

SOCIAL NETWORKING: LEGAL ISSUES AND BOUNDARIES

Hopkins and Huebner, P.C.
www.hopkinsandhuebner.com

(prepared by Wendy D. Boka, M. Anne McAtee & Paul Salabert)

The fairy tale of Kevin Colvin



- ❑ Intern at Anglo Irish Bank
- ❑ Kevin had e-mailed his boss on October 31, 2007, to let him know he would not be in the office that day or the next due to a “family emergency.”
- ❑ This photo was posted on Kevin’s Facebook page on November 1, 2007.
- ❑ Kevin’s Facebook page was accessible by his boss, who saw the photo the next day.
- ❑ Kevin was fired from his internship and this photo, as well as the story behind it, made the rounds at his office and has since become a frequent e-mail forward.

Employer Uses of Social Networking With Possible Legal Ramifications

- **Hiring and Firing**
- **Workers' Compensation**
- **Other Lawsuits - Discrimination
Claims, Etc.**

Hiring

Studies show that approximately 75% of prospective employers do internet searches of candidates – why?

- Verifying past employment (LinkedIn or Myspace/Facebook)
- Checking for content posted – does this person have good judgment and character?
 - Many people post pictures and/or comments that call their decision-making into question (e.g., Kevin Colvin)

Firing

- ▣ Kevin Colvin is not an isolated incident – plenty of employees have been fired as a result of photos or postings on Myspace, Facebook, or Twitter
- ▣ Not all postings are as blatant as Kevin's – some just show poor judgment as opposed to being evidence of dishonesty to one's employer or skipping work.

Examples from Iowa

- ▣ • In 2006, a youth counselor at Four Oaks of Iowa allegedly posted pornographic photos of himself to a Web site
- ▣ • In 2007, an Iowa office manager who worked for Central Financial Services uploaded sexually provocative photos of herself to a Web site. She used her work computer, then bookmarked the site.
- ▣ • In 2007, a Hardin County corrections officer allegedly posted sexually provocative material to her MySpace page and solicited contact with a registered sex offender.

Examples from Iowa

- ▣ • In 2008, a supervisor with the Gannett Satellite Info Network mistakenly sent a department-wide e-mail that contained the salaries of numerous employees. After the payroll information was posted to a Facebook page, a recipient who retained a copy on his hard drive was fired.
- ▣ • In March 2009, a Scott County deputy allegedly used county equipment to take, and then post to his personal Web site, sexually explicit photos of himself.
- ▣ In February 2009, an Altoona police officer (Abigail Keller) was forced to resign from the police force after a citizen brought to light photographs from her Myspace page that included her “mooning” the camera and simulating sex acts on friends at a bar. There were also photos of Keller on her site in her police uniform, and her supervisor found that having both types of photos associated the police department with her behavior.

Workers' Compensation Cases & Other Lawsuits

- Co-workers often “friend” one another.
- It is foreseeable that an employee might report seeing postings on a co-worker (or former co-worker)'s page that are inconsistent with claims being made against the employer in pending suit.
 - Ex: person claiming to be disabled posts photos of himself waterskiing or golfing
 - Ex: person claiming to have been harassed or discriminated against posts comment about “getting back” at employer
- Can that information be used?
 - Probably - no legal precedent on this issue
 - A person has no expectation of privacy and once he or she makes that known to “friends” (sometimes numbering in the several hundreds), he or she has no expectation that a “friend” won't print and/or share that information with adverse parties.
 - NOTE - it is not recommended that you ask employees to “friend” you (the employer)!

Legal/Privacy Considerations



Grounds for termination? Yes. Grounds to deny unemployment? Maybe not.

- ▣ In the last example of Iowa terminations related to social networking postings, the Altoona police officer who resigned after a citizen found questionable photos on her Myspace page received unemployment benefits.
- ▣ The administrative law judge (ALJ) found that her conduct was grounds for termination, but that it didn't rise to the "intentional" misconduct required to deny unemployment benefits.

LAWSUIT: Discrimination

Employers who make adverse employment decisions based on an applicant's social networking profile may find themselves subject to discrimination claims

Discrimination

Title VII

Federal anti-discrimination statute that prohibits employers from discriminating against applicants and employees because of such individual's race, color, sex, religion, or national origin

If an employer only checks the social networking profiles of certain types of applicants or employees it may be considered evidence of unlawful discrimination

Americans with Disabilities Act

Prohibits discrimination in employment decisions against

an individual with a disability who with or without a reasonable accommodation, can perform the essential functions of the job

Claims of invasion of privacy require that the claimant have a reasonable expectation of privacy



However, the information must be legally obtained

Privacy

- ▣ Social networks increase amount of information available to employers about applicants and employees
- ▣ Security restrictions within the website do not protect the user from unwanted viewing of information
- ▣ Default privacy settings may or may not be personalized by user
- ▣ Information must be legally obtained

Defamation



**Be careful with the information you find
on social networking profiles.**

Be certain the person identified on the social website is the same person you are searching

- **Identity and authenticity issues**
- **Multiple users with same name**
- **Is the information trustworthy?**

i.e., job applicants create fake users with unfavorable information regarding competitors for a job

Lawsuit – Constitutional Claims

- *Spanierman v. Hughes* (Connecticut federal court case)
- High school teacher's contract was not renewed because he had Myspace page on which he "friended" students and had conversations with them as a peer, even discussing sex and rumors at school
- He sued, claiming his due process and freedom of speech/freedom of association rights were violated
- The court noted that he had been warned and had removed his page, only to post it again and that this was insubordination.
- The court also noted that he was employed at will, and was not actually terminated – rather, his contract was not renewed.
- The teacher's case was dismissed.
- Lesson – employment is still at will (however – note that this employee was given an opportunity to cease this behavior before his employment was ended for this).

How to use information from social networking sites – hiring, firing, or for use in litigation

- ▣ First, make sure all employees are treated the same.
 - Ex: a racy photo of a woman vs. a man
 - Ex: posts about “getting wasted” or “partying too hard” – treat young employees the same as older employees
- ▣ Have a written policy; make sure employees see this and understand it.
- ▣ Articulate and document the precise infraction and how it factored into the decision made.

How to use information from social networking sites – hiring, firing, or for use in litigation

- ▣ Do not require employees to be your “friend” and do not create a false persona or profile for purposes of communicating with employees
 - Creating a false profile can have legal consequences
- ▣ Beware of communicating directly with employees who have asserted claims against you – if they have counsel, that is not allowed.
 - Note that there is a difference between viewing their page/printing off their comments and making a comment or soliciting information via their page.
- ▣ When in doubt, seek legal counsel!