of employees to use social media to discuss the “terms and conditions” of their employment, without fear of retaliation or retribution.⁶⁵

NLRB General Counsel, Lafe Solomon, cautioned that social media policies cannot “interfere with, restrain, or coerce employees in the exercise of” their right under the National Labor Relations Act to engage in “self-organization, to form, join, or assist labor organizations.”⁶⁶ He noted that a corporate social media policy that warns employees to “think carefully about ‘friending’ co-workers” might unlawfully “discourage communications among co-workers and thus necessarily interfere with activity” involving unions.⁶⁷ Solomon also warned that a social media policy prohibiting employees from revealing “non-public information on any public site” runs afoul of federal labor laws because it “would be reasonably interpreted to apply to discussions about, or criticism of, the employer’s labor policies and its treatment of employees.”⁶⁸ Finally, a social media policy which encourages employees to “report any unusual or inappropriate internal social media activity” might be viewed

⁶¹ Nick Birkenhauer, *Employees’ Social Media Activity: NLRB Clicks the “Like” Button*, JD SUPRA, (Apr. 24, 2012), <http://www.lexisnexis.com/hottopics/lnacademic>.

⁶² Ruth Mantell, *Your Social-Media Posts Could Get You in Hot Water*, MARKETWATCH (Jun. 6, 2012), http://articles.marketwatch.com/2012-06-04/finance/31951218_1_facebook-page-social-media-policies-workers.

⁶³ *Id.*

⁶⁴ Tim Devaney, *Tweeting Workers ‘Friended’ by NLRB; Memo Warns of Restricting Rights*, WASH. TIMES, June 26, 2012; Michelle Davis, *National Labor Relations Board Releases Third Report On Social Media Policies*, LAWS. WKLY. USA. (2012).

⁶⁵ Tim Devaney, *Tweeting Workers ‘Friended’ by NLRB; Memo Warns of Restricting Rights*, WASH. TIMES, June 26, 2012.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

as “encouraging employees to report to management the union activities of other employees,” an unlawful labor practice.⁶⁹

Solomon commended social media policies that are specific and provide illustrative examples. He lauded corporate social media policies that encourage employees to be respectful in their social media use and to refrain from posting comments that “could be viewed as malicious, obscene, threatening or intimidating.”⁷⁰ Echoing the NLRB’s directives on corporate social media policies and the federal labor laws, the United States Chamber of Commerce issued a comprehensive report in August 2011 on the impact labor laws have on employers’ implementation of social media policies in the workplace.⁷¹

4. OTHER FEDERAL LAWS IMPLICATED

Cases involving employment-related disputes involving social media use have implicated federal statutes as disparate as the Fair Credit Reporting Act, the Health Insurance Portability and Accountability Act, and the Stored Communications Act. Claims involving the United States Constitution have also been litigated.

In June 2012, the Federal Trade Commission settled its first civil case brought against a company for violations of the Fair Credit Reporting Act in connection with the company’s data gathering and sale of information gathered on the Internet and social media sites for use in screening of job candidates.⁷² The FTC assessed \$800,000 in civil fines against a California firm, Spokeo, for failure to ensure that its consumer profiles were accurate and used for lawful purposes. These profiles were marketed to employment recruiters and human resource departments as well as companies involved in employment screening. The profiles included information such as an individual’s email address, social media use, photographs, marital status, ethnicity, and religion. The Federal Trade Commission unanimously voted to refer the complaint against Spokeo to the United States Justice Department for further review.⁷³

In December 2009, the Health Insurance Portability and Accountability Act (HIPAA) was drawn into the mix. Jennifer Carter, an administrative assistant at the nursing school at the University Medical Center (UMC), was disciplined and then encouraged to resign her position for her reply Twitter tweet to Mississippi Governor

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Catherine Ho, *Businesses Abuzz About Workplace Rules on Social Media*, WASH. POST, Oct. 3, 2011, at A.15.

⁷² Edward Wyatt, *U.S. Fines Data Collector for Illegal Profiling*, INT’L HERALD TRIBUNE, June 13, 2012; Edward Wyatt, *U.S. Penalizes Online Company in Sale of Personal Data*, N.Y. TIMES, June 13, 2012.

⁷³ *Id.*

Haley Barbour. Carter replied to Barbour's tweet about trimming the state of Mississippi's expenses in light of its "dire fiscal situation" with a tweet of her own: "Schedule regular medical exams like everyone else instead of paying UMC employees overtime to do it when clinics are usually closed."⁷⁴ Carter claimed her tweet referred to Governor Barbour's health checkup at UMC's clinic, which was performed on a Saturday when the clinic is normally closed and required special staffing.⁷⁵ Two days after Carter's tweet, UMC advised Carter that her tweet violated HIPAA and, according to Carter, she was "strongly encouraged to resign."⁷⁶

In 2009, a federal jury in New Jersey returned a guilty verdict against an employer for violations of the federal and New Jersey Stored Communication Acts in a case brought by two employees terminated for social media use.⁷⁷ The jury awarded the two former employees, Brian Pietrylo and Doreen Marino, compensatory and punitive damages against their employer, Hillstone Restaurant Group d/b/a Houston's for the employer's misconduct in viewing a password-protected, private chat group site on MySpace.com created by the employees to "vent about any BS we deal with at work."⁷⁸ The MySpace posts included sexual remarks about managers and customers at Houston's, jokes about the restaurant chain's policies, references to violence and illegal drug use, and a copy of an employee test given to restaurant workers. The jury found that the restaurant chain had coerced another employee into providing a manager the password to the social media site and that the restaurant had acted maliciously in repeatedly accessing the site using the coerced employee's password.

First Amendment concerns have also been raised in employment-related social media disputes. A federal district court judge in the Eastern District of Virginia recently dismissed a case brought by six employees of the Sheriff's Department in Hampton, Virginia. One of the six employees had clicked the "Like" button on the Facebook page of the Sheriff's opponent in a political race. The federal court refused the terminated employees' request to rule that a public sector employee's "liking" a Facebook page rose to the level of constitutionally protected free speech under the First Amendment.⁷⁹

5. OWNERSHIP DISPUTES OVER SOCIAL MEDIA ACCOUNTS

⁷⁴ Julia Straw, *Woman Out of a Job After Sending Tweet to Governor Barbour*, WLBT (Dec. 22, 2009), <http://www.wlbt.com/story/11713360/woman-out-of-a-job-after-sending-tweet-to-governor-barbour>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Pietrylo v. Marino*, 2009 U.S. Dist. LEXIS 88702 (D. N.J. Sept. 25, 2009); *Pietrylo v. Marino*, 2008 U.S. Dist. LEXIS 108834 (D.N.J. July 25, 2008).

⁷⁸ *Id.*

⁷⁹ Ruth Mantell, *Your Social-Media Posts Could Get You in Hot Water*, MARKETWATCH (Jun. 6, 2012), http://articles.marketwatch.com/2012-06-04/finance/31951218_1_facebook-page-social-media-policies-workers.

Legal disputes between an employer and employee over ownership rights in social media accounts or profiles are also on the rise, fueling litigation over who owns a social media account when the employment relationship ends.⁸⁰ Courts are faced with adjudicating these high-stakes disputes where profits are clearly linked to a social media user's influence and clout in the marketplace but where the delineation between who owns and controls a social media account may not be so clearly marked.

In a highly contentious case still working its way through the federal district court in Illinois, the court issued an opinion attempting to sort through the numerous legal issues surrounding a company's use of a hospitalized employee's personal Twitter and Facebook accounts to promote the company's business.⁸¹ Jill Maremont was employed as the Director of Marketing, Public Relations, and E-Commerce for a Chicago-based interior design firm, SFDG. Maremont used her personal Twitter and Facebook accounts to promote SFDG and she created and blogged on an SFDG blog. While she was hospitalized after an auto accident, Maremont alleges that SFDG posted tweets on her personal Twitter account and posted entries on her Facebook page promoting SFDG. A guest blogger took over the SFDG blog during her hospitalization. Maremont requested that SFDG refrain from using her social media accounts, but her employer ignored these requests. Maremont returned to work at SFDG but eventually resigned. She subsequently sued her former employer, alleging that SFDG's conduct violated the Lanham Act, Stored Communications Act, Illinois' Right of Publicity Act, and the state's common law right to privacy. Adjudicating cross-motions for summary judgment, the federal district court made multiple rulings relating to the alleged usurpation of Maremont's social media accounts by her employer.

First, the court concluded that Maremont created her personal Twitter and Facebook accounts for her own economic benefit even though she did promote her employer's interests on these sites as part of her marketing strategy as Director of Marketing for SFDG. Therefore, the court ruled that Maremont had standing to bring a false endorsement claim under the Lanham Act for SFDG's unauthorized use of Maremont's Twitter and Facebook accounts.

Second, Maremont's claim that her employer's use of her personal social media accounts violated the federal Stored Communications Act survived summary judgment since there were "disputed issues of material fact [as to] whether Defendants exceeded their authority in obtaining access to Maremont's personal Twitter and Facebook accounts."⁸² The federal Stored Communications Act

⁸⁰ *Communication Control*, EMP'RS' LAW, (July 7, 2012), <http://www.lexisnexis.com/hottopics/lnacademic>.

⁸¹ *Maremont v. Susan Fredman Design Group, LTD*, 2011 U.S. Dist. LEXIS 140446 (N.D. Ill. Dec. 7, 2011).

⁸² *Id.*

authorizes lawsuits for “unauthorized, intentional access to communications that are held in electronic storage” and covers Facebook, Twitter and other social media sites.⁸³

Third, the federal district court ruled that Maremont’s employer did not violate Illinois’ Right to Publicity Act because SFDG did not pass itself off as Maremont in the tweets sent from Maremont’s private Twitter account. Interestingly, the federal district court dismissed Maremont’s common law right to privacy intrusion upon seclusion claim, noting that Maremont must have demonstrated that the matter at issue in the lawsuit was private and that she attempted to keep private facts private in order to bring a valid claim. The district court concluded that Maremont’s Facebook and Twitter posts were not private, as required under the common law tort: Maremont boasted that she had 1,250 Twitter followers and often linked her Facebook and Twitter posts to SFDG’s public blog. Also, Maremont did not attempt to keep posts made on any of these accounts private.

A case currently pending in federal district court in California involves a dispute over the legal rights to a Twitter account used by a former employee.⁸⁴ Noah Kravitz was an editor and video blogger for PhoneDog, a South Carolina-based company, which offers reviews, information, and news in phone and related technologies industries.⁸⁵ PhoneDog uses social media to market and promote its services, including YouTube, Twitter, and Facebook. In the lawsuit, PhoneDog alleges that it provided Kravitz with a Twitter account that Kravitz used to promote PhoneDog’s services and to disseminate information. PhoneDog maintains that the Twitter account and password are confidential proprietary information owned by PhoneDog.

In 2010, when Kravitz left his employment at PhoneDog, the Twitter account had 17,000 followers. Refusing to relinquish the account to PhoneDog, Kravitz changed the Twitter account’s handle and continued to use the account.⁸⁶ PhoneDog sued Kravitz alleging misappropriation of trade secrets, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and conversion.⁸⁷ PhoneDog contends that Kravitz’s Twitter followers are akin to a company’s customer list and are the property of PhoneDog. PhoneDog is seeking an order requiring Kravitz to pay it

⁸³ *Id.*

⁸⁴ *Phonedog v. Kravitz*, 2012 U.S. Dist. LEXIS 10561 (N.D. Cal. Jan. 30, 2012) [hereinafter *Phonedog*]; *Phonedog v. Kravitz*, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011) [hereinafter *Kravitz*].

⁸⁵ Ron Barnett, *Ex-Employee Is Sued Over Keeping Work Twitter Account*, USA TODAY, Feb. 24, 2012, at A.4.

⁸⁶ *Phonedog*, *supra* note 84.

Kravitz, *supra* note 84.

⁸⁷ *Id.*

\$2.50 per follower per month for eight months, an amount totaling \$340,000.⁸⁸ Kravitz responded to the lawsuit, arguing that Twitter legally owns the Twitter account and that nearly half of the tweets he made on the Twitter account were personal.⁸⁹ To date, PhoneDog's lawsuit has survived two motions to dismiss brought by Kravitz.

In December 2011, a federal district court in Pennsylvania ruled on the lawfulness of an employer's actions involving the LinkedIn account of a high-level employee who was being terminated.⁹⁰ The litigation arose after Dr. Linda Eagle and her partners sold the stock of a financial services and training company they founded, Edcomm, to Sawabeh Information Services Company (SISCOM). Edcomm continued to employ Dr. Eagle and her partners for several months after the stock sale. Eventually, Dr. Eagle and her partners were involuntarily terminated. Litigation ensued in two separate cases brought in federal court in New York and in Pennsylvania.

In the Pennsylvania case, Dr. Eagle alleged that her employer, Edcomm, gained unauthorized access to Dr. Eagle's LinkedIn account when she was terminated. She asserts that her employer's actions were unlawful and in violation of federal and state law, including the Computer Fraud and Abuse Act, the Lanham Act, invasion of privacy, and misappropriation of identity. Edcomm countersued Dr. Eagle, accusing her of unfair competition and misappropriation of Edcomm's connections and telephone number on that LinkedIn account.

Facing a pitched battle between employer and employee, the federal district court in Pennsylvania refused to dismiss Edcomm's misappropriation and unfair competition counterclaims against Dr. Eagle. In a nuanced ruling, the court concluded that the LinkedIn account was not a protectable "trade secret" because "neither the telephone number nor the LinkedIn account connections qualify as trade secrets, as both are either generally known in the wider business community or capable of being easily derived from public information," but if the LinkedIn account connections and content were developed by Edcomm and not Dr. Eagle, then Edcomm had stated a cognizable claim of misappropriation of an idea.⁹¹ The federal district court further ruled that this alleged misappropriation of the LinkedIn account

⁸⁸ Ron Barnett, *Ex-Employee Is Sued Over Keeping Work Twitter Account*, USA TODAY, Feb. 24, 2012, at A.4.

⁸⁹ *Id.*

⁹⁰ *Eagle v. Morgan*, 2011 U.S. Dist. LEXIS 147247 (E.D. Pa. Dec. 22, 2011).

⁹¹ *Id.*; In September, 2010, a federal district court made a similar finding in a lawsuit brought by an executive search firm against a former executive for misappropriation of trade secrets. The court ruled that the purportedly confidential and proprietary information contained in the firm's database lost any protectable interest since the information was accessible through social media sites such as LinkedIn and internet sites such as Bloomberg or Google. *See Sasqua Group, Inc. v. Courtney*, 2010 U.S. Dist. LEXIS 98621 (E.D.N.Y. Sept. 7, 2010); *Sasqua Group, Inc. v. Courtney*, 2010 U.S. Dist. LEXIS 93422 (E.D.N.Y. Aug. 2, 2010).

information by Dr. Eagle could also constitute a tortious claim of unfair competition under Pennsylvania law.⁹²

This legal tug-of-war over rights to social media accounts when employment ends is not limited to the United States. In a 2008 British case, the High Court concluded that a former Hays Specialist Recruitment employee had breached confidential information through the use of the employee's LinkedIn account. The High Court ordered the employee to disclose to the employer the business contacts added to the LinkedIn account.⁹³ In 2011, the BBC's chief political correspondent left the BBC to accept a position with ITV and kept her Twitter account and its 58,000 followers. The BBC declined to challenge the legal ownership of the Twitter account.⁹⁴

V. LEGISLATURES REACT

With the litigation floodgates opened, courts are left to wrestle with the rights and responsibilities of parties involved in social media employment-related disputes under existing law. State and federal legislatures are beginning to weigh in on this legal debate. Employers' practice of asking or, in some instances, requiring prospective and current employees to divulge their passwords to their private social media accounts in order to screen or monitor these individuals is not believed to be widespread.⁹⁵ However, state and federal lawmakers are preemptively addressing this issue by crafting legislation that legally prohibits employers from requesting or requiring job candidates or current employees to disclose this information.

Legislatures in several states including Maryland, Illinois, California, Massachusetts, New Jersey, Washington, Minnesota, and Ohio have introduced laws that prohibit employers from requesting employees or prospective employees to divulge their usernames and passwords to social media accounts.⁹⁶ Each state's statutory prohibitions vary, but all are designed to oppose employers' attempts to intrude into private social media accounts.⁹⁷

⁹² The terms of service agreements provided by the social media source may help determine the outcome of ownership disputes. For example, LinkedIn's service agreement provides that if an employee's account is in his or her own name, the employee retains ownership rights in the account, and an employer may not require an employee to transfer her account or disclose her password and username to the employer. While the ownership and right to control a LinkedIn account may reside with the employee, confidential or proprietary information communicated through that account might legally belong to the employer. See *Communication Control*, THE EMP'RS' LAW, (July 5, 2012), <http://www.lexisnexis.com/hottopics/lnacademic>.

⁹³ *Id.*

⁹⁴ Shane Richmond, *Can Your Employer Claim Your Social Media Connections?: An American Blogger is Being Sued by His Former Employers Over Ownership of His Twitter Account. Could the Same Happen Here?*, TELEGRAPH, Dec. 29, 2011.

⁹⁵ Jessica Guynn, *Social Media Bill OKd*, L.A. TIMES, May 11, 2012.

⁹⁶ *Id.*

⁹⁷ *Id.*

The legislation passed in Maryland (which became law in October 2012) prohibits employers from, as a condition of employment, asking or requiring current or prospective employees to disclose information that would give the employer access to their private social media accounts.⁹⁸ Brad Shear, a Maryland attorney who worked on the drafting of the legislation, notes that this legal constraint “not only protects employees’ privacy, [sic] it also protects employers. It protects [employers] from having to create new legal duties and liabilities and compliance costs.”⁹⁹

In May 2012, California’s state Assembly passed Assembly Bill 1844, which bans employers from asking prospective and current employees for social media user names and passwords. The legislation would also allow employers to continue to check publicly available information from social networking sites of employees or job applicants. Public sector employees in law enforcement or security agencies are exempted from the prohibitions in this bill.

At the federal level, Congress is considering two proposed pieces of legislation: the Social Networking Online Protection Act (SNOPIA) and the Password Protection Act of 2012.¹⁰⁰ These proposed statutes either prohibit or penalize employers who seek access to social networking accounts of current or prospective employees. Congressman Eliot Engel, who introduced SNOPIA in April of 2012, called such employer tactics “coercive,” and he argued that social media accounts should enjoy the same privacy protections as banking accounts and email accounts.¹⁰¹

Not surprisingly, the social media industry has joined this debate. Facebook welcomed legislative restrictions on employers requesting passwords to private social media accounts. Facebook’s Privacy Chief, Erin Egan, stated, “As a user, you shouldn’t be forced to share your private information and communications just to get a job. We’ll take action to protect the privacy and security of our users, whether by engaging policymakers or, where appropriate, by initiating legal action.”¹⁰² Egan further noted that it is “a violation of Facebook’s Statement of Rights and

⁹⁸ Catherine Ho, *Md. Employers Cannot Collect Facebook Passwords*, WASH. POST, Apr. 16, 2012, at A.14; *Maryland Becomes First State To Enact Password Privacy Protection Bill*, HR.BLR (May 15, 2012), <http://hr.blr.com/HR-news/HR-Administration/Electronic-Monitoring/Maryland-Becomes-First-State-to-Enact-Password-Pri>.

⁹⁹ Catherine Ho, *Md. Employers Cannot Collect Facebook Passwords*, WASH. POST, Apr. 16, 2012, at A.14.

¹⁰⁰ *Maryland Becomes First State To Enact Password Privacy Protection Bill*, HR.BLR (May 15, 2012), <http://hr.blr.com/HR-news/HR-Administration/Electronic-Monitoring/Maryland-Becomes-First-State-to-Enact-Password-Pri>.

¹⁰¹ *Laws Proposed in the United States*, 2012, Apr. 30, 2012, <http://www.telegraph.co.uk/technology/facebook/9235869/Laws-to-protect-Facebook-passwords-from-prying-employers.htm>.

¹⁰² *Id.*

Responsibilities to share or solicit a Facebook password.”¹⁰³ In March 2012, Facebook issued a warning to employers regarding the practice of requesting password information to Facebook sites and threatened to consider possible legal action if its policy forbidding password sharing was violated.¹⁰⁴ Facebook stated:

We don't think employers should be asking prospective employees to provide their passwords because we don't think it's the right thing to do. While we do not have any immediate plans to take legal action against any specific employers, we look forward to engaging with policymakers and other stakeholders, to help better safeguard the privacy of our uses.¹⁰⁵

VI. CONCLUSION

The multiple and complex legal issues surrounding social media use in the employment context present increasing risks to employers and employees. As federal and state courts and legislatures wrestle with the legal implications of workplace disputes involving social media use, the increasing significance of social media's role in employment decisions confirms that these risks will rise. Assessing and avoiding liability is a herculean task.

The authors believe that it is imperative for today's business law professors to communicate the serious legal, ethical, and professional implications social media use has for both individuals and organizations. Students need to become aware of the professional and legal risks and rewards involved in the use of their favorite technological tools and to understand the significant impact social media use has on business organizations' employment-related decisions. While instances of the negative employment impact of improper social media use are reported almost daily in the press, there is also a growing body of case law and legislation on this relevant and timely topic. Reviewing the legal issues surrounding social media's increasing role in employment decisions is one lecture your students will not likely sleep through.

¹⁰³ Ron Scherer, *Facebook Privacy: Can Firms Legally Demand Password From Job Applicants?; On Friday Facebook Criticized the New Practice of Screening Job Applicants as 'Alarming,' and Some Employment Specialists Say It Could Expose Firms to Legal Landmines*, CHRISTIAN SCI. MONITOR, Mar. 23, 2012.

¹⁰⁴ *Must We 'Friend' Our Bosses?*, PHILA. INQUIRER, Mar. 29, 2012; Manuel Valdes, *Can Employers Ask For Applicants' Passwords?*, WASH. POST, Mar. 36, 2012.

¹⁰⁵ Valdes, *supra* note 104.