

The Law of the Lawyer

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Considerations For Drafting Social Media Policies

Two short decades ago, the rise of email revolutionized the way companies conduct business — and created new pitfalls for both employers and employees, who soon realized that emails easily can be forwarded to unanticipated audiences and used for unintended reasons.

Facebook, Twitter, and other forms of social media have now rocketed these issues to dizzying new heights with amazing speed. As of January 2011, Facebook was estimated to have more than 600 million active users — roughly double the entire population of the United States. With so many people memorializing every aspect of their lives online, the line between peoples’ personal and professional lives has never been so blurry.

Social networking sites are a goldmine of information about who people are. Users of sites such as Facebook and Myspace create profiles disclosing personal information ranging from immutable characteristics such as name, age, race, national origin and gender, to information about their likes, dislikes, and associations, including relationship status,

political and religious views, hobbies, and interests. After describing themselves in some level of detail, users can then add other users as “friends,” join virtual groups with other users with shared interests, and send messages and post comments on their friends’ pages.

Social networking sites also are a goldmine of information about what people think. Users of Facebook, Myspace, Twitter, and other sites can post messages (or “microblogs”) for other users to see. There is no limit to the kinds of topics such posts can include, from what someone had for breakfast to pictures of their kids’ school play to detailed accounts of UFO sightings. But with so much time spent at work, it is perhaps inevitable that many of these microblogs contain employees’ thoughts about coworkers, their supervisors, their companies, their customers, and their jobs in general.

Privacy in social media is almost non-existent. While many social networking sites contain privacy settings that limit who can view certain content, not all users are aware of the privacy settings or how to



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use them. Moreover, privacy settings do not provide complete protection because any intended viewer of the content can copy or forward it to someone who does not have independent access.

With that background in mind, this article explores how social media has affected the employment relationship and addresses the provisions that employers should consider including in social media policies. Inasmuch as this is a new and rapidly evolving area of the law, however, employers and attorneys should take particular care in balancing employers' legitimate interests in obtaining information regarding their employees and restricting their employees' actions with employers' risk tolerance for litigation.

Discrimination In Hiring And Other Employment Decisions

In making hiring decisions that avoid unnecessary risks of liability, sometimes ignorance is bliss. There are certain things employers should seek to avoid learning at certain stages of the hiring process, and reviewing social media sites as resources of information regarding candidates can frustrate that goal.

One significant source of potential liability in making hiring decisions is the risk of a discrimination claim. It is a well-settled principle of discrimination law that an employer cannot have intended to discriminate against an employee or a candidate for employment if the employer was unaware of the employee's or candidate's protected characteristics. That principle applies with particular force during the hiring stage, when an employer is reviewing applications for employment, because the employer is often unlikely to be aware of the protected characteristics. Social media, however, can change that.

Take two examples. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., prohibits discrimination against individuals in employment on the basis of race, color, religion, sex, or national origin. It is impossible to tell the color of a candidate's skin from a properly drafted employment application. Thus, an employer's de-

cision to extend or not extend an invitation to interview with the company is fairly insulated from such claims of discrimination. If the employer researches candidates on social media sites, however, that insulation erodes. Many users of social media sites post pictures of themselves, from which their skin color is immediately apparent. If an employer decides not to interview a candidate after viewing such a picture — even if the reason was unrelated to the picture — the candidate may be able to state a discrimination claim.

The Age Discrimination in Employment Act, 42 U.S.C. §621 et seq., prohibits discrimination on the basis of age against individuals over the age of 40. An employer conducting an interview may or may not be able to estimate a candidate's age with any accuracy. In such circumstances, a discrimination claim based on the decision not to extend an offer of employment will be ambiguous at best. An employer may have believed a 40-year-old employee was in his or her early thirties. Again, however, an employee's precise age may well be disclosed by social media sites, which may expressly list users' ages or indirectly indicate their ages by, for example, stating the dates they graduated from school.

Any number of discrimination claims may be enabled by employers' review of social media sites. Federal laws prohibit discrimination against employees who take leaves of absence for health reasons or to care for family members (the Family and Medical Leave Act, 29 U.S.C. §2601 et seq.), qualified individuals with disabilities (the Americans With Disabilities Act, 42 U.S.C. §12101 et seq.), and members of the military (the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §4301 et seq.). Something as innocuous as a picture of an applicant with his or her children, or a picture of the applicant sitting in a wheelchair, or a picture of the applicant in uniform, can serve as the basis for a claim that the employer knew about the applicant's protected characteristic in making hiring decisions.

Nor is finding out too much information the only risk. Employers also face potential liability for discrimination in deciding who to research on social media sites. Employers may legitimately use social media to decline to extend employment offers to candidates who post unprofessional messages or pictures on their Facebook or Myspace accounts. But if the employer only checks the accounts of applicants of a particular race or gender — thereby ignoring potentially unprofessional messages or pictures posted by other candidates — that discriminatory decision regarding who to research can taint the otherwise legitimate decision not to hire an unprofessional candidate.

These dangers are not limited to the hiring context but can occur in that context or at any time during employment. For example, in *Simonetti v. Delta Air Lines Inc.*, No. 5-cv-2321 (N.D. Ga. 2005), an airline discharged a female flight attendant who posted risqué pictures of herself wearing a partly unbuttoned uniform. The employee claimed discrimination on the grounds that the airline did not similarly discharge male flight attendants who similarly posted risqué pictures of themselves. The employer's difference in treatment gave rise to a potential discrimination claim, even though the employer otherwise had the right to protect its image and discharge employees who post inappropriate material to social media sites.

Conversely, in *Ganzy v. Sun Chem. Corp.*, 2008 WL 3286262 (E.D.N.Y. Aug. 8, 2008), the employer was able to make a compelling argument that it had not discriminated based on its record of employee searches: eight out of 26 African-American employees, three out of 22 Hispanic employees, and three out of four Caucasian employees. The court concluded that such facts were inconsistent with a claim of discrimination by a minority employee because “Caucasian employees were starkly over-represented and African-American and Hispanic employees were underrepresented in the group of seventeen names [the supervisor] investigated, as compared to the racial and ethnic breakdown of the employees he supervised as a whole.”

Employees seeking to avoid adverse employment actions on the basis of discrimination have few options when it comes to social media. They can opt out of using social media entirely or decline to post pictures or information disclosing personal information, but for many the benefits will outweigh the risks. They can attempt to use privacy settings to minimize circulation of their personal information, but even such efforts may not prevent employers from viewing their posts. Outside of the hiring context, much of the information that may be available to employers from social media may also be available through other means, so employees' control over discriminatory decisions is limited.

By contrast, employers can and should take several steps to minimize the potential for discrimination claims because of the use of social media:

- Create a policy regarding human resources' and supervisors' use/review of social media websites in regards to employees;
- Use social media the same way for all employees or applicants. Do not limit searches to particular classes of individuals;
- Consider restricting searches of social media sites to certain employees (such as human resources professionals) and instruct other employees (such as supervisors) not to perform such searches without authorization;
- Consider making certain employment decisions, such as the decision of which applicants to interview, before conducting any searches of social media. Then use social media to confirm or override those decisions;
- Consider separating the decision-making function from the research of social media sites. Have one person review social media sites to search for inappropriate pictures or information and report that information to the decision-maker without extraneous information regarding race, gender, age, and so forth;
- Consider whether the benefits to be obtained from social media outweigh the risks of using social media sites.

Most of the onus here, however, is on the em-

employees. Employees should consider the following activities as active attempts to get fired:

- Disparaging their employers;
- Disparaging their employers' products or services;
- Disparaging their employers' customers;
- Making inappropriate or harassing comments about coworkers;
- Admitting (or posting pictures of) any violation of any company policy;
- Admitting (or posting pictures of) any criminal act; or
- Posting anything placing them (and, by extension, their employers) in a poor or unprofessional light.

Employees and employers both should:

- Consider all the people who could access information before posting it to social media sites;
- Refrain from posting any information to social media sites unless that information is intended for public consumption;
- Learn about the privacy settings on social media sites to understand whether particular posts are private or public; and
- Respect password-protected information by refraining from accessing such information without authorization and by refraining from improperly using it or disclosing it to others.

When Does A Treating Physician Become An Expert Witness? The Ninth Circuit Clarifies The Scope Of Rule 26(a)(2)(B)

By Dahlia R. Robinson

The Ninth Circuit Court of Appeals recently decided a case of first impression, which affects the status of physician expert witnesses. This decision will affect the way that attorneys prepare for and present evidence during trials. "Generally, a treating physician is not 'retained or specially employed to provide expert testimony' — a treating physician is a percipient witness of the treatment he rendered — and therefore he is not subject to the written report requirement." *Goodman v. Staples*, 2011 U.S. App. LEXIS 8979 (9th Cir. May, 2011) at 17, quoting Fed. R. Civ. P. 26(a)(2) advisory committee's



note (1993). Federal Rule of Civil Procedure 26(a)(2)(B) requires a party to submit a written report to the court "if the witness is one retained or specially employed to provide expert testimony in the case...." There appears to be a slight disconnect between the general practice and the application of Rule 26. It is unclear whether medical doctors may testify as expert witnesses when they have not submitted expert witness reports and if they base their conclusions on more data than discovered while treating the party in question. *Goodman* settled the