Social Media Expression v. Employers’ Right to Terminate

LeAnn M. Gentry

National University

Social Media Expression v. Employers’ Right to Terminate

Social media use is growing incredibly fast. According to Facebook.com (2010), their site currently has 500 million active users. The *Huffington Post* (2010) reports that Twitter has 105,779,710 users and *TechCrunch* (2010) says that LinkedIn has 60 million users (Rao). These staggering numbers are only for a few of the most popular social networking sites and do not come close to including the numerous social networking programs emerging daily. Don Phin attributes social media’s popularity to several things, “Social media has exploded because it (1) is inexpensive, (2) is accessible to all (3) is easy to use, (4) has a broad reach, and (5) allows for instant feedback” (HR that Works, 2010, p. 2). Phin also warns, “As with any communication technology, these new media forms carry considerable risks” (HR that Works, 2010, p. 1). One rising risk associated with social media surrounds the role social sites can have in the termination of an employee in either the private or public sector.

Schoening and Kleisinger (2010) mention, “Not surprisingly, the law lags behind the technology and social networking phenomenon,” but also caution, “Employees should have no expectation of privacy when posting information on a public website and employees should think twice before doing so” (p. 16). The authors continue to explain, “While both Kentucky case law and the Kentucky legislature have been silent on whether it is lawful for an employer to police employees’ off-duty conduct (besides smoking), other jurisdiction have addressed this issue” (Schoening and Kleisinger, 2010, p. 14). California, Colorado, and New York currently have off-duty conduct statues, which some believe protect employees right to use social media sites during nonworking hours without the threat of being terminated.

The California law allows, “The Labor Commissioner to take assignments of claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away form the employer’s premises” (Schoening and Kleisinger, 2010, p. 14). Therefore, the argument could easily be made that this law protects employees’ legal use of social media sites during off hours.

The Colorado law is more explicit than the California using the following language, “It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours” (Rita & Gunning, 2006, p. 2). Rita and Gunning (2006) explain, “The law originally was passed to protect tobacco workers, and case law suggests it also may protect an employee’s sexual or romantic activities outside work. Arguably, the off-duty conduct law could protect a plethora of activities, including alcohol use outside of work, political expression or activities, participation in legal gambling or blogging” (p. 2).

The New York law, which took affect on January 1, 1993, also has roots within the tobacco industry and “grew out of efforts by the tobacco lobby to prevent employers from discriminating against employees who smoke” (Kauff, McGuire & Margolis LLP, 1992, p. 1). The statue says, “New York employers may not take adverse employment actions against employees or applicants for employment on the basis of the legal, off-duty conduct” (Kauff, McGuire & Margolis LLP, 1992, p. 1). An explanation of protected employee activities is described in the statute and includes, “(1) political activities, such as campaigning or fundraising; (2) legal recreational activities, broadly defined to include virtually all non-compensated leisure time activity; (3) the legal use of consumable products, off company property and outside of working time; and (4) membership in a union or the exercise of rights related to union activity” (Kauff, McGuire & Margolis LLP, 1992, p. 1).

Although the California, Colorado, and New York statues do not mention social media specifically, it can be argued that social media use falls under the category of legal, off-duty activities. In addition to state-specific off-duty activity laws some believe the Sarbanes-Oxley Act could protect employee social media use, but still others remain skeptical “The Sarbanes-Oxley Act of 2002 for example, contains a provision protecting employees who report violations of any Federal or state securities law. To gain the statute’s protection, however, an employee must report the unlawful conduct to a supervisor, a regulatory agency, law enforcement, or Congress. A blog posting, in itself, probably would not trigger the statute’s protection” (Rita & Gunning, 2006, p. 2).

Another statute that may protect social media usage outside of work is the National Labor Relations Act. “In 1935, Congress enacted the NLRA to protect the unionizing efforts of employees. Its grasp, however, extends beyond union activities and protects employees who engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” (Rita & Gunning, 2006, p. 2). Rita and Gunning also argue that it may be difficult for social media including blog entries to be protected by the NLRA explaining, “To succeed, employees would have to show that they explicitly notified other employees about the blog, frequently discussed the company’s work environment on the blog, and allowed co-workers to post responses or comments on the blog. If proven, these elements would support a finding that the blog could be protected under the NLRA” (Rita & Gunning, 2006, p. 2).

In addition to the statutes mentioned above, the First Amendment’s protection of free speech may offer a shield for social media use by employees, but Schoening and Kleisinger (2010) caution, “However, the application of the First Amendment claim is limited due to rigid standards imposed by courts; furthermore the employer must be a governmental entity or entity acting with the power of a government entity. Additionally, in order for a public employee to establish a successful First Amendment claim, the information that is spoken or written must be of public interest” (p. 9).

Despite the loose application the First Amendment offers to social media termination a student teacher tried to gain protection for her MySpace posts through the First Amendment in a 2008 lawsuit. As a student teacher in Millersville’s BSE program, Stacy Snyder was dismissed from her teaching position after both her onsite and University supervisors observed several questionable decisions Snyder made while teaching. Additionally, Snyder’s MySpace account included an image of her dressed as a pirate while carrying a “drunken pirate” cup and included the following post:

First, Bree said that one of my students was on here looking at my page, which is fine. I have noting to hide. I am over 21, and I don’t say anything that will hurt me (in the long run). Plus, I don’t think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They keep asking me why I won’t apply there. Do you think it would hurt me to tell them the real reason (or who the problem was) (Stacy Snyder v. Millersville University, 2008)?

Snyder eventually lost the suit for several reasons. Her MySpace post was not considered protected speech under the First Amendment because the Amendment is only applicable, “So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively” (Stacy Snyder v. Millersville University, 2008). Additionally, Snyder’s claim that she did not receive her degree because of her misunderstood MySpace post was dismissed based on the information presented by the University and School District. Both schools delivered documentation from months prior to the MySpace post noting issues with Snyder’s teaching style. As a byproduct of her dismissal as a student teacher Snyder did not complete her student teaching and therefore did not fulfill the requirements for the BSE degree. Ultimately, Snyder’s lawsuit and her request for First Amendment protection was dismissed altogether (Snyder v. Millersville University, 2008).

Another Federal act that may be used to protect employees’ social media use is the Stored Communications Act (SCA), which is part of the Electronic Communications Privacy Act (ECPA) of 1968. Schoening and Kleisinger (2010) explain, “While in the past the ECPA was considered virtually useless to employees disgruntled over an employer’s email monitoring, save for extreme circumstances, recent cases have found the SCA to be more beneficial to employees than originally thought” (p. 14).

The SCA was used successfully to safeguard a password-protected social media group in the case of Brian Pietrylo and Doreen Marino v. Hillstone Restaurant Group. In this case, Pietrylo created a password-protected MySpace group criticizing the Hillstone Restaurant Group. Pietrylo provided some fellow employees the password, but was careful not to provide access to Hillstone’s management. Eventually the management found out about the group and coerced Pietrylo’s co-worker, Doreen Marino, into providing her password. Eventually:

The jury could find the employer acted maliciously in repeatedly accessing the employees’ site via the other employee’s password, as (1) its manager knew access was unauthorized, and (2) the other employee was not told other managers would be given her password or that management would repeatedly access the site (Brian Pietrylo and Doreen Marino v. Hillstone Restaurant Group, 2009).

Pietrylo’s MySpace group, his critical posts, and ultimately his employment were protected under the SCA because the Hillstone Restaurant Group’s illegal methods used to view the site violated the Stored Communications Act.

Based on a 1997 case, Michael Marsh v. Delta Air Lines, Inc., it could be seen where the Hillstone Restaurant Group may have thought they were within their rights to fire a publically critical employee. In the 1997 case Marsh was fired after a letter he authored critical of Delta Air Lines was published in the *Denver Post*. The court found Marsh at fault and therefore legally subject to termination because, “An implied duty of loyalty was a bona fide occupational requirement within that statutory exception, and the employee was not attempting to inform the public of a safety concern” (Michael Marsh v. Delta Air Lines, 1997).

Although the Marsh and Pietrylo cases may seem similar, there are a few extremely important differences. In the case of Marsh, his critical letter was published publically for many to read and was accessed by Delta Air Lines without using any extreme or misleading measures. Marsh’s public criticism was considered a breach of his implied employment contract with Delta Air Lines and therefore legal grounds for termination. Conversely, in the case of Pietrylo, his critical writings were housed in a password-protected site that was accessed by the restaurant’s management by coercing another employee and not notifying Pietrylo of their access. Since Pietrylo’s critical MySpace site was found through these means the restaurant group was in violation of the SCA and ultimately could not legally justify the termination of Pietrylo or his coworker Marino.

A recent case in Louisiana protected an employee’s Facebook post for entirely different reasons. An employee of a local news station, Scott Griffin, was terminated following a posting on his personal Facebook page that the news station claimed damaged the station’s reputation. Following Griffins termination he applied for unemployment benefits. After the station asked for reversal of the Louisiana Workforce Commission’s approval of Griffin’s unemployment benefits he, “Testified that the Facebook post, made on a personal webpage viewable only to his Facebook ‘friends’ and not associated with Nexstar/KTVE, did not damage the television station’s reputation, citing an incident on August 18 where Scott was asked by Klinzing and Cheryl Olive, general manager of KTVE, to ‘mingle with the clients’ during an advertising sales pitch for the 2010 Olympics” (Amy, 2010, p. 2). Although Griffin’s civil suit is pending the court ruled to allow Griffin to continue receiving his unemployment benefits (Amy, 2010, p. 2).

While this case did not overturn Griffin’s termination, it did uphold his unemployment benefits and therefore shows that the court did not perceive that Griffin was terminated for cause. Ultimately this court’s ruling shows precedence for other cases to refer to when protecting an employee’s right to social media use during nonworking hours.

While the United States has yet to create a Federal Law in regards to social media use and the workplace Australia has been a pioneer in this sector. In an effort to streamline many of the issues surrounding social media and employment Australia references their Privacy Act, which, “Dictates that companies must only collect personal information that is necessary for their business” (Southam, 2009, p. 2). This act goes even further than dealing with terminations and addresses issues with social media during the recruitment process as well. “Under the Privacy Act, employers and recruiters must: Inform a candidate that they have collected personal information about them; explain the purpose of gathering the information; and tell the candidate who else will see the information” (Southam, 2009, p. 2).

Until clear laws are created in the United States to deal with social media issues and employment one law firm suggests, “In order to avoid exposure to considerable liability, employers should develop an approach to personal online conduct and apply that approach in both policy and practice” (Lanham, 2010, p. 1). Lanham urges companies to take a two-pronged approach to social media policy by creating a written policy and implementing managerial training. Additionally, he explains the written policy should cover the following: separation of employees’ personal and professional digital lives, confidentiality, monitoring, and a termination policy based on inappropriate electronic communications. Lanham also strongly suggests offering training sessions for employees to learn the appropriate use of social media under the written policy (Lanham, 2010, p. 5).

As outlined above, many of the laws used in social media cases were created for entirely different purposes, but are still applicable since they deal with the wrongful termination of employees for legal activities during nonworking hours. While the social media cases discussed in this paper deal with legal off-duty activities some wonder how private these off-duty activities are when they are published for hundreds to see via platforms like Facebook, MySpace, and Twitter. As with the case of Marsh v. Delta Air Lines, if a social media post is seen by many, not password protected, and critical of a company it is easy to see where it could be appropriate grounds for termination. On the other hand, if an employer uses unethical means to gain access to an employee’s social media account or if the termination of an employee is based on assumptions made stemming from an employee’s personal, non-company related Facebook postings, the lines become a bit more blurred. In essence social media usage creates two main problems for employers – regulating critical or sensitive information about the company, and patrolling assumptions that can be made about the company when linking employees nonworking activities to their employers.

Does a company have the right to terminate an employee for legal, off-duty actions that the company believes are not inline with their company image? Although case law has not offered a clear-cut answer to this question, I believe it is up to each company to determine this internally. If the company decides that it would like to monitor and dictate their employees’ social media usage, it is imperative for the company to create a written policy that clearly defines what they consider appropriate social media activities for its employees. Some might believe that the creation of such a policy goes too far, but with social media’s growth in recent years it may become a necessity.

Social media allows employees’ private activities to be accessed in an incredibly public forum. Employees’ nonworking actions that used to only be known by a select few are now broadcast through social media sites for hundreds to learn about via the Internet and mobile devices. In many cases these social networking sites also list an individual’s occupation and employer. Therefore one could only assume correlations will be made between an employees actions and the type of business they work for. At its core this is not a new phenomenon. Prior to social media sites employees still made questionable decisions in their off-hours, which allowed for assumptions to be made about their employer. Social media sites have only increased exposure to these activities.

In the case of Marsh v. Delta Air Lines Marsh was terminated because he violated Delta’s implied loyalty policy by criticizing his employer in a public forum, the *Denver Post*. With newspaper circulation decreasing and social media usage increasing, it may not be too long before Facebook and the like are considered more of a public forum than newspapers.

Employee social media use offers a difficult dilemma for employers. Whether it is policing critical comments or determining if an employee is the correct fit for an organization, it ultimately becomes an issue of brand management. Until Federal laws are created to specifically deal with the complexity of these issues it is critical for companies to create and distribute social media usage guidelines to protect the company in the case of possible future litigation.

References

(2010) Twitter user statistics revealed. The huffington post. Retrieved from: http://www.huffingtonpost.com/2010/04/14/twitter-user-statistics-r\_n\_537992.html.

(2010, September 29). *Statistics*. Retrieved from http://www.facebook.com/press/info.php?statistics.

Amy (2010, March 3). Scott wins unemployment hearing, still knows about the enola gray. Retrieved from http://thinktankidea.com/vault/archives/690. (2010, September 29).

Brian Pietrylo and Doreen Marino v. Hillstone Restaurant Group d/b/a Houston’s, 29 L.E.R. Cas. (BNA) 1438 (United States District Court for the District of New Jersey 2009).

HR that works. (2010) Social Media and its risk implications.

Kauff McGuire & Margolis LLP. (1992). New law protects new york employees from discrimination based on legal off-duty conduct.

Lanham, J. (2010) Social media and the workplace. *Employment Law commentary Newsletter, 22*, 1, 1-7.

Michael Marsh v. Delta Air Lines, 952 F. Supp. 1458 (United States District Court for the District of Colorado 1997).

Rita, E., & Gunning, E. D. (2006). Navigating the Blogosphere in the Workplace – The Blogosphere or: How I learned to stop worrying and enjoy the blog. *The Colorado Lawyer, 35*, 5, 55-65.

Schoening, K., & Kleisinger, K. ( 2010). Off-duty privacy: How far can employers go? *Northern Kentucky Law Review, 37*, 287.

Southam, K. (2009, August 1). Snoop at your peril. *The Courier Mail*. 3.

Stacey Snyder v. Millersville University, et al., 97943 (United States District Court for the Eastern District of Pennsylvania 2008).

Rao, L. (2010). LinkedIn Now 60 Million Strong. *Tech Crunch*.