

I N S I D E T H E M I N D S

Understanding the Use of Social Media in Litigation

*Leading Lawyers on New Evidence Collection
Methods and Necessary Precautions for Clients*



ASPATORE

©2014 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.west.thomson.com.

“Friend” or Foe?: Balancing
the Litigation Risks of
Monitoring Employees’ Social
Media Profiles at Various
Stages of Employment

Rodney Satterwhite

Partner

McGuireWoods LLP



ASPATORE

Introduction

Social media can be a useful business tool in a variety of ways. Employers can use social media in hiring, to connect with current employees or network with others, and as a strategic marketing tool. Social media also present a unique set of challenges, sometimes exposing employers to increased risk of litigation for alleged discrimination and harassment.

Because the pervasiveness of social media is incontrovertible, employers want to be able to control the extent to which employees access social media during the workday and identify themselves as representatives of their employers in social media content. Employees, on the other hand, want to maintain separation between their personal lives and employment and often argue that an employer has no business monitoring their social media activity. Social media thus blur the lines between personal and professional spheres, and employees may be less careful about the information they disclose on these platforms and how it could impact their employer or employment status.¹

The potential risks of monitoring employees' social media activity require that any such surveillance be carefully managed to ensure it does not lead to increased litigation. If not, a company's use of social media could lead to claims of discriminatory hiring, wrongful termination, harassment, or even violation of protected Section 7 activities governed by the National Labor Relations Board (NLRB).

Implemented thoughtfully, however, social media policies can regulate employee use of technology in a meaningful way to decrease risk of discrimination, harassment, or disclosure of the employer's trade secrets. Social media can even be a defensive tool for employers during litigation through discovery of relevant information about adverse parties. Employers must strike a three-way balance between the non-discriminatory use of social media, the protection of intellectual property, and respect for employees' rights, such as privacy and the right to organize.

¹ See, generally, Kathleen Carlson, *Note, Social Media and the Workplace: How I Learned to Stop Worrying and Love Privacy Settings and the NLRB*, 66 FLA. L. REV. 479 (2014).

Hiring Practices

Many employers view social media as a promising resource for obtaining information about job candidates. Social networks host a vast array of information about individuals, including general interests, work habits—and, sometimes, inappropriate behavior or comments. This can provide potentially relevant information during the hiring process. Before the widespread use of social media, much of this information would have been unavailable to potential employers. Now, social media content can supplement traditional sources of hiring information, such as the candidate-provided application, interviews, references, and background checks, and can often help complete the picture of a potential employee.

Performing a social media search during the hiring process can enhance a candidate’s success in securing a position. Some individuals have clean, well-thought-out social media presences. A social media presence can help give the true flavor of an employee’s personality and provide clues about whether there is a good fit with the company and job requirements. Media content can bolster the strength of an application where the applicant has an online presence supported by his or her professional qualifications and can even make the difference between candidates if there is a tough hiring decision. A candidate who displays creativity in social media could be a more marketable employee who thinks outside the box and would be an asset to the company. Professional social media platforms can provide good references, as well as evidence of reviews or awards.²

In contrast, a far more controversial use of social media includes viewing negative qualities of a candidate. An applicant, for example, might regularly post inappropriate pictures or information about excessive drinking or drug use. Perhaps the candidate has an online blog that regularly discusses his or her desire to commit a felony. Like the positive qualities discussed above, these factors would certainly bear on a hiring decision in a tangible, relevant way. A social media search could reveal the candidate engaging in discriminatory behavior or making discriminatory comments. It could also reveal a misrepresentation of qualifications or generally poor communication

² See, generally, Mark Bannister et al., *Employer Use of Facebook and Other Social Media in Hiring*, J. KAN. BAR ASS’N 21, 31-33 (2013).

skills. Social media serve as another resource to verify the personality or integrity of the candidate. The central questions in hiring practices are, “Is this person a good fit for the position?” and “Is this person a good fit for company culture?” Running social media searches on candidates can strengthen the answers to those key questions.

Despite the allure of using social media in this context, there are pitfalls to using such information in making a hiring decision. For example, what if an employee engages in legal behavior, visible on social media, that is frowned upon by the company or by society in general? Title VII of the Civil Rights Act of 1964,³ the Americans with Disabilities Act,⁴ and the Age Discrimination in Employment Act⁵ still apply in the social media context as over-arching anti-discrimination laws for employment.⁶ The same Equal Employment Opportunity Commission (EEOC) guidelines apply to employers who use social media. While questions during job interviews and on employment applications are usually limited to topics relevant to the job, social media content may go far beyond these boundaries. Photographs and posts in social media may disclose religious affiliations, an applicant’s physical or mental disabilities, national origin or race, sexual orientation, and medical history.⁷

Employers cannot make hiring decisions based on such factors, but once the employer accesses the social media site, it is more difficult to claim that it ignored such information. Moreover, even if there is no discriminatory intent, courts have found that disparate impact is enough to support a discriminatory hiring practices suit.⁸ The Supreme Court held that Title VII “proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.”⁹ Litigation is possible where there is statistical evidence of disparate impact from particular hiring practices. Where social media give an employer more sources of improper information about a candidate, the risk of such a claim increases.

³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

⁴ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

⁵ Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967) (as amended).

⁶ See, generally, *id.*

⁷ See, generally, Edward Sisson, *Employers, Beware the Siren’s Song of Social Media Searches*, N.H. EMP. L. LETTER, Nov. 1, 2012, at 2.

⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁹ *Id.* at 431-32.

Employers can, and should, take precautions to balance these risks and benefits of social media hiring. For example, organizations may designate a separate individual who is not part of the hiring decision to look at the candidate’s social media profiles. That person would then relay specific, objective, and non-discriminatory information to the hiring manager, such as information reflecting the candidate’s education or qualifications.

When employers do undertake social media inquiries, they should limit activities to publicly available social media profiles and should not ask for login information or passwords from potential employees. While technically not likely to be found illegal (at the time of this writing), this practice routinely draws negative publicity. For example, in a case in Bozeman, Montana, the city required applicants to provide their usernames and passwords for essentially all social media and networking platforms. The city received significant negative feedback, and the city manager had to abandon the policy quickly.¹⁰

In another case, the Maryland Department of Corrections (MDOC) required a candidate to provide his Facebook username and password as part of the agency’s job application. The Department of Corrections defended the policy because they wanted to know whether a potential applicant was a member of a gang, had any illegal affiliations, or was engaged in any illegal activities. The American Civil Liberties Union (ACLU) argued that the policy was illegal under the federal Stored Communications Act (SCA)¹¹ and its Maryland counterpart.

Media pressure surrounding the ACLU’s case led the MDOC to drop the policy before a court could rule on the legality of it. Nevertheless, it serves as an example of a highly unpopular, possibly illegal way in which an employer could use social media during the hiring process.¹² A court may not find requiring usernames and passwords illegal, but it is a risky policy and may have legal or political pushback, especially given the nature of privacy laws and public sentiment about personal privacy, even in the social media age.

¹⁰ Bannister et al., *supra* note 2.

¹¹ Stored Communications Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

¹² *Id.*

Discovery Issues

Although improper use of social media can give rise to employment-related claims, social media can also play an important role after an employment lawsuit has been filed. Increasingly, employers request social media during discovery as a helpful tool to combat allegations of discrimination or harassment. Given the wide net a request for social media could cast, courts are wary of social media discovery issues. However, the developing question remains: What is fair game for discovery?¹³

As with traditional discovery, courts require that employers demonstrate a reasonable need for social networking evidence. Overbroad discovery requests that amount to “fishing expeditions” are prohibited.¹⁴ Requests must be relevant to the nature of the plaintiff’s claim and limited in time and subject matter.¹⁵ A district court in Kansas recently addressed the issue of social media discovery in an employment matter.¹⁶ The plaintiff, a former employee of the defendant Kohl’s, alleged damages for lost wages and emotional distress caused by “gender discrimination, gender stereotyping, pregnancy discrimination, and hostile environment created by sexual harassment.”¹⁷

Applying Federal Rule of Civil Procedure 26, the court noted that a discovery request must be reasonably calculated to lead to the discovery of admissible evidence.¹⁸ While this standard is somewhat broad, “requests must be relevant on their face.”¹⁹ The court upheld defendant’s request for production of plaintiff’s Twitter and Facebook account data between her date of hire and the present day. The court acknowledged the “broad scope of relevancy in the discovery process” and allowed the request because it concluded that the plaintiff’s online postings might lead to relevant

¹³ See, generally, John Browning, *With “Friends” Like These, Who Needs Enemies? Passwords, Privacy, and the Discovery of Social Media*, 36 AM. J. TRIAL ADVOC. 505 (2013).

¹⁴ *Mackelprang v. Fid. Nat. Title Agency of Nevada Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007).

¹⁵ *Jackson v. Deen*, No. CV412-139, 2013 WL 1911445, at *3-4 (S.D. Ga. May 8, 2013).

¹⁶ *Kear v. Kohl’s Dep’t Stores Inc.*, No. 12-cv-1235-JAR-KGG, 2013 WL 308922 (D. Kan. Jun. 18, 2013).

¹⁷ *Id.* at *1.

¹⁸ *Id.*

¹⁹ *Id.* (citing *Williams v. Bd. of County Comm’rs*, 192 F.R.D. 698, 705 (D. Kan. 2000)).

information about her alleged discrimination and harassment. It is important to note that Kohl’s did not seek “unfettered or unlimited access to [employee’s] social media accounts” and therefore it was a reasonable, limited request that was feasible to produce.²⁰

A handful of courts have reached similar conclusions. Especially in an employment discrimination or sexual harassment case, social media profiles can be rich with information about the employee that could lead to an affirmative defense. Courts have held that the nature of the claims will usually dictate the scope of inquiry into social media content.²¹ In 2012, the Eastern District of New York held:

Although the law regarding the scope of discovery of electronically stored information (“ESI”) is unsettled, there is no dispute that social media information may be a source of relevant information that is discoverable ... For example, where a plaintiff puts her emotional well-being at issue when asserting claims of sexual harassment or discrimination in this action, some courts have found that “Facebook usage depicts a snapshot of the user’s relationships and state of mind at the time of the content’s posting.”²²

The Southern District of New York agreed, stating that in an employment discrimination case, plaintiff’s chats with an online psychic revealed her “work performance, relationships with co-workers, views regarding her treatment ... emotional state before, during and after her employment” and “efforts to mitigate damages.”²³ Social media could be a source of information for an affirmative defense for the employer against employee’s claims of emotional distress and harassment.²⁴ However, while it can be

²⁰ *Id.* at *6.

²¹ *See, generally, Mackelprang v. Fid. Nat. Title Agency of Nevada Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007); *Ogden v. All-State Career Sch.*, 299 F.R.D. 446 (W.D. Penn. 2014).

²² *Reid v. Ingerman Smith LLP*, No. CV 2012-0307(ILG)(MDG), 2012 WL 6720752 (E.D.N.Y. Dec. 27, 2012) (quotations in original).

²³ *Glazer v. Fireman’s Fund Ins. Co.*, No. 11Civ. 4374 (PGG)(FM), 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012).

²⁴ *Robinson v. Jones Lang LaSalle Ams. Inc.*, No. 3:12-cv-00127-PK, 2012 WL 3763545 (D. Or. Aug. 29, 2012).

evidence, it is not always dispositive to a court, and building an affirmative defense solely on social media information is risky.²⁵

For emotional distress cases, many courts cite *EEOC v. Simply Storage Mgmt.* as well-reasoned, persuasive authority on the discoverability of social media communication related to alleged emotional distress.²⁶ *Simply Storage* held that even where communications do not reference the events described in a plaintiff's complaint, a defendant may discover relevant social media communications related to the plaintiff's emotional distress claims.²⁷ The *Simply Storage* court recognized that some lines seem arbitrary, but they are not unlike the arbitrary lines courts draw in other media of communication. "Discovery is meant to be a self-regulating process that depends on the reasonableness and cooperation of counsel."²⁸ Social media discovery is merely "application of basic discovery principles in a novel context" where there must be "appropriately broad limits."²⁹

When courts do grant social media discovery, they usually narrow the boundaries of discoverable material. Sifting through social media communication for discovery can be burdensome. Every conversation or interaction with a plaintiff would not be discoverable, so most limit social media discovery along the same lines to not burden either side or unfairly advantage one party. Common limitations for social media discovery include limiting the request to a set time period; identifying specific topics, such as other potential sources of emotional harm; and limiting the discovery to posts relating to the plaintiff's employment with the defendant.³⁰ Setting these guidelines outright will make a discovery request more favorable in the eyes of the court and increase the likelihood that an employer can access social media as a defensive mechanism when creating affirmative defenses.

An employee-plaintiff may raise objections to a social media discovery request on grounds that it violates his or her privacy. As with any other kind of discovery, however, these objections will require a balancing of the

²⁵ See, generally, *Bass v. Miss Porter's School*, No. 3:08cv1807, 2009 WL 3724968 (D. Conn. Oct. 27, 2009).

²⁶ *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430 (S.D. Ind. 2010).

²⁷ *Id.* at 434-36.

²⁸ *Id.* at 436.

²⁹ *Id.* at 430.

³⁰ *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011).

requestor’s need for the information with the burden, including that associated with disclosure of private information, on the employee. *Simply Storage* provides persuasive reasoning on the issue, stating, “the consideration [of violating privacy] is germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose instead of being a basis for shielding those communications from discovery.”³¹ If an employer can characterize a discovery request as something necessary to its defense, rather than something overbroad, burdensome, or oppressive, a court is more likely to grant the request.³²

Additionally, the context of the social media site can be significant. Although social media users often claim “privacy” to their online postings, the nature of the online networking forums does not support them. Courts have held that there is no real expectation of “privacy” on Facebook even when users set things to a “private” network; the user’s “friends” can easily share the information. This premise has helped employer-defendants gain access to social media through discovery.³³

The most important lesson employers can learn from recent cases regarding social media discovery is that it can be a viable avenue to secure information for defense of an employment-related claim. If an employee claims to have suffered from harassment or discrimination, then it may be logical to look to the relevant social media sites for the specified time period to determine whether the employee has discussed these claims. Although the discovery standard of relevance is broad, the best strategy is to limit the request to only information that bears directly on the claims. Emphasizing the inherently public nature of social media and networking will bolster any discovery request and potentially protect against plaintiff-employee’s privacy claims.

Wrongful Termination Suits

Just as with discriminatory hiring practice cases, social media play a role in wrongful termination suits and are one of the most significant ways social

³¹ *Simply Storage*, 270 F.R.D. at 434 (internal quotations omitted).

³² *See id.*

³³ *See United States v. Meregildo*, 883 F. Supp. 2d 523 (S.D.N.Y. 2012) (“No justifiable expectation that h[er] ‘friends’ would keep h[er] profile private. ...”).

media can impact employment litigation. “Social media firing” involves an employer learning something about the employee via social media, either through “friending” the employee or through a general Internet search. The employee might represent something on social media that is unfavorable to the company or that the employer does not like. The employer then takes adverse action against the individual, usually in the form of a termination. Ordinarily, employees can be terminated for inappropriate behavior, but the injection of social media complicates the analysis because employees often argue that information on their personal social media profiles has no bearing on their employment or that it is protected expression.

Further compounding the problem, co-workers and supervisors may be friends with one another and translate that relationship into online connections on platforms such as LinkedIn or Facebook. This raises questions as to the appropriate nature of communication between a supervisor and employee online and creates the risk of litigation for harassment or discrimination because, as in the hiring context, the supervisor gains access to large amounts of personal information otherwise likely inaccessible. If an employee grants his supervisor “friend” access to a personal social media profile, does that mean the employee is granting the employer the power to monitor him? The key is to monitor the social media usage of employees in a way that does not invite lawsuits for alleged discrimination, but this balance can be elusive. The results of social media firing cases are as complex as the social media platforms they involve.

An Indiana case arose under the Americans with Disabilities Act, where a former employee alleged that an agent of his former employer wrongfully disclosed confidential information about his medical condition to other people via a Facebook post, resulting in loss of employment, impairment of his earning capacity, emotional distress and humiliation, and mental pain and suffering.³⁴ The key issue in the decision denying a motion to dismiss was whether the former employee publicly disclosed his own medical information, which might render his claim that the employer disclosed confidential information moot.³⁵

³⁴ *Shoun v. Best Formed Plastics Inc.*, 2014 WL 2815483173866 71, at *1 (N.D. Ind. 2014).

³⁵ *Id.*

The employee was injured on the job in 2012, and for a period of months following his injury, his supervisor monitored his medical treatment for the company. The supervisor learned the extent and nature of the disability and in early 2013 allegedly used that confidential information as the subject of a Facebook posting. The posting read: “Isn’t [it] amazing how Jimmy experienced a 5 way heart bypass just one month ago and is back to work, especially when you consider George Shoun’s [plaintiff’s] shoulder injury kept him away from work for 11 months and now he is trying to sue us.”³⁶ The court denied the employer’s motion to dismiss the claim because the issue of whether the supervisor in question “gained knowledge of the employee’s medical condition solely within the context of his employment-related medical examination is a question of fact not appropriate for resolution in a motion to dismiss.”³⁷ This case articulates the critical nature of determining whether information was in fact confidential and private to the employee, or whether that confidentiality was waived, leaving the employer with no obligation to keep it confidential. (Regardless of the social media aspect of this case, employers should prohibit supervisory or managerial employees from discussing any employee’s medical condition in such a public forum.)

In another recent social media firing case, a helicopter paramedic posted a comment on her co-worker’s Facebook page complaining about an unruly patient. The comment said she wanted to slap that particular patient. The paramedic’s supervisor saw the comment and terminated her for insubordination and unprofessional conduct. The Second District Texas Court of Appeals upheld her termination. The court noted that this behavior was “not within the zone of her seclusion, solitude and private affairs.”³⁸ This case reiterates the critical determination in wrongful termination cases arising out of social media firing: Was the information personal to the employee, or did the employer lawfully have access to it?

The NLRB reviewed the case of a former BMW salesperson who was fired from the dealership for pictures he posted to his Facebook page.³⁹ The pictures were of an event sponsored by his employer, the dealership, along

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Roberts v. CareFlite*, No. 02-12-00105-CV, 2012 WL 4662962 (Tex. App. Oct. 4, 2012).

³⁹ *Karl Knauz Motors Inc.*, 358 N.L.R.B. No. 164, 170, 174 (2012).

with sarcastic comments related to the event. When his supervisor learned of the posts, he was terminated. The administrative law judge found that the postings were made at the employee's sole discretion, without any consultation from his employer. The judge found the salesperson's posts to be a violation of the employer's reasonable expectations of employee behavior. Although the terminated employee claimed his Facebook posts were protected speech, the judge found it was unprotected expression and did not review the legality of the content.⁴⁰

There is, however, precedent that supports limitations on an employer's ability to terminate an employee based on password-protected social networking content.⁴¹ In *Pietrylo*, servers at the restaurant started an invitation-only MySpace.com group for employees to post grievances about issues at work.⁴² The forum included profanity and directed sexual comments at company managers.⁴³ A member of the group showed the forum to a manager, who asked for the password to the forum from the employee.⁴⁴ The restaurant fired the servers who founded the forum, based on the "sexually inappropriate and derogatory content on the site," and the servers sued.⁴⁵

A jury found that the employer's access to the site violated the Stored Communications Act, and the court upheld the verdict. The court held that "employers face significant liability when using information obtained from password-protected social networking sites to discipline or terminate employees, where that information is obtained without the requisite permission."⁴⁶ The court did leave "unanswered" the question of "what level of authorization must an employer have to access employee content on a private social networking [site] without fear of liability," but the overtone of the case warned that employers should be wary of monitoring employee social media use and using it as cause to fire them.⁴⁷

⁴⁰ *Id.* See also Saby Goshray, *Employer Surveillance Versus Employee Privacy: The New Reality of Social Media and Workplace Privacy*, 40 N. KY. L. REV. 593, 595 (2013).

⁴¹ *Pietrylo v. Hillstone Restaurant Group d/b/a/ Houston's*, No. 06-5754 (FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009).

⁴² *Id.* at *2.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at *2-4.

⁴⁷ *Id.* at *2.

These cases teach that when a company decides to monitor employee behavior online, it enters a realm of uncertainty. Courts will side with employers where the employee clearly has no expectation of privacy on the social media site and a protected class is not involved. The courts regularly recognize the limits of expression when it relates to employment.⁴⁸ Social media is by nature public, despite privacy settings, and some courts have held that there is no inherent expectation of privacy in such public content. Nevertheless, employer monitoring of personal information, such as pregnancies, sexual orientation, or religious affiliation, can invite litigation because Title VII still applies, and an employer may be hard pressed to say it did not use information gained online to take adverse action against an employee. The more personal information the employer has access to, the more problematic the situation becomes. Likewise, employers who access sites without proper authorization risk claims under non-employment-related statutes, such as the Stored Communications Act.

Employee Disclosure of Trade Secrets

Social media also open a potentially unregulated arena for employees to disclose company trade secrets intentionally or inadvertently to the public. Social media platforms can reach millions of potential viewers instantly and offer a far-reaching forum for disgruntled current or former employees. To maintain legal protection as a valid trade secret, the company secret must not be publicly known.⁴⁹ Although there are “privacy” settings on social media platforms like LinkedIn, Facebook, and Google+, a more thorough reading of the policies reveals it is unlikely that information shared on these sites will maintain the “private” status required to be a trade secret. There are “private” settings, but all note that information posted is accessible publicly in some form. Google+, for example, says it will record information about a user’s site activity to better provide future services. Facebook states that information posted on the site can be copied or shared by anyone the user allows to view it.⁵⁰

⁴⁸ *But see infra* IV.a. The NLRB, “Concerted Activity,” and Social Media Practices.

⁴⁹ *See, generally*, Carlson, *supra* note 1.

⁵⁰ *Id.* *See also Basic Privacy Settings & Tools*, <https://www.facebook.com/help/325807937506242/> (last visited Sept. 29, 2014); *Privacy Policy*, <https://www.google.com/intl/en/policies/privacy/#infocollect> (last visited Sept. 29, 2014).

Employees may post status updates on Facebook or blog posts or other social media updates that explicitly reveal employer trade secrets. However, one of the more interesting and nuanced trade secret issues is the disclosure of customer lists. While there has been little conflict over disclosure of documents titled “Customer List,” many social networking profiles—e.g., LinkedIn—have built-in contact lists. Employees can maintain “contacts,” “connections,” or “friends” lists on social networking profiles. Some employers contend that these online contacts mirror their customer lists and, if developed or cultivated on company time, are the employer’s property and prohibited from disclosure.

At least one court discussed this issue and whether customer lists qualify as trade secrets. The Eastern District of New York found in 2010 that the nature of information available on the Internet presents a new and different challenge for employers protecting their trade secrets.⁵¹ A former employee became a company’s competitor and took clients with her to the new business. The court held that this information was not protected because the allegedly secret information was available through basic Internet searches, such as information about who was involved in that industry in the particular area.⁵²

Social Media Policies

A common way for employers to decrease the risk of employee disclosure on social media is to protect confidential company information by allowing employee access only on a strict need-to-know basis. For those employees who do have access to confidential information, employers often use confidentiality agreements that explicitly prohibit disclosure through social media. Yet another way to address this problem, as well as many of the other areas requiring a balancing of employer and employee interests, is to create a social media policy governing aspects of employee use of social media during and outside of work. Even this option, however, is not a perfect solution, as such policies have been the targets of recent scrutiny by government agencies like the NLRB. In fact, the NLRB recently struck down several social media policies for being too broad and violating protected speech under the National Labor Relations Act (NLRA).

⁵¹ See *Sasqua Group Inc. v. Courtney*, No. 09-cv-528(ADS)(ETB), 2010 WL 3702468, at *5 (E.D.N.Y. Sept. 7, 2010).

⁵² See *id.* at *22.

Social media policies usually address two key areas: employee use of social media on company time and employee use of social media that harms the company’s image or business. Restricting employee use of social media at work, unless otherwise authorized by a supervisor, is a fairly non-controversial condition. However, employers struggle with drafting a policy that protects the company from harmful social media exposure that is simultaneously in line with labor and employment laws. Section 7 of the NLRA protects an employee’s right to discuss working conditions and to organize, and recently the NLRB found that many employer social media policies violate this protected Section 7 right.

The most recent and prominent example is the Walmart case, where the company’s initial policy was struck down.⁵³ It prohibited social media use that might “[harm] the image and integrity of the company,” and prohibited the disclosure of personal information about Walmart employees.⁵⁴ From a practical standpoint, the policy makes sense, given the types of risks an employer faces from social media: bad press, harassment, disclosure of company secrets. However, Walmart’s conditions were found unlawful because the NLRB concluded that those policies could reasonably be construed to include a prohibition on discussing working conditions and wages. The board counsel concluded that even a savings clause could not fix the unlawful, overbroad nature of the entire policy.⁵⁵

In light of this guidance, employers should craft specific policies that state employees may not discuss “trade secrets and private or confidential information.” Walmart did exactly that, and its revised social media policy was cited with approval. The revised policy defined trade secrets as “information regarding the development of systems, process, products, know-how and technology.”⁵⁶ It went on to say, “do not post internal reports, policies, procedures or other internal business-related confidential communications.”⁵⁷ These are defined boundaries about what an employee cannot disclose. There is no question as to whether Section 7 activities are

⁵³ See Memorandum from Anne Purcell, Associate General Counsel, NLRB, to All Regional Directors, Officers-in-Charge and Resident Officers, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012).

⁵⁴ *Id.* at 12-13.

⁵⁵ *Id.*

⁵⁶ *Id.* at 20-21.

⁵⁷ *Id.*

included. This was an appropriate remedy to satisfy the NLRB while still protecting Walmart from disclosure of trade secrets by having a definable policy governing employee social media use.

Conclusion

These are merely a few issues that arise out of the increased use of social media in the workplace. As the lines between personal and professional continue to blur, there is increased risk from employees' online behavior, and employers must be equipped to handle it. The same anti-discrimination and labor laws apply, but the need to monitor and regulate employee behavior has grown. Employees now have more access to forums where they can inadvertently or intentionally discuss employers to a company's real detriment. Monitoring employees on social media has both risks and benefits. Overall, if employers weigh the particular risks to their companies and define clear, narrow, and specific monitoring policies, then the balance can be tipped toward the beneficial impact of social media.

Key Takeaways

- Avoid claims of discriminatory hiring, wrongful termination, harassment, or violation of protected Section 7 activities by focusing on striking a three-way balance among the non-discriminatory use of social media, the protection of intellectual privacy, and respect for employees' rights, such as privacy and the right to organize. Tread carefully in monitoring employees' social media to avoid increased litigation. Consider technology and company policies as defensive tools to decrease risk of discrimination, harassment, or disclosure of employer's trade secrets.
- When requesting social media during discovery as a defendant, take precautions to avoid claims of fishing expeditions. Make all requests relevant to the nature of the plaintiff's claim, and limit them in time and subject matter. Avoid requesting or implying the need for unfettered or unlimited access to the social media accounts being searched.
- Defend against claims with emotional issues, such as harassment, by persuading the court that social media present a snapshot of the user's state of mind at the time of posting. Be aware that building

an affirmative defense solely or mostly on social media information is risky. Follow the example of *EEOC v. Simply Storage Mgmt.* in discovering relevant social media communications related to the plaintiff's emotional distress claims.

- Set guidelines that will make a discovery request more favorable in the eyes of the court and increase the likelihood of accessing social media as a defensive mechanism. Make the boundaries of discoverable material narrow. Limit social media discovery to avoid burdening either party or creating an unfair advantage.
- Defend against plaintiff-employee privacy claims, and bolster discovery requests by emphasizing the inherently public nature of social media and networking. Consider the content of the social media site. The nature of the online networking forums does not support the claims of privacy. Courts have held that there is no real expectation of “privacy” on social media sites, even when users implement privacy settings, because the user’s “friends” can easily share the information. The best strategy is to limit the discovery request to only information that bears directly on the claims.
- Practice extra caution when monitoring employees’ social media use and using it as cause to fire them. Recent cases teach that when a company decides to monitor employee behavior online, uncertainty takes over. Courts will side with employers where employees clearly have no expectation of privacy on the social media site and a protected class is not involved. Courts do recognize the limits of expression related to employment. However, monitoring employees’ personal information can lead to litigation where Title VII still applies. Take steps to prove that information gained online was not used to take adverse action against an employee.
- Protect company trade secrets by preventing such information from becoming public. Remember that there is no privacy on social media platforms because anything shared can eventually be copied and shared by anyone the user allows to see it. Decrease the risk of employee disclosure of confidential company information on social media by allowing employee access only on a strict need-to-know basis. Utilize confidentiality agreements that explicitly prohibit disclosure through social media. Create a social media policy that covers all employees in the company, restricting aspects of

employee use of social media during and outside of work. Prevent NLRA violations by constructing social media policies that are not too broad and do not violate protected speech.

Rodney Satterwhite, a partner with McGuireWoods LLP, tries employment and intellectual property cases in state and federal courts. Most recently, he was trial counsel for DuPont in its trade secret litigation against Kolon Industries, in which the jury awarded DuPont \$919.9 million. BEST LAWYERS IN AMERICA has recognized Mr. Satterwhite in the areas of Employment Law and Technology Law for the last five consecutive years.

Focusing his practice on trade secret and noncompetition laws, federal employment discrimination laws, and the Family and Medical Leave Act, Mr. Satterwhite has litigated claims in state, federal, and administrative courts, including the US Courts of Appeal for the First, Second, Fourth, and Sixth circuits. He has also represented corporate clients in responding to administrative charges filed with the Equal Employment Opportunity Commission (EEOC) and in managing investigations conducted by that agency. In this context, he advises clients on hiring and termination decisions, drafting and implementing employment policies, and guarding intellectual property through employment agreements and trade secret policies. In all of these areas, he prosecutes or defends client interests in court.

Acknowledgment: *I would like to thank Claire Condro for her assistance in researching and preparing this chapter.*



ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE