

# SOCIAL MEDIA SYMPOSIUM

## Social Networking and Employment Law

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Marshall McLuhan famously declaimed that the “medium is the message,” which according to that noted repository of McLuhan wisdom, Wikipedia, means that “the form of a medium embeds itself in the message, creating a symbiotic relationship by which the medium influences how the message is perceived.”<sup>1</sup> Because social networking technology is relatively new, there is a perception among employers that its introduction has created new legal issues complicating the already byzantine regulations applicable to the employment relationship. In reality, the substance of social networking is not new—there have always been conversations around the water cooler or at the lunch table, and in those conversations employees have always complained about their employers, their bosses, and their colleagues; employees have always tried to avoid work and been distracted from the tasks at hand; and they have always behaved foolishly when off duty. Facebook, MySpace and the like are simply tools that provide employees additional distractions, a larger audience, and an archive of their various misadventures.

The huge popularity of social networking sites, and the novelty of the technology they use, should not distract employers and their counsel from the basic employment law principles that apply to the correct resolution of issues arising out of the use and abuse of social networking tools. With a basic understanding of employment law, familiarity with some of the statutes applicable to these particular types of technologies, and some common sense, employers should have no more difficulty addressing 21st century issues than they had dealing with those issues in the last millennium.

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1. [http://en.wikipedia.org/wiki/The\\_medium\\_is\\_the\\_message](http://en.wikipedia.org/wiki/The_medium_is_the_message).

## OVERVIEW OF THE LEGAL ENVIRONMENT

### Regulation of the Employment Relationship

Numerous federal, state and local employment laws regulate employment and hiring decisions. Employers are subject to increasing restrictions on what they can ask in applications, on tests, in interviews and in selecting candidates. Many of these laws prohibit discrimination against individuals because of their membership in a protected class (such as race, gender, age, disability), making it unlawful to refuse to hire or to fire an employee because he or she is a member of a protected class.<sup>2</sup>

Employers are undoubtedly tempted to use the wealth of information and insight into character that many potential employees and applicants have posted publicly (unwittingly or intentionally) on their personal social media pages. Before indulging that temptation, however, employers should carefully consider the possible legal ramifications.

**With an understanding of employment law, familiarity with the statutes applicable to electronic data, and common sense, employers can address these issues.**

### Social Networking and the Hiring Process

A January, 2009 CareerBuilder.com survey recently reported that more than 45% employers search social networking Internet sites to screen job candidates.<sup>3</sup> Of these hiring managers, 18% of hiring managers found content on social networking sites that helped convince them to hire the candidate in question. However, 35% admit that the information found on the Internet led them to not hire the candidate for the job. The stated areas of concern found on social networking sites were:

- Candidate posted provocative or inappropriate photographs or information—53 percent

2. These include at the Federal level: Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e, *et seq.*; Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621, *et seq.*; Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101, *et seq.*; The Equal Pay Act of 1963 ("EPA"), 29 U.S.C. §206(d); the Reconstruction Era Civil Rights Acts, 42 U.S.C. §§1981 & 1983; Executive Order No. 11246; Sections 503 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*, §794 *et seq.*; Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. §2012; Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §1101, *et seq.*; Fair Credit Reporting Act (FCRA"), 15 U.S.C. §1681, *et seq.*; Fair and Accurate Credit Transactions Act, 15 U.S.C. §1681 *et seq.*; and Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001, *et seq.*

At the state level, the following are some of the laws regulating the employment relationship: Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §951, *et seq.*; Pennsylvania New Hire Reporting Law, 23 Pa.C.S.A. §4391, *et seq.*; Pennsylvania Employee Polygraph Protection Act, 18 Pa.C.S.A. §7321; Pennsylvania Reference Immunity Law, 42 P.S. §8340.1; and the Pennsylvania Criminal History Record Information Act, 18 Pa.C.S.A. §9125.

Locally, the Pittsburgh Human Relations Ordinance, Pittsburgh Code §659.02; the Philadelphia Fair Employment Practices Ordinance, Phila. Code § 9-1103; and the Harrisburg Human Relations Ordinance, Harrisburg Code §114-1 all regulate employment practices within their respective jurisdictions. Allegheny County, Pennsylvania recently enacted a Human Relations Commission ordinance, the purpose of which is to "assure that all persons regardless of race, color, religion, national origin, ancestry or place of birth, sex, gender identity or expression, sexual orientation, disability, marital status, familial status, age or use of a guide or support animal because of blindness, deafness or physical disability enjoy the full benefits of citizenship and are afforded equal opportunities for employment, housing and use of public accommodation facilities" without discrimination. Allegheny County, Pennsylvania, County Code §215-30.

3. <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009&cbRecursionCnt=3&cbsid=26ce2808344d4d66a4bc7825c673a65f-307112466-R4-4>.

- Candidate posted content about them drinking or using drugs—44 percent
- Candidate bad-mouthed their previous employer, co-workers or clients—35 percent
- Candidate showed poor communication skills—29 percent
- Candidate made discriminatory comments—26 percent
- Candidate lied about qualifications—24 percent
- Candidate shared confidential information from previous employer—20 percent

Likewise, a January 2010 study sponsored by Microsoft found that “[o]nline reputation . . . plays an important role in personal and professional life and has become a significant factor in the making of hiring decisions.”<sup>4</sup> The study surveyed recruiters, human resources professionals, hiring managers and consumers from four countries—France, Germany, the United Kingdom, and the United States—about their use of social media and their attitudes about it. The conclusion of the study highlights the issues that should be of most concern to employers:

Of particular concern is the depth and breadth of information that recruiters are seeking about candidates. Traditionally, recruiters have had clear restrictions on the types of information they can ask candidates. This included restrictions on asking about their families, their affiliation to religious, political or other groups, their financial situation, medical condition, and so on.

Now, recruiters can easily and anonymously collect information that they would not be permitted to ask in an interview, and the survey found that recruiters are doing just that. Specific research into the legality of collecting information about candidate’s online reputations is needed to get a clearer understanding of this area. Study results also indicate that, with the exception of the French, consumers surveyed generally underestimate the impact of their online reputation on their professional and personal life and the extent to which recruiters looked at candidate’s online reputations.<sup>5</sup>

It is easy to assume that anything posted on websites such as “Facebook” and “MySpace” is fair game, but employers should be wary. While employers may have solid grounds to look up candidates on the Internet, they may be opening a Pandora’s box: exposure to information about a job candidate that cannot be used as the basis of a hiring decision. Internet applications and internet searches of applicants are subject to the same laws as any other type of application. Therefore, if searching for information on job candidates over the internet, it is important to be prepared for what may be found.

Following are some considerations to keep in mind.

## Keeping the Hiring Process Legal

### Where to Advertise

Where employers choose to place ads and recruit is important when considering the type of work being offered and the pool of qualified applicants. An advertisement on Craigslist.com is likely to reach a different demographic than one placed in the classified section of the local newspaper. If an employer relies on “word-of-mouth” for hiring, or limits its advertisements to on-line, members-only social

4. Online Reputation in a Connected World, Cross-Tab Marketing Services, January, 2010 at 3, available for download as of March 20, 2010 from <http://go.microsoft.com/?linkid=9709510>.

5. *Id.* at p. 20.

media sites, it must ensure that the applicant flow it obtains through these sources accurately represents the applicant pool. If it does not, the selection of these limited media may have a disparate impact on qualified, minority candidates. The employer should consider using other sources to make sure that all potential applicants have equal access to the information about job openings. If advertising in newspapers or periodicals, make sure they have a diverse readership.

### **Applications and Interview Questions**

As the Microsoft study discussed above acknowledges, employment law delegitimizes certain inquiries into an applicant's personal characteristics, yet the ready availability of personal details on social media sites represents a potential breach in these protections. Employers should be mindful of the issues that may be raised by pre-employment review of an applicant's social media information. Following are some examples of the types of inquiries that are discouraged under the employment laws but for which information may nevertheless be readily apparent from, e.g., an applicant's Facebook page.

Under Title VII and the PHRA, it is not illegal for an employer to learn the race, gender, disabled status, ethnicity, *etc.* of an individual prior to an interview. Of course, the employment laws require that all individuals be provided equal, nondiscriminatory treatment throughout the hiring process. If an employer representative observes a job seeker's social media page, and either learns or surmises the person's gender, race, disabled status, ethnicity, or other protected trait, such knowledge could increase the risk of discrimination or the appearance of discrimination. Employers need to take care in training hiring officials and human resources staff about the appropriate responses when these protected traits are disclosed during recruitment. Social media information might be analogized to information on a resume that clearly tells an individual's race, such as, "President, Black Law Students Association." The employer needs to focus on the person's qualifications for the job.<sup>6</sup>

### **Questions Regarding Age**

Questions regarding an applicant's age tend to contravene the proscriptions of the ADEA and PHRA, each of which protects employees and applicants who are 40 and older from discrimination based on their age, unless age is a bona fide occupational qualification for a particular job. Therefore, the following are improper inquiries:

- a. What is your date of birth?
- b. What is your age?
- c. What is your age group?
- d. What year did you graduate from high school?

However, the following are proper inquiries:

- a. If hired, can you provide proof that you are of legal age to be employed?
- b. Are you 18 years of age or older?
- c. If you are under 18 years of age, can you, after employment, submit a work permit?

<sup>6</sup> See generally the discussion in Title VII / ADA: Recordkeeping Responsibilities for Electronic Resumes with Video Clips / Employer Knowledge of Ethnicity, Gender, and Disability Prior to Interview, Equal Employment Opportunity Commission, October 4, 2005, [http://www.eeoc.gov/eeoc/foia/letters/2004/titlevii\\_ada\\_recordkeeping\\_video.html](http://www.eeoc.gov/eeoc/foia/letters/2004/titlevii_ada_recordkeeping_video.html).

After hiring, questions regarding an employee's age (date of birth) are permitted for pension and fringe benefit eligibility purposes.

### **Questions That May Infer Sex/Marital Status Discrimination**

Title VII and the PHRA both prohibit employment decisions based on an individual's sex. The following inquiries are problematic:

- a. What is your maiden name?
- b. Do you prefer Mrs., Miss or Ms.?
- c. Do you believe in/use birth control?
- d. Who cares for your children/who will care for your children?
- e. Are you pregnant?
- f. What is your husband's name?
- g. What is your marital status?
- h. Do you plan on having children?
- i. How many children do you have? What are their ages?

The following inquiries are permissible:

- a. Have you ever used another name?
- b. Is any additional information relative to change of name, use of an assumed name, or nickname necessary to enable a check on your work and education record?
- c. Are you willing to relocate?
- d. Will you be able and willing to travel as needed by the job?
- e. Do you have any relatives that work at the company?

After an employee is hired, employers may inquire into the number and ages of dependents and the age of an employee's spouse for benefits and tax purposes.

As is evident, much of the information that it is impermissible to inquire about directly might be available indirectly from review of a social media site, e.g., a picture of the applicant with her family.

### **Questions That May Give Rise to Claims of Race Discrimination**

Inquiries regarding an applicant's race or color should be avoided as race is never be a bona fide occupational qualification. The following inquiries are improper:

- a. What is your race?
- b. What is your hair/skin/eye color?
- c. Requirement or request that and applicant affix a photograph to application (or a requirement that an applicant submit a photograph after application but before an offer of employment is made).

However, a photograph may be required after employment.

Many people post photographs of themselves on their social media sites; pre-employment review of these sites can give rise to a claim that improper information was considered during the hiring process.

### **Questions Regarding National Origin**

Questions regarding national origin are not permitted. These types of questions include questions regarding the applicant's place of origin, his or her ancestor's place of origin, or the individual's physical, cultural or linguistic characteristics. Examples of impermissible questions include:

- a. What nationality is your name?
- b. What is your mother tongue/native language?
- c. Where were you (or your parents) born?
- d. What nationality are your parents?
- e. What is your maiden name?
- f. When did you become a citizen?
- g. Are you a U.S. citizen?
- h. Are your parents U.S. citizens?
- i. What is your lineage/descent/national origin?

However, permissible inquiries include:

- a. What language do you read/write/speak? (if necessary for job)
- b. Are you a U.S. citizen, national of the U.S., a lawful permanent resident of the U.S. or a non-citizen authorized to work in the U.S.? (do not require applicant to choose a category).

Again, review of an applicant's social media information page might reveal her national origin, thus creating a potential issue where none would otherwise be present.

### **Questions Regarding Physical Condition or Handicap<sup>7</sup>**

Under the ADA and PHRA, employers may not discriminate against a qualified applicant with a disability on the basis of the applicant's disability, perceived disability or history of a disability. In addition, both acts prohibit discrimination association with a disabled individual. The ADA specifies what may be requested pre- and post-offer. However, for application and interview questions, employers may not ask questions likely to elicit answers about the existence, nature, or extent of a possible disability. The following are improper inquiries:

- a. Do you have a disability that would interfere with your ability to perform the job?
- b. Have you ever filed for workers' compensation?
- c. Have you ever been injured on the job?
- d. Do you have any medical conditions? How is your general health?
- e. How did you get that limp? Do you expect to walk again?
- f. How many days did you call in sick last year?
- g. Will you need medical leave for treatment or for other reasons related to a disability?
- h. Have you ever had a drug or alcohol problem?
- i. What medications do you currently take?

The following inquiries/statements are permissible:

- a. This offer is made contingent upon passing a job-related physical examination (so long as all similarly situated entering employees are subject to the examination).
- b. This job requires [list essential job functions]. Can you perform these essential job functions with or without reasonable accommodation?

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7. See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, <http://www.eeoc.gov/policy/docs/preemp.html>.

- c. Please demonstrate/describe how you would perform the job, with or without a reasonable accommodation (if required by everyone applying for a job in the job category).
- d. Can you meet the attendance requirements of the position?
- e. Do you use illegal drugs?

### **Miscellaneous Taboo Questions**

When asking questions about holiday work, it is important to avoid questions that would elicit information about the applicant's religion. It is better to state the regular hours or shifts to be worked and ask if the employee would be available for those shifts.

When asking about an applicant's activities outside of work, it is important to ask applicant's to omit any organizations, clubs and societies that would tend to indicate the applicant's race, national origin, color, sex, age or other protected status. For these types of inquiries, it is also helpful to seek only those activities that are job-related.

When checking references and speaking with former employers, potential employers should not elicit information regarding the applicant's race, color, religion, national origin, ancestry, disability, age, sex or other protected characteristic.

### **Keeping Adequate Records**

The employment laws require employers to maintain applications, resumes and other hiring records that they either receive or create for a period of one year from the time the record was created or from the time of the personnel action associated with that record, whichever is later.<sup>8</sup> The Office of Federal Contract Compliance Programs requires contractors to keep records of all applicants received through the Internet or other means for two years from the time the record was created or from the time of the personnel action associated with the record, whichever is later.<sup>9</sup> Arguably, if an employer is using Internet information for a hiring decision, it is advisable to save a copy, either an electronic copy or a hard copy, of the information for the statutory period in case there is an audit or a discrimination claim. This is true electronic resumes, email applications, and for any data from social media sites used for making the decision to offer employment to an applicant.

### **Potential Discrimination Claims**

Information concerning protected characteristics may be disclosed and if the person is not hired, employers may find themselves in a discrimination claim. Once they have learned certain information, employers will no longer be able to claim that they "didn't know" of the protected status and therefore could not have discriminated based upon it. For example, a web search of an applicant may reveal the applicant's religious lifestyle. In such an instance, laws prohibiting discrimination based on religion would come into play and the employer may not use such information to make the employment decision. If an employer stumbles upon someone's MySpace or Facebook page containing a picture of the candidate drinking and stories about past drug use, it may reveal that the candidate is a former drug user. In such a case, the Americans with Disabilities Act could be invoked. (The defense to

8. See 29 C.F.R. §1602.14.

9. 41 C.F.R. §60-1.12.

the claim is, of course, the applicant's complete lack of common sense demonstrated by the posting of the picture).

It is also important to realize that the information obtained through a web search may be misleading. It may be posted by someone other than the candidate or it may be untrue. Additionally, some states (such as California) prohibit employers from considering lawful off-duty conduct in employment decisions.<sup>10</sup>

Finally, once an employer uses the internet to vet a candidate for a job, it should perform similar searches on ALL candidates for the job in order to avoid a disparate treatment claim. The failure to search everyone is evidence that different criteria were applied to the candidates, and the disappointed applicant will find it easy to establish a *prima facie* case of discrimination.

With regard to employee conduct on the Internet, the cases overwhelmingly revolve around terminations. However, that is not to say that failure to hire would not be a viable cause of action. In fact, the probable reason for the lack of cases in this area is because many applicants are likely unaware that the employer was researching them on the Internet. It is just a matter of time before a failure to hire discrimination case makes its way to court based on information regarding a protected status discovered on the Internet, or through the inconsistent use of the available internet search tools. Regardless, the lawfulness or advisability of accessing this personal information is the same for hiring as it is for firing.

In the end, it may be useful for employers to consider the web search as tool to be used only after a conditional offer of employment has been made, much in the manner of the post-offer physical examination. Applicants could be alerted at the beginning of the process, *e.g.*, on the application form itself, that the employer will conduct an internet search on those applicants who are conditionally offered employment, and the applicant will sign a consent form to permit such a search. Those who refuse to consent need not be considered further, much as those who refuse to consent to background investigations may be excluded.

## **LAWS REGULATING ELECTRONIC COMMUNICATION**

In addition to considering how the employment laws may impact on the employer's resort to review of an applicant's social media information, employers need to be cognizant of the regulatory world in which social media sites are situated. Several statutes control how information available from social media sites can be accessed and used.

### **Stored Communication Act**

Perhaps most significant is the Stored Communications Act<sup>11</sup> ("SCA"), which makes it a crime to (1) intentionally access without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceed an authorization to access that facility; and to obtain, alter or prevent authorized access to wire or electronic communication while it is in electronic storage.

Section 2707 of the SCA provides for a civil action by any "person aggrieved by violation of this chapter" for injunctive relief, damages and attorney's fees. Damages are either "actual damages suffered by the plaintiff and any profits made by the

10. See, *e.g.*, Cal. Lab. Code §§96(k), 98.6, 1101, 1102; Colo. Rev. Stat. §24-34-402.5; N.D. Cent. Code. §14.02.4-01; N.Y. Lab. Code §201-d.

11. 18 U.S.C. § 2701, *et seq.*

violator as a result of the violation" but "in no case shall a person entitled to recover receive less than \$1000." Punitive damages are available under the Act.<sup>12</sup>

## Wiretapping and Electronic Surveillance Control Act

Pennsylvania has a statute analogous to the SCA, the Wiretapping and Electronic Surveillance Control Act,<sup>13</sup> contains provisions similar to the SCA, providing for criminal penalties and civil actions for damages, including punitive damages.<sup>14</sup>

## SOCIAL NETWORKING AND WORK

Most employers already regulate their employees' work-related conduct, and those that do not should seriously consider doing so. There are rules of conduct, confidentiality obligations, ethical guidelines and internet use policies, all of which are designed to get employees to behave by setting forth the behaviors that are expected and discouraged and the consequences of noncompliance. Regulation of the use and abuse of social networking sites fits comfortably into existing internet use policies.

### Litigation Issues

Even an airtight social networking/internet use policy cannot protect an employer who does not apply that policy in accordance with the law. Examples abound:

#### Title VII

*Williams v. Wells Fargo Financial Acceptance Corp.*<sup>15</sup> is a disparate treatment race discrimination case, in which 31 employees were terminated for sending sexually suggestive and otherwise inappropriate emails, containing jokes, picture attachments and other material that violated Wells Fargo's Information Security and Sexual Harassment policies. 30 of these terminated employees were African-American, some of whom sued contending that race discrimination was the true reason for their termination. The court's rationale for denying Wells Fargo's motion for summary judgment presents a cautionary tale for all employers:

Here, Williams has met his burden to show pretext. First, he has adduced evidence from which a jury could reasonably infer that Wells Fargo selectively enforced its policies so that it would result in the terminations of numerous African-American employees. For example, he presents evidence, from testimony of non-party witnesses and terminated employees, that it was commonplace at Wells Fargo for all employees, non-African American and African American, to send personal emails, including those with pornographic or sexual content, during work hours. Wells Fargo usually counseled or warned rather than fired employees who violated the company's email policies. In this case, none of the employees who were terminated had been given warnings; and, those employees who did receive warnings instead of being fired were given them after the three waves of terminations and a threat of a racial discrimination lawsuit. In addition, in an employee training session, Wells Fargo showed slides depicting a scenario where an employee received only a written warning for sending "x-rated" emails. Based on this, a jury could reasonably infer that the defendant selectively enforced its email policies and used the most severe discipline available because

12. *Id.* §2707(c); *Van Alstyne v. Electronic Scriptorium Ltd.*, 560 F.3d 199 (4th Cir. 2009).

13. 18 Pa.C.S.A. §5701 *et seq.*

14. *E.g.*, 18 Pa.C.S.A. §§5703, 5725.

15. 564 F.Supp. 2d 441 (E.D. Pa. 2008).

it would result in the termination of a disproportionate number of African-American employees.

Second, after Marshall, Vice President of Human Resources in the Chester office, viewed the November newscast and became aware of allegations of race discrimination, she discussed with Conway's supervisor, Louis-Goldford, whether they should conduct random sampling and go beyond the original chain of emails being investigated in order to ensure that the investigation was being done fairly. Louis-Goldford decided against it because it was not the "normal protocol for an email investigation." A jury could infer that Louis-Goldford, who is supposedly the only person with whom Conway consulted during her investigation, did not want to conduct random sampling because it might thwart the goal to terminate African-American employees.

Finally, the evidence Williams points to in support of his prima facie case also supports a finding of pretext. For example, the evidence that Wells Fargo treated three similarly situated non-African-American employees more favorably than Williams and the other terminated African-American employees creates a question of fact on the issue of pretext.

### Stored Communications Act

The recent decision denying defendant's motion for judgment as a matter of law in *Pietrylo v. Hillstone Restaurant Group d/b/a Houston's*<sup>16</sup> illustrates the applicability of the Stored Communications Act to claims of unlawful access to a MySpace account by plaintiffs' supervisors. In denying the defendant's motion, the court noted the testimony of witness Karen St. Jean, a coworker of the plaintiffs, who "testified that she felt that she had to give her password to Anton [the supervisor] because she worked at Houston's and for Anton. She further testified that she would not have given Anton her password if he had not been a manager, and that she would not have given her information to other co-workers. Furthermore, when asked whether she felt that something would happen to her she did not give Anton her password, she answered 'I felt that I would probably have gotten in trouble.'" [citation to record omitted]. The court concluded that the evidence negated defendant's contention that access had been authorized by St. Jean: "The jury could reasonably infer from such testimony that St. Jean's purported 'authorization' was coerced or provided under pressure. As a result, this testimony provided a basis for the jury to infer that Houston's accessing of the [MySpace chat room] was not, in fact, authorized."<sup>17</sup>

Significantly, the court found persuasive the argument that "Houston's managers accessed the [MySpace chat room] on several different occasions, even though it was clear on the website that [it] was intended to be private and only accessible to invited members." *Id.* This suggests that an invasion of privacy action will lie under these facts, although curiously the jury decided that defendants had not invaded plaintiffs' common law right of privacy by accessing the MySpace account. *Id.* at 2 n.1.

Finally, although the amount of damages awarded to the plaintiffs was modest, the court upheld the jury's award of punitive damages (stipulated by the parties to be "four times the amount of compensatory damages awarded by the jury, *id.* at 2): "the jury had sufficient evidence from which it could reasonably infer that Houston's acted maliciously in repeatedly accessing the [MySpace account] via St. Jean's password." This evidence included: that St. Jean did not feel free to deny her boss's request for her account password; that she was not informed that her supervisors would convey the log-in information to other managers; and that she was not told that they would access the site repeatedly without her knowledge. *Id.*

16. No. 2:06-cv-05754-FSH-PS (slip op., D.N.J. September 25, 2009).

17. Slip op. at 6.

at 11. From this evidence, the court concluded that jury's finding that the access to the MySpace account was "intentional" was supported by the record and justified the punitive award.

## Special Concerns for Public Entities and Employers

Because of First Amendment and due process considerations, public entities and employers face greater constraints in their ability to respond to their employees' social networking postings than do private employers. "A public employee's statement is protected by the First Amendment when, '(1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made."<sup>18</sup>

While the public employer is able to discipline employees for postings that do not enjoy First Amendment protections, e.g., racist or sexist remarks that create a hostile working environment, the public employer must take care that protected speech appearing in blogs and other forms of social networking media is not made the subject of discipline.

*Ranck v. Rundle*<sup>19</sup> illustrates the point. David Ranck was an Assistant State Attorney at the Miami-Dade State Attorney Office. In 2004, after he was removed from an investigation of a police shooting, he wrote an internal memo critical of the decision. In 2008, with the investigation of the shooting still ongoing, he posted the memo and other critical comments on his blog site, and linked it to "a well known public forum used by lawyers practicing criminal law in Dade County." Plaintiff was subsequently suspended for 30 days, in part because "of his public posting of information about an ongoing police shooting investigation, the positing of derisive and offensive comments about senior ASAs, and inflicting harm to the integrity, reputation, and well being of the [State Attorney Office]." Ranck sued, claiming a violation of his First Amendment rights. The court held "that Plaintiff's speech, in the form of the May 2008 blog posting of the Memo, would be an appropriate exercise of Plaintiff's First Amendment rights meriting protection against adverse employment action by his employer," although the court ultimately found that Ranck's posting of derisive comments were insubordinate and constituted other, legitimate grounds to suspend him.<sup>20</sup>

Another interesting example is presented by the case of *Yoder v. University of Louisville*,<sup>21</sup> involving the dismissal of a student nurse from a public university's School of Nursing because of blog posting that the University contended violated the privacy rights of a patient. Although not an employment case, it does illustrate how employers, especially public employers, need to adhere to their own policies and to carefully consider whether conduct does in fact run afoul of rules.

In *Yoder*, the plaintiff posted on her MySpace page a colorful description of her impressions of attending a live birth as part of her clinical course work at the School of Nursing. The patient whom she attended was not identified, and the post was more concerned with the plaintiff's reaction to the birth experience than it was with the patient. It soon became a popular topic of discussion among other nursing stu-

18. *Hill v. Borough of Kutztown*, 455 F.3d 225, 241 (3d Cir. 2006) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

19. 29 IER Cases 576, 2009 WL 1684645 (S.D. Fla. June 16, 2009).

20. 2009 WL 1684645 at \*11-\*13.

21. No. 3:09-CV-205-S, 2009 WL 2406235 (W.D. Ky. August 3, 2009)

dents, and came to the attention of the administration. Plaintiff was confronted by the administration, which accused her of violating the patient's confidentiality and various other University policies, and dismissed her from the School of Nursing ("SON"). She of course sued, under 42 U.S.C. §1983, claiming a violation of her First Amendment right to free speech. The court granted her summary judgment on liability (without reaching the First Amendment issue), and in the course of its opinion highlighted the tension between the expression of the personal views of the blogger and the neatly outlined distinction between the personal views of the blogger and the limits on a public entity's ability to react:

In sum, the Blog Post does not contain information that could possibly lead to the discovery of the birth mother's identity. Therefore, the Blog Post does not violate the confidentiality provision of the Honor Code by Defendants' own terms, nor the Confidentiality Agreement. If the SON wishes for its students' confidentiality obligations to extend to the giving of non-identifiable information about patients, it must give fair notice.

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The court does not disagree with Defendants that the Blog Post is vulgar. It is generally distasteful and, in parts, objectively offensive. . . . It is simply a crude attempt by Yoder to be humorous in describing an anonymous prolonged labor and delivery. It was written without any clearly intended audience and posted on Yoder's own personal MySpace page. That the Blog Post was technically accessible to the public does not fundamentally change the nature of the writing.

To be sure, Yoder's attempt at humor was an abject failure. Her observations on women, children, motherhood and the birthing process are, for the most part, crass and uncouth....

Regardless, the court does not judge the Blog Post on its comedic or literary merit. Despite what we, or Defendants, may think of it, the Blog Post does not violate the professionalism provision of the Honor Code because it was not created or used in any professional context. Again, if the SON wishes for the professionalism affirmation in the Honor Code to apply to every act or all conduct of a SON student everywhere and at all times in all contexts, it must give fair notice by explaining such obligation clearly. In this case, the SON has taken a crude attempt at humor done in a nonprofessional context, and attempted to shoe-horn it into a violation of a "professionalism" promise which speaks to conduct as a "representative of the School of Nursing." That square peg doesn't fit the round hole which the facts disclose. Accordingly, there is no basis for Defendants' dismissal of Yoder from the SON.<sup>22</sup>

## CONCLUSION

In the end, the use of social networking media raises employment law issues that likely have already been encountered and addressed, albeit in a different context. Employers should be cognizant of the laws that specifically apply to these types of electronic communications, *e.g.*, the Stored Communication Act, but should not deviate from the application of settled principles of employment law to the problems presented by this new and burgeoning technology.

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22. 2009 WL 2406235 at \*6-\*7.