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ADAM S. FORMAN
TEL (313) 496-7654
FAX (313) 496-8453
E-MAIL forman@millercanfield.com

Miller, Canfield, Paddock and Stone, P.L.C.
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
TEL (313) 963-6420
FAX (313) 496-7500
www.millercanfield.com

#WINNING STRATEGIES FOR ADDRESSING SOCIAL MEDIA IN THE WORKPLACE

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Adam S. Forman. Esq.[*]
Miller, Canfield, Paddock & Stone. P.L.C.
150 W. Jefferson, Suite 2500
Detroit, Michigan 48226
forman@millercanfield.com
@Adam Forman
@AdamSForman

[*] The author acknowledges the contributions of David G. King, an associate at Miller Canfield Paddock and Stone, to this paper.

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I. INTRODUCTION

The information flow generated by the explosion of social media has dramatically changed how humans interact with each other, including within the workplace. Consider the following January 2011 anecdote:

> Employee of a small sports bar files a complaint with human resources about her manager for sexual harassment. One week later, the owner of the sports bar posits a question on her own Facebook page in the form of a "Status Update": "Why do people think and believe it is OK to lie and hurt people that have never hurt or lied to them!" Several individuals responded, including employees from the sports bar who seemed to make vague references about the complaint. The employee who complained saw this, resigned, and a retaliation charge is now pending with the Equal Employment Opportunity Commission.[1]

Whether the employee has an actionable case of retaliation is unclear, but what is clear is that the owner's "Status Update" opened a door for the complaining employee – a door that likely would not have opened but for social media.

Social media is the term used to describe the various different internet-driven media applications that connect individuals for the purposes of social interaction. "Media" is as broad as one can imagine. It allows individuals to share all types of information, from 140 character "tweets" on Twitter to unlimited treatises or opinions on blogs. One can share pictures, videos, articles, weblinks, and so much more. Some social media sites are centered on individuals, like Facebook and MySpace, others have a more collaborative feel, like the online encyclopedia Wikipedia or like business review sites like Yelp and Trip Advisor. There are literally hundreds of social media applications. Some of the most popular include: Facebook, MySpace, Twitter, YouTube, LinkedIn, and Flickr.

Recently overtaking Google, Facebook is the most popular website in the world. Facebook has *more than 500 million active users*, half of whom log on everyday and spend nearly one hour on the site per day. Social media is not just limited to the newer generations. In fact, the average social network user is 37 years old, with nearly 60% of users over 35 years old. Social media is not just for individuals; over 70% of companies operating in the United States utilize social media in some form. And yes, studies suggest that U.S. workers on average spend at least five hours per month on social media while at work.

With the fact that complaints filed by employees are now at record highs as a backdrop,[2] employers must adapt to the rapidly colliding worlds of social media and the law. This paper

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[1] *Employer's Facebook posts part of bar worker's lawsuit*, Pittsburg Tribune-Review (Jan. 10, 2011), *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/s_717409.html.

[2] Charge Statistics FY 1997 Through FY 2010, Equal Employment Opportunity Commission, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

offers a primer for employers on how the explosion of social media has forever changed the workplace landscape. It considers both the benefits and legal risks associated with social media and generally discusses discovery issues relevant to employment litigation. The paper concludes by offering several best practice suggestions.

II. ISSUES IN THE WORKPLACE

Employee use of social media *can and should* be a positive for employers. Social media use by employees can lead to things like improved client relations, exposure to new customers, and can foster professional development and new ideas. But like most things, there are significant risks to employers. Social media allows employees to broadcast infinite amounts of information – from their desk, home or from a growing number of mobile devices with Internet access, such as cell phones, netbooks and tablets.

The risks are not just contained to whether an employer can use information on an employee's social media page to take an action, like discipline or discharge, against the employee. From a business perspective, employee postings can damage an employer's reputation.[3] They can embarrass customers or reveal trade secrets. As to legal risks, postings on social media sites run the gamut from exposing the employer to liability under civil statutes like security, trademark, and patent laws and to common law torts like tortious interference with contractual relations[4] and defamation.[5]

In addition to these risks, consider that social media now allows easier monitoring of employees. Monitoring can help employers keep tabs on whether employees are actually working as most social media posts are time stamped as to when employees "posted" information. It also allows employers to more closely monitor employees who are out on leave

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[3] *See* George Hunter, *Detroit cops stop Facebook photos*, Det. News, March 18, 2011, *available at* http://detnews.com/article/20110318/METRO01/103180359/Detroit-cops-stop-Facebook-photos#ixzz1GxAg2SyQ (discussing the Detroit Police Department's recent directive reminding officers of the confidentiality issues when posting to social media sites in light of crime scene photos being posted online).

[4] *See, e.g. Lifestyle Lift Holding Co. v. Prendiville*, No, 10-11874, 2011 WL 830280 (E.D. Mich. March 9, 2011) (granting defendant's motion to dismiss for lack of personal jurisdiction where plaintiff attempted to predicate a tortious interference and defamation suit on defendant's social media page).

[5] As a very recent example, an NBA official filed a defamation suit against an Associated Press reporter for a "tweet" he claimed disparaged his "professional and business reputation as a working, officiating NBA Referee . . . ." *See Spooner v. Associated Press*, No. 11-cv-00642-JRT (D. Minn. 2011). *See also* Jennifer Preston, *Courtney Love Settles Twitter Defamation Case*, N.Y. Times, March 4, 2011, *available at* http://artsbeat.blogs.nytimes.com/2011/03/04/courtney-love-settles-twitter-defamation-case/?partner=rss&emc=rss (detailing a $430,000 settlement agreement between Courtney Love and a fashion designer for remarks Love made on her Twitter account about the fashion designer).

and whether the leave is legitimate.[6] Employers can also check former employee's activities in relation to non-compete and non-solicitation agreements.[7] Employers, however, monitor at their own peril. By gathering exponentially more information about their employees, employers increase their legal risk when faced with decisions that result in adverse actions like hiring, discipline, and discharge. As discussed in detail below, such risks include violating federal, state, and local non-discrimination laws, infringing upon employee rights to engage in protected concerted activities under the National Labor Relations Act ("NLRA"), violating Constitutional rights of public employees, and invading an employee's privacy.

A. Employee Hiring and Recruitment

1. *The Hiring Process*

a. Hiring Process – In General

Recently, Microsoft commissioned a study examining the impact of individual's online reputation on hiring.[8] Some of the key findings include the following:

- 75% of companies have *formal* policies requiring hiring personnel to conduct some sort of online research of applicants;
- 70% of recruiters and professionals have *rejected* candidates based upon information found online; and
- 86% of recruiters and professionals have *informed* the candidate for the reason for the rejection.

The report further detailed categories of facts discovered that led to rejecting a candidate, including: inappropriate comments written by the candidate; colleagues, or friends and relatives; unsuitable photos; false information; and comments criticizing prior employers, coworkers or clients. Essentially, online reputations have become unintended "reference checks" to candidate's resumes. Gathering information from social media to use in the hiring process can help employers weed out potential problem employees, as well as reinforce a good applicant's

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[6] *Cf* Shan Li*, Insurers are scoring social media for evidence of fraud*, Chi. Trib., Jan. 27, 2011, *available at* http://articles.chicagotribune.com/2011-01-27/business/ct-biz-0128-facebook-evidence-20110127_1_social-media-facebook-manulife (detailing an insurance company's decision to stop paying disability benefits for depression after it found pictures on the employee's Facebook page "show[ing] her frolicking at a beach and hanging out at a pub . . . .").

[7] *See Amway Global v. Woodward*, No. 09-12946, 2010 WL 3927661 (E.D. Mich. Sept. 30, 2010) (refusing to overturn arbitrator's award for, among other things, defendant's violation of a non-solicitation agreement for posts on a blog); *TEKsystems, Inc. v. Hammernick*, No. 10-cv-00819-PJS-SRN (D. Minn. 2010) (alleging violations of non-compete, non-solicitation, and non-disclosure agreements when defendant contacted current contract employees via LinkedIn).

[8] *Online Reputation in a Connected World*, Cross-Tab (2010).

potential for success. An employer's take-away from the Microsoft study is this: using online reputations as "reference checks" is growing increasingly more common, but it is what employers *do* with that information that can cause risks.

Social media profiles can provide a torrent of information about potential applicants, information that is generally not provided during a "normal" application process. For example, social media profiles often readily allow visitors to determine certain demographic statuses protected by federal law: race, color, religion, sex, national origin, age, disability, pregnancy status, and genetic information.[9] More expansive state and local non-discrimination laws also cover other classifications, including height, weight, familial status, marital status, gender identity, and sexual orientation. Thus, employers who access social media may potentially waive any future argument that they were not aware of an applicant's protected status. In effect, by utilizing social media, employers risk losing an argument based upon "lack of notice" and thus are forced to prove a negative; that they did not consider the applicant's protected status.

One question that has not yet been addressed by the courts is whether employers have an affirmative obligation to search for and review publicly available information on social media sites. Given the shear amount of public information available on the web and the number of applicants who likely maintain some presence on social media sites, it is possible that we will soon see claims alleging that employers negligently hired (or retained) an employee who is either known or should be known to harm individuals the employee comes into contact within the scope of his/her employment (coworkers *and* the public).[10]

Some employers have even taken the controversial step of requiring applicants to provide login and password information during the application process. The Maryland Department of Public Safety and Correctional Services recently suspended its practice of requiring social media login and passwords after receiving a letter from the American Civil Liberties Union ("ACLU").[11] The ACLU complained, among other things, that the requirement violated an employee's privacy and that the requirement was illegal under the Stored Communications Act

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[9] For the first time, the EEOC recently issued regulations specifically addressing the use of social media by employers (in the context of implementing the Genetic Information Nondiscrimination Act). *See* CFR § 1635.8(b)(1)(ii)(D) (providing an exception where one "inadvertently learns genetic information from a social media platform which he or she was given permission to access by the creator of the profile at issue").

[10] *Compare, e.g., Doe v. XYC Corp*., 887 A.2d 1156, 1168 (N.J. Sup. Ct. 2005) (employer breached its duty to exercise reasonable care when it knew about and failed to prevent an employee from using the employer's computer and network to view and transmit child pornography) *with Maypark v. Securitas Sec. Services USA, Inc*, 321 N.W.2d. 270, 272, 275-76 (Wis. App. 2009) (employer not liable for negligent supervision where employee uploaded altered pictures from home of other employees on adult websites).

[11] Letter from Gary D. Maynard, Secretary, Maryland Department of Public Safety and Correctional Services, to Sara N. Love, President, American Civil Liberties Union of Maryland (Feb. 22, 2011).

("SCA") and Maryland law.[12] Namely, the ACLU took the position that by requiring login and password information for employment purposes, the Department was accessing protected communications without proper authorization.[13]

b. Hiring Process – Discovery Issues

While discussed in greater detail below in the "Discovery Issues" section, an employer's practice and process of obtaining information from social media networks, as well as the specific information acquired from such networks is discoverable in employment litigation. Not only is it discoverable, employers have an *affirmative* obligation to maintain documentation about the process and information obtained in making employment decisions. Analogously, the Equal Employment Opportunity Commission ("EEOC") published an informal letter on October 5, 2004 finding that an employer's obligation to keep video resumes is the same as its normal obligations to keep regular paper applications and all other records relating to recruitment.[14] In other words, solicited resumes from applicants, regardless of paper or electronic, should be retained for at least one year. Resumes for those who are hired should become part of a personnel file and maintained for at least three years. Unsolicited resumes, however, need not be kept.

c. Hiring Process – Federal Contractors

Federal contractors have even more record retention requirements for "internet applicants." Under regulations promulgated by the Office of Federal Contract Compliance Programs ("OFCCP"), federal contractors *must* now obtain and retain records relating to gender, race, and ethnicity of every "internet applicant." An internet applicant is defined as an individual who meets the following four factors: (1) The individual submits an expression of interest in employment through the Internet or related electronic data technologies; (2) The contractor considers the individual for employment for a particular position; (3) The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and (4) The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further considerations or

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[12] Letter from Deborah A. Jeon, Legal Director, American Civil Liberties Union of Maryland, to Gary D. Maynard, Secretary, Maryland Department of Public Safety and Correctional Services (January 25, 2011). The letter also notes that the City of Bozeman Montana recently rescinded a similar policy after public outcry.

[13] *Id.* It should be noted that a bill is currently pending before the Maryland Senate stating that "an employer may not require an employee or any applicant for employment to disclose any user name or password for any Internet site or Web-based account." *See* S.B. 971, 2011 Regular Session (Md. 2011).

[14] *Title VII/ADA: Recordkeeping Responsibilities for Electronic Resumes with Video Clips/Employer Knowledge of Ethnicity, Gender, and Disability Prior to Interview* (Oct. 5, 2004), available at http://www.eeoc.gov/eeoc/foia/letters/2004/titlevii_ada_recordkeeping_video.html.

otherwise indicates that he or she is no longer interested in the position.[15] This regulation potentially affects applications through social media.

d. Hiring Process – Fair Credit Reporting Act

A final note on hiring issues. The Fair Credit Reporting Act ("FCRA") provides, among other things, applicants and current employees procedural and notice rights when employers seek information from a "consumer reporting agency." As defined, social media is not a "consumer reporting agency," and thus an employer's search of social media alone does not trigger the Act's procedural and notice requirements. On the other hand, employers who retain third party vendors to conduct background checks likely do.[16]

2. *Recruitment and Searches*

Gone are the days of simply placing advertisements in newspapers or hanging "help wanted" signs in the window. Employers now extensively advertise job positions online, including through their own websites, "traditional" job search engines like monster.com or careerbuilder.com, as well as through social media sites. For example, some employers announce job positions on their own social media pages.[17] Others utilize the virtual advertisement space on social media sites to announce job openings and then link to the company's general hiring website.[18]

Federal and state employment laws require employers to recruit in a non-discriminatory manner. Using social media as a recruitment source thus presents several issues to employers. How an employer recruits potential employees affects the composition of the employer's workforce. By relying exclusively upon social media or by not utilizing it at all, employers run the risk of denying potentially protected classes access to information about job openings. While not intentional, such actions might expose employers to "disparate impact" discrimination claims. A disparate impact occurs generally when facially neutral criteria results in a disproportionate result due to protected characteristics. For example, by relying on an applicant pool generated exclusively from a social media network, an employer risks recruiting from a less diverse applicant pool. This risk is compounded by the fact that several social media networks are specifically designed to target demographic characteristics that are protected by state and federal employment laws such as race, color, religion, sex, national origin, disability or age.

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[15] *See generally* 41 CFR § 60-1.3 (2006).
[16] *See Adams v. Nat'l Engin. Serv. Corp.*, 620 F. Supp. 2d 319 (D. Conn. 2009).
[17] *Summerfest Added More Job Postings*, http://www.facebook.com/note.php?note_id=335200902840.
[18] *Apple advertising jobs on Facebook,* TechAU, http://www.techau.tv/blog/apple-advertising-jobs-on-facebook/.

B. Issues Relating to Employment

Taking adverse action against an employee because of their use of social media may trigger several federal and state employment statutes, as well as other common law protected areas.

1. *Off-Duty Conduct*

Employers should be generally aware that several states have passed "off-duty conduct" statutes.[19] These statutes typically prevent employers from taking an adverse action against employees for otherwise legal conduct when off-duty, such as drinking alcohol or participating in a political activity. At the same time, however, they tend to contain broad exceptions – like creating a conflict of interest – such that employers are still able to take some action. For example, Colorado law prohibits an employer from firing an employee "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . . ."[20] It exempts restrictions relating to *bona fide* occupational requirements or those aimed at preventing conflicts of interest.[21] New York's law is broader: "[I]t shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment" because of off-duty conduct including political activities, the legal use of consumable products, legal recreational activities outside of work, and union/civil-service membership.[22] Participating in social media is perhaps covered by these statutes and employers should check their specific state laws concerning off-duty conduct prior using an employee's social media posting to take an adverse action.[23]

2. *Discrimination*

a. Adverse Action by Employer Because of Employee's Social Media Site

Discrimination charges by employees whose use of social media led to their adverse action are becoming more prevalent. The basis for the charges themselves is not novel as they tend to make the following standard employment discrimination argument: I was disciplined or discharged for doing X; I am a member of Y protected group; and employee Z did X as well, but was not disciplined or discharged as was I.

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[19] The states that offer some of the broadest protections are California, Colorado, New York, and North Dakota. Several other states offer some protection based on the lawful use of alcohol or tobacco.
[20] Colo. Rev. Stat. § 24-34-402.5(1) (2007).
[21] § 24-34-402.5(1)(a-b).
[22] N.Y. Lab. Law. § 201-d(2)(a-d)
[23] *See also Land v. L'Anse Creuse Pub. Sch. Bd. of Educ.*, 2010 WL 2135356 (Mich. App. May 27, 2010) (affirming decision by the State Tenure Commission that the school district did not have reasonable and just cause to discharge the plaintiff for pictures taken without her consent at a bachelor/bachelorette party).

Such was the case with Ellen Simonetti, a Delta Flight Attendant. Simonetti maintained a blog entitled "Diary of a Flight Attendant" where she mused about her travel and experiences as a flight attendant. In one post, she uploaded several pictures of herself on an airplane in uniform – including one with her blouse partially unbuttoned exposing part of her bra. Delta deemed her pictures inappropriate and terminated Simonetti. She filed suit against Delta alleging, among other things, that other similarly situated male flight attendants had posted similar pictures, but were not terminated and thus, Delta's action constituted sex discrimination.[24] The merits of Simonetti's case were never decided due to Delta filing for bankruptcy. Ellen Simonetti's suit is a case study in why employers should consider the extent to which it should investigate other "comparable employee" actions in the social media sphere prior to taking an adverse action against an employee.[25]

The case of *Mai-Trang Thi Nguyen v. Starbucks Coffee Corporation* shows just how easy it is for employees to bring discrimination claims when challenging adverse actions given how typical references to information concerning protected class information appears upon social media sites.[26] In *Mai-Trang*, Starbucks fired the plaintiff after she had, among other things, posted comments on her MySpace page containing threats against Starbucks and fellow coworkers.[27] The comments included vague references to her religion: "I've worked Tirelessly 2 not cause trouble, BUT I will now have 2 to turn 2 my revenge side (GOD'S REVENGE SIDE) 2 teach da world a lesson of stepping on GOD."[28] After being fired, she sued on a variety of actions including alleging that she was fired not because of her "threats" but because of her religion.[29] Upon the employer's motion to dismiss for summary judgment, the court quickly dismissed this *pro se* plaintiff's claims.[30]

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[24] No. 1:05-CV-2321 (N.D. Ga. 2005).

[25] *See also Marshall v. Mayor and Alderman of City of Savannah, Ga.*, 366 F. App'x 91, 99, 100 (11th Cir. 2010) (probationary firefighter who posted pictures taken from the City's website of firefighters on her MySpace page next to revealing pictures of herself failed to establish a prima facie case of sex discrimination because no other similarly situated employee was treated more favorably); *Williams v. Wells Fargo Fin. Acceptance*, 564 F. Supp. 2d 441, 449-50 (E.D. Pa. 2008) (denying employer's summary judgment motion where plaintiff – who was fired for sending "sexually suggestive and otherwise inappropriate jokes or pictures" – put forth evidence that a similarly situated employee had sent inappropriate emails from his MySpace account but was not fired).

[26] *See also Shaver v. Davie County Pub. Schs.*, No. 1:07cv00176, 2008 WL 943035, at *1-2 (M.D.N.C. April 7, 2008) (dismissing plaintiff's claim for failing to exhaust administrative remedies for his claim that he was fired for information contained on his MySpace page that "reveal[ed] he practices the Wicca religion . . . .")

[27] *Mai-Trang Thi Nguyen v. Starbucks Coffee Corporation,* Nos. CV 08-3354 CRB, CV 09-0047, 2009 WL 4730899, at *2 (N.D. Cal. Dec. 7, 2009).

[28] *Id.*

[29] *Id.* at *3.

[30] *Id.* at *5.

b. Harassment and Hostile Work Environment Claims

The nature of social media makes both the notice and content requirements of hostile work environment claims much more dangerous that "traditional" claims. Social media sites often blur the line between colleagues, friends, and family members, granting access to messages, pictures, and videos that have traditionally been separate. These virtual water coolers facilitate more communication before, after, and in all likelihood, during work hours. Given human nature, it is inevitable that employees will not only network with each other on social media sites, but will also use the social media to discuss things like working conditions and other coworkers. Put another way, there is a good chance that if one employee is publicly harassing another employee via social media, other employees will likely know about it.

i. Employer Liability

Applying the traditional harassment rubric, employers might be liable for harassment on social media depending upon several factors. First, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[31] Put another way, an employer is *presumed liable* for a supervisor's harassment that results in a tangible employment action like "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[32] An employer may escape liability or damages stemming from a supervisor's harassment by proving that (1) there was no tangible employment action, (2) it "exercised reasonable care to prevent and correct promptly any . . . harassing behavior", and (3) the "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[33]

Second, employers may also be liable for harassment on social media by coworkers or even non-employees. If an employer either *knows* or *has a reason to know* of work-related harassment occurring on social media, then an employer might be liable under federal and state hostile work environment claims.[34] This was the exact issue at hand in *Blakey v. Continental Airlines*.[35] There a female pilot made hostile work environment and harassment complaints to the company "based on conduct and comments directed at her by male co-employees."[36] After her complaints and the subsequent litigation that occurred, fellow pilots began posting

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[31] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).
[32] *Id.* at 761.
[33] *Id.* at 765.
[34] *Faragher v. City of Boca Raton*, 524 U.S. 775, 779 ("[The federal courts have] uniformly judg[ed] employer liability for co-worker harassment under a negligence standard . . . ."); *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F. 3d 754, 756 (9th Cir. 1997) (employer liable for non-employee's harassment "where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or correction actions when it knew or should have known of the conduct").
[35] *Blakey v Continental Airlines*, 2 F. Supp. 2d 598 (D.N.J. 1998).
[36] *Id.* at 164 N.J. at 47.

"derogatory and insulting remarks about Blakey on the pilots[']on-line computer bulletin board . . ." that was accessible to all of Continental's pilots and crew members.[37] Noting that other courts "have held that 'an employer can be liable for coworkers' retaliatory harassment'",[38] the New Jersey Supreme Court stressed that "employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace."[39]

In *Amira-Jabbar v. Travel Services, Inc.*, the plaintiff's coworker posted pictures from a company outing on a Facebook page.[40] The plaintiff then "commented" on a picture of herself, stating, "remind me that taking pictures in the shade is really disservice to my wonderful chocolate skin."[41] Another fellow employee responded to the plaintiff's comment saying "[t]hat is why you always have to smile!!!!"[42] Plaintiff interpreted this comment as racist, resigned, and eventually filed a discrimination suit in part because of the Facebook "incident."[43] Among other things, the plaintiff argued that the employer should be liable "because it allowed its employees to post photos and comments on the website during company time for company purposes."[44] The court dismissed plaintiff's claim of a hostile work environment because the employer had promptly and appropriately responded to plaintiff's internal complaints.[45]

ii. A Brief Word on Discovery of Social Media Information

As discussed below in the "Discovery Issues" section, an employee's own social media sites are likely to produce relevant and discoverable information relating either to his or her claims or the employer's defenses. One area for discovery – by either side – is the extent to which an employee participates in conduct that she then later complains about. A recent decision from Wisconsin addresses the situation where an employee alleging sexual harassment also made "some off-color, sexual jokes on the online community 'MySpace' . . . ."[46] The jury found the employer liable for a hostile work environment and the employer challenged, as relevant here, the jury's finding that the employee was offended by her supervisor's sexual harassment despite

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[37] *Id.* at 48.
[38] *Id.* at 58 (citation omitted).
[39] *Id.* at 62.
[40] 726 F. Supp. 2d 77, 81 (D. P. R. 2010).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 83.
[45] *Id.* at 86-87. *See also Urban v. Capital Fitness*, No. CV8-3858(WDW), 2010 WL 4878987, at *9, 10 (E.D.N.Y. Nov. 23, 2010) (employee's personal MySpace page did not lend evidence to plaintiff's hostile work environment claim because it was "something that an employee had to go out of his or her way to view, and not pervasive in the workplace environment.")
[46] *E.E.O.C. v. Management Hospitality of Racine, Inc*, No, 06-C-0715, 2010 WL 3431822, at *4 (E.D. Wis. Aug. 31, 2010).

her own "off-color, sexual jokes" posted on MySpace.[47] In refusing to overturn the jury's finding, the court juxtaposed the behavior alleged in supporting the hostile work environment with those comments posted on MySpace: "However, sharing jokes with friends in an online community is vastly different than being propositioned for sex by a supervisor at work. Thus, the jury reasonably concluded that [the employee] subjectively believed that the harassment was severe or pervasive."[48] Perhaps different facts here would have diminished the employee's claims, but it is clear that social media sites should not be ignored during discovery to better flesh out employee claims and employer defenses.

iii. Use of Social Media as Direct Evidence of Age Discrimination

Despite the statistics suggesting that social media usage is not just limited to younger employees, it is possible that an employer's reference to social media sites might be interpreted as age discrimination. Take *Fisher v. Department of Veterans Affairs*, for example.[49] One of the pieces of evidence the plaintiff used to try to support her hostile work environment claim was that one of her managers allegedly said that "he was happy to see young workers at the VA because 'they understand computers. They know Facebook.'"[50] The court dismissed plaintiff's claim, but it stands to reason that use of terms generally associated with younger generations might be used in the future in an attempt to support age discrimination and hostile work environment claims.

3. *Retaliation*

The communication vehicle that is social media now affords employees more opportunities than ever to publicly share their thoughts about their employer. In some cases, such thoughts can put employers on notice of an employee's opposition to an alleged unlawful practice or participation in a statutory complaint process. Any subsequent adverse action by the employer can then be possibly construed as retaliation for the employee's protected activity. (See the introductory anecdote).[51]

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[47] *Id.*
[48] *Id.*
[49] No. 08-10748, 2009 WL 1885072 (E.D. Mich. June 30, 2009).
[50] *Id.* at *3.
[51] *See also Derrick v. Metro. Gov. of Nashville and Davidson County, Tenn.*, No. 3-06-1222, 2007 WL 4468673, at *10 (M.D. Tenn. Dec. 17, 2007) (plaintiff did not establish a prima facie case of retaliation where, in part, her supervisor had "posted rhetorical questions such as 'what is wrong with women these days?' and [had] mad[e] statements such as 'Chicks seem to have more issues these days than Jet Magazine, and keep up more drama than daytime television and Jerry Springer combined." The statements did not show pretext because they did not relate to the employer's legitimate non-discriminatory reason for its adverse action – plaintiff's poor performance.); *Williams v. Singing River Hosp. System*, No. 08cv86-LG-RHW, 2009 WL 484587, at *3-4 (S.D. Miss. Feb. 26, 2009) (dismissing plaintiff's retaliation complaint predicated upon being shown an allegedly racist video by a co-worker because she complained about the video after the adverse action).

The recent case of extreme sexual harassment by a supervisor in *Forsberg v. Pefanis* is instructive.[52] In that case, the supervisor's harassment allegedly forced the plaintiff to resign and she then sued her supervisor and her former employer.[53] After finding out about the lawsuit, the supervisor and the co-owner, among other things, sought to gain access to plaintiff's MySpace page through one of plaintiff's mutual friends.[54] They did so, in order to "obtain personal and private information about plaintiff and her family" which they would then use to disseminate false information about the plaintiff.[55] Such actions by the employer, concluded the court, were "evidence of 'post-employment blacklisting'" and thus actionable retaliation.[56]

4. *Labor Environmentt*

The NLRA (and state counterparts) provide rights to employees in protected "concerted activity for the purposes of collective bargaining or other mutual aid or protection . . . ." Examples of such activity include communications among employees about wages, hours, and work conditions, regardless of whether the communication occurs within the employer's facilities. Importantly, the Act applies to *both* unionized *and* non-unionized settings. The National Labor Relations Board ("NLRB") has yet to address whether an employer's social media policy is a mandatory subject of bargaining. That said, "[i]t is well established that work rules that can be grounds for discipline are mandatory subjects of bargaining"[57] and therefore social media policies are likely "other terms and conditions of employment" that must be bargained over.

Until recently, one of the leading cases in this area was *Konop v. Hawaiian Airlines*.[58] In *Konop*, a pilot created and then maintained a website that had postings critical of his employer, fellow coworkers, and his union.[59] In several posts, he "criticized Hawaiian management and its proposal for wage concessions in the existing collective bargaining agreement."[60] He secured the website by controlling who could access it. The Ninth Circuit Court found that his website "would ordinarily constitute protected union activity . . . ."[61]

On October 27, 2010, the NLRB's Hartford office filed a complaint against American Medical Response of Connecticut for its decision to terminate an employee who posted negative

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[52] No. 1:07-CV-3116-JOF-RGV, 2009 WL 901015 (N.D. Ga. Jan 26, 2009), *rev'd on other grounds*, 1:07-CV-3116-JOF, 2009 WL 201012 (N.D. Ga. March 27, 2009).
[53] *Id.* at *4.
[54] *Id.* at *14.
[55] *Id.* at *14-15.
[56] *Id.* at *15.
[57] *In re King Soopers, Inc.*, 340 NLRB 628, 628 (2003)
[58] 302 F. 3d 868 (9th Cir. 2002)
[59] *Id.* at 872.
[60] *Id.* at 882.
[61] *Id.*

remarks about her supervisor on her Facebook page.[62] The comments included referring to her boss as a psychopath, "dick", and "scumbag." Other employees then added further comments, including "I am sorry, hon! Chin up!" The company terminated the employee pursuant to its Internet usage policy. Specifically, the company's Employee Handbook prohibited employees "from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, coworkers and/or competitors." American Medical Response's Standards of Conduct also prohibited "[r]ude or discourteous behavior to a client or coworker" and the "[u]se of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature." The employee filed an unfair labor practice charge, claiming that her posting was protected concerted activity under the NLRA and that the company's Internet usage policy overly broad. Unfortunately for those hoping that a decision in this case would provide some guidance on the issue, the case settled before an Administrative Law Judge could hear the case. According to the NLRB's press release, the terms of the settlement called for the company to "revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing wages, hours and working conditions with coworkers and others while not at work and that they would not discipline or discharge employees for engaging in such discussions."[63]

Stay tuned however, as the Service Employees International Union filed a charge against Student Transportation of American Inc. on February 4, 2011 alleging the employer's social media policy violated Section 7 rights. The policy bans "the use of electronic communication and/or social media in a manner that may target, offend, disparage or harm customers, passengers or employees; or in a manner that violate any other company policy."[64]

Another recent trend is that the NLRB General Counsel's office is reviewing companies' social media policies and opining on whether they comply with the NLRA. For example, on December 4, 2009, the General Counsel's office examined Sears Holdings' Media Policy that prevented the "disparagement of [the] company's or competitor's products, services, executive leadership, employees strategy, and business prospects" in social media.[65] Contrast this disparagement policy with American Medical Response's disparagement policy where employees were prohibited "from making disparaging, discriminatory or defamatory comments

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[62] Case No. 34-CA-12576, *American Medical Response of Connecticut and International Brotherhood of Teamsters, Local 443.*

[63] Press Release, National Labor Relations Board, Settlement reached in case involving discharge for Facebook comments (Feb. 8, 2011), *available at* http://www.nlrb.gov/news/settlement-reached-case-involving-discharge-facebook-comments.

[64] Case No. 34-CA-12906, *Student Transportation of America and Service Employee International Union*. *See also* Sodexo Settles Speech Case With the NLRB, Must Notify Every Worker in U.S. of Right to Speak About Workplace Issues, March 9, 2011, *available at* http://news.yahoo.com/s/usnw/20110309/pl_usnw/DC62228 (employer agreed to change media policy that stated: "Do not make statements or comments to the media. If you are asked by the media to speak or comment on *any subject*, contact your manager or Corporate Communications immediately.") (emphasis added).

[65] *Sears Holdings*, Case 18-CA-19081, Office of Gen. Counsel, NLRB (Dec. 4, 2009).

when discussing the Company or the employee's superiors, coworkers and/or competitors." Here, the General Counsel's office concluded that Sears Holding's Media Policy *did not* chill employee rights under Section 7 of the NLRA because it prevented many discussions, not just those about potential workplace conditions and because "there [was] no evidence that the [e]mployer implemented this [p]olicy in response to protective activity."

Employers should take extreme care when taking an adverse action against an employee for his/her usage of social media, especially where that usage relates in any way to work.

5. *Public Employers*

Public employees may too be disciplined for content on social media. The expanded protections afforded to public employees by federal and state constitutions, however, means public employers have additional considerations when dealing with a public employee's usage of social media.[66] Such considerations include free speech and association, unreasonable searches and seizures, and substantive and procedural due process rights.[67]

a. First Amendment

Public employers are prohibited from retaliating against an employee's constitutionally protected speech. In *Spanierman v. Hughes*,[68] a federal court addressed this very issue in the context of speech on MySpace and provides a good overview of how courts approach First Amendment issues relative to social media postings. There the teacher's MySpace page contained inappropriate pictures as well as facilitated communication between the teacher and his students about non-school related items including "what [students] did over the weekend at a party, or about their personal problems."[69] The school district eventually decided to not renew plaintiff's contract and the plaintiff sued alleging several claims, including First Amendment retaliation.[70]

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[66] Although generally outside the scope of this paper, it should be noted that public schools may be liable for statutory and constitutional claims from students stemming from the usage of social media by other students or administrators. *See, e.g., Wolfe v. Fayetteville, Arkansas School District*, 600 F. Supp. 2d 1011 (W.D. Ark. 2009) (refusing to dismiss several claims against a school district in part because of a Facebook page created by school that contained "harassing and threatening posts").

[67] *Byrnes v. Johnson County Community College*, No. 10-2690-EFM-DJW, 2011 WL 166715, at *3 (D. Kan. Jan. 19, 2011) (reinstating dismissed nursing student who had posted pictures of a placenta on her Facebook page because, among other things, she was given permission to take the pictures and because "[t]he appeal process provided to Plaintiff was in no way a fair and unbiased opportunity for the students to fully present their case before a neutral and unbiased arbitrator").

[68] 576 F. Supp. 2d 292 (D. Conn. 2008).

[69] *Id.* at 298.

[70] *Id.* at 299.

The first issue relating to plaintiff's First Amendment claim was "whether the Plaintiff expressed his views as a citizen, or as a public employee pursuant to his official duties."[71] Under *Garcetti v. Ceballos*,[72] public employees who make statements pursuant to their official duties are not speaking as citizens for the purposes of the First Amendment and thus are not entitled to its protection.[73] In *Spanierman*, the court found that the plaintiff's MySpace page was not made pursuant to his official duties – i.e., "[t]here [was] no indication in the record that the [p]laintiff, as a teacher, was under any obligation to make the statements he made on MySpace"[74] – and thus *Garcetti* did not apply.

In order for a public employee to make out a *prima facie* case of retaliation based on the First Amendment, the employee must show that his speech was: (1) of a public concern; (2) that he suffered an adverse employment action; and that (3) there was a causal connection between the speech and the adverse employment action.[75] The court concluded that most of the plaintiff's MySpace posts and communications were not of a public concern, but found that a poem showing his opposition for the Iraq War "could constitute a political statement."[76] In the end however, the court found that there was no causation between plaintiff's posting of his Iraq war poem and his adverse action.[77] The plaintiff also brought a "Freedom of Association" claim as well, which the court rejected by finding that plaintiff's MySpace page was not an "organization" for the purposes of advocating a public concern and even if it was, he could not establish causation.[78]

Several other courts have addressed this issue with similar results.[79]

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[71] *Id.* at 309.
[72] 547 U.S. 410 (2006)
[73] *Id.* at 424.
[74] 576 F. Supp. 2d at 309.
[75] *Id.*
[76] *Id.* at 310-311.
[77] *Id.* at 313. *See also Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007) (correction's officers posts on a website were of public concern, but no violation of First Amendment).
[78] *Id.*
[79] *See, e.g., Snyder v. Millersville University*, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008) (denying injunction sought by student teacher whose MySpace page contained pictures of her as a "drunken pirate", leading to her not completing a student teaching practicum because, in part, she admitted that her postings related only to "personal matters" not matters of public concern); *Dible v. City of Chandler*, 515 F.3d 918, 927 (9th Cir. 2008) (police officer who was terminated for operating a sexually explicit website featuring pictures and videos of his wife did not have a viable First Amendment claim because his "activities . . . did not contribute speech on a matter of public concern"); *Richerson v. Beckon*, No. C07-5590 JKA, 2008 WL 833076, at *4 (W.D. Wash. March 27, 2008) (school district's involuntary reassignment of a teacher due to comments made on her blog did not violate First Amendment because comments were not of a public concern); *but see Navab-Safavi v. Broadcasting Bd. of Governors*, 650 F. Supp. 2d 40 (D.D.C. 2009) (employee who was terminated because of a YouTube video protesting the Iraq War sufficiently pled proper First and Fifth Amendment claims to survive defendant's motion to dismiss).

b. Fourth Amendment

The Fourth Amendment likely has some limited applicability to social media sites maintained by public employees. As discussed below in "Privacy Concerns," a public employer may run afoul of the Fourth Amendment's prohibition against unreasonable searches and seizures if the employer fraudulently accesses an employee's social media site or accesses without authorization.[80]

6. *Privacy Concerns*

Most of the discussion above centers around an employer's access to publicly available information. In other words, the information is either (a) available to all web-users, like a blog or (b) available to certain users including fellow employees or supervisors – think: supervisor and subordinate are "Friends" on Facebook. But what if within the social network, the access is intentionally set up to only be accessible to a set group of individuals – intentionally keeping others, like employers, from seeing the information? Accessing these more private social media sites implicates many privacy related protections, including the Stored Communication Act, the invasion of privacy tort, and for public employers, the Fourth Amendment.

a. Stored Communications Act

The Stored Communications Act ("SCA") generally prohibits individuals from intentionally accessing stored electronic information without authorization.[81] The Act *does not*, however, protect information that is readily available to the general public. In *Pietrylo v. Hillstone Restaurant Group*, an employee set up a MySpace group that was accessible only to certain individuals and specifically, not the restaurant's management.[82] Upon pressure from a manager, one of the group members gave up her password to the manager and the plaintiff was eventually terminated due to information on the MySpace page.[83] A jury found that the employer violated the Stored Communication Act[84] for accessing the site without permission and that the act of getting one of the employees to give up her password was malicious, exposing the employer to punitive damages.[85] It should be noted that in this case, the jury found that the

[80] In *City of Ontario v. Quon*, the Unite States Supreme Court expressly refused to determine whether a public employee had an expectation of privacy in text messages sent on his work-provided pager for the purposes of the Fourth Amendment's prohibition against unreasonable searches and seizures. Instead, the Court avoided the issue, deciding the case on the narrow ground that *even if* the employee had a reasonable expectation of privacy in his text messages, the employer's search did not violate the Fourth Amendment because it was reasonable. 130 S. Ct. 2619, 2631 (2009). It is likely only a matter of time before the Supreme Court provides guidance regarding the Constitution's privacy expectations in this digital age.

[81] 18 U.S.C. § 270(a)(1).

[82] No. 06-5754 (FSH), 2009 WL 3128420, at *2-3 (D.N.J. Sept. 25, 2009).

[83] *Id.* at *3.

[84] The Stored Communications Act is discussed in more detail below in the "Discovery Issues" section.

[85] *Pietrylo*, 2009 WL 3128420 at *3-6.

employer did not violate the employee's right to privacy.[86] Such claims are usually state and fact specific, but query whether using improper means to obtain access to a restricted website constitutes an unlawful invasion of privacy or for public employers, a violation of the Fourth Amendment.

b. Electronic Monitoring Statutes

Some states *require* employers to notify employees when they conduct electronic monitoring. For example, in Connecticut, employers who "collect[] information on an employer's premises *concerning employees' activities or communications*" are required to provide written notice to employees.[87] This law, however, provides several exceptions for the notice requirement, including when the employer "has reasonable grounds to believe the employee is engaged in violating a law." Workplace postings or polices should suffice as notice, but employers should consult counsel in their state to determine whether they need to comply with state electronic monitoring statutes.

7. *Whistleblower Protection Laws*

A final potential risk with social media is whether an employee's social media postings trigger whistleblower protections under federal and/or state statutes. Most whistleblower laws dictate that an employee must "report" violations to "public bodies" or entities. It appears that any whistleblower protection might derive from the extent that an employee posts on social media sites maintained by those to whom the employee would be required to "report." Conversely, posts generally to the employee's *own* social media page will likely not constitute a "report" given the specific "reporting" requirement to "public bodies" or entities.

Because this is a developing area with little applicable case authority, employers are advised to tread cautiously when dealing with potential whistleblowers use of social media sites.

8. *Miscellaneous Considerations*

Employers should be on notice of the Federal Trade Commission regulations requiring the disclosure of relationships between "the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement . . . ."[88] The regulations provide several hypothetical situations, including one involving social media:

> Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery - mentioning the clinic by name - on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is

[86] *Id* at *1.
[87] Conn. Gen. Stat. § 31-48d (emphasis added).
[88] 16 C.F.R. § 255.5 (2009)

> disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.[89]

In sum, a variety number of federal and state laws intertwine with an employee's use of social media. Employers should seek advice of counsel prior to taking adverse action against an employee for his/her use of social media.

[89] *Id.*

III. DISCOVERY ISSUES

A. Social Media Information is Generally Discoverable

The digital footprint left by social media must not be discounted when formulating discovery plans. Rather, attorneys must embrace them as part of the "new normal." Discovery through the lens of social media should not be viewed as new an unfamiliar territory. Posts on social media are just additional ways for individuals to document their lives like diaries, letters, or emails. An individual's posts may document things that are seemingly innocuous at the time but could literally make or break a case later. Consider how valuable a time-stamped post on Facebook documenting an individual's mood – including as expressed in pictures – may be to either buttressing or undermining that individual's claim for emotional distress damages. Furthermore, in claims that in no way rely upon the usage of social media, attorneys would be remiss from not at least probing to see whether an individual's social media site contains discoverable material or confirming that broad discovery requests – like those seeking all communications about the individual's claims – include communications over social media. Such discovery is exactly the type of discovery contemplated by the 2006 amendments to Rule 34 of the Federal Rules of Civil Procedure which of course define "documents" broadly to include "electronically stored information."[90]

1. *Content Must be Relevant*

Whereas courts are just now grappling with social media,[91] it is clear that courts are applying traditional discovery rules to the discovery of social media content. One of the leading cases in this developing area of the law is *EEOC v. Simply Storage Management LLC*.[92] In *Simply Storage*, the EEOC filed a sexual harassment complaint against the employer and the employer's attorneys propounded document requests seeking the content of the complaining employees' social networking sites to obtain information about the employees' emotional health.[93] The requests were as follows:

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[90] Fed. R. Civ. P. 34. The comments to the amendments provide that "[t]he change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and 'documents.'"

[91] One example of how courts are struggling with social media is the case of *Barnes v. CUS Nashville, LLC*. No. 3:09-cv-00764, 2010 WL 2265668 (M.D. Tenn. June 3, 2010). There the Magistrate Judge offered to expedite the discovery dispute by creating a Facebook account and then "friending" two individuals "for the sole purpose of reviewing photographs and related comments *in camera* . . . ." *Id.* at *1. He then would "properly review and disseminate any relevant information to the parties . . . [and would] then close this Facebook account." *Id.*

[92] 270 FRD 430 (S.D. Ind. 2010)

[93] *Id.* at 432, 433.

> **Request No. 1:** All photographs or videos posted by [employee] or anyone on her behalf on Facebook or MySpace from April 23, 2007 to the present
>
> **Request No. 2:** Electronic copies of [employee]'s complete profile on Facebook and MySpace (including all updates, changes, or modifications to [employee]'s profile) and all status updates, messages, wall comments, causes joined, activity streams, blog entries, details, blurbs, comments, and applications . . . .[94]

The EEOC objected on the grounds of overbreadth, relevance, "unduly burdensome because they improperly infringe on claimants' privacy, and calculated to harass and embarrass.[95] Upon the employer's motion to compel, the court rejected the idea the discovery of social media or other electronically stored information is unique. "Rather, the challenge is to define appropriately broad limits-but limits nevertheless-on the discoverability of social communications in light of a subject as amorphous as emotional and mental health . . . ."[96] The court detailed some general guiding principles before discussing the specific requests at issue.

First, the court rejected the argument that since the social media profiles were "locked" or "private," they were not discoverable due to privacy concerns as such privacy concerns could be "addressed by an appropriate protective order . . . ."[97] Additionally, privacy arguments by those attempting to prevent the discoverability of social media are undermined "by the fact that the production . . . would be of information that the claimants have already shared with at least one other person through private messages or a larger number of people through postings."[98] The very purpose of social media undercuts such an argument: "Facebook is not used as a means by which account holders carry on monologues with themselves."[99]

Second, the court emphasized that the material requested must be relevant to a claim or defense in the case. Here, the employer requested access to the employees' entire Facebook and MySpace accounts, but according to the court did not show why such broad access was relevant to the employees' claims for emotional damages. "[T]he simple fact that a claimant has *had* social communications is not necessarily probative of the particular mental and emotional health matters at issue in this case."[100]

Third, when an employee makes claims for emotional damages, "[i]t is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of

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[94] *Id.* at 432.
[95] *Id.*
[96] *Id.* at 434.
[97] *Id.*
[98] *Id.* at 437.
[99] *Id.* (citations omitted).
[100] *Id.* at 435.

distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant."[101] The discoverability of social media information should be broader, according to the court, than just "communications that directly reference the matters alleged in the complaint" as argued by EEOC.[102]

Turning to the case at hand, the court narrowed the employers' requests, while still allowing significant social media discovery:

> [T]he court determines that the appropriate scope of relevance is any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social media] applications for [the employees] . . . that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.[103]

As for the employer's request for pictures on social media pages:

> The same test set forth above can be used to determine whether particular pictures should be produced. For example, pictures of the claimant taken during the relevant time period and posted on a claimant's profile will generally be discoverable because the context of the picture and the claimant's appearance may reveal the claimant's emotional or mental status. On the other hand, a picture posted on a third party's profile in which a claimant is merely 'tagged' is less likely to be relevant.[104]

Such a holding provides the framework for litigators who seek to discover (or prevent the discovery of) social media information. "The court's determination of relevant material is crafted to capture all arguably relevant materials, in accord with the liberal discovery standard of Rule 26. In carrying out this Order, the EEOC should err in favor of production."[105]

Also applicable is the case of *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*[106] In *Mackelprang*, the plaintiff alleged sexual harassment and other claims against her employer.[107] At issue was the employer's motion to compel private communications on plaintiff's MySpace page after subpoenas to MySpace resulted in the production of only public information.[108] The employer claimed that such communications would show that the plaintiff

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[101] *Id.* at
[102] *Id.*at 435-36.
[103] *Id.* at 436.
[104] *Id.*
[105] *Id.*
[106] No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007)
[107] *Id.* at *1.
[108] *Id.* at *2.

"was a willing participant who condoned and actively encouraged the alleged sexual communications . . . and sexual conduct" at the basis of her claims.[109] The court found that the employer was "engaging in a fishing expedition since . . . it has nothing more than suspicion or speculation as to what information might be contained in the private messages."[110] It did so, relying upon Federal Rule of Evidence 412(a), because there was not "a sufficiently relevant connection between . . . plaintiff's non-work related sexual activity and the allegation that . . . she was subjected to unwelcome and offensive sexual advancements in the workplace."[111] Even if such evidence were relevant, the court continued, "its probative value as to either liability or damages is not substantial enough to outweigh the unfair prejudice that its admission would cause."[112]

The employer in *Mackelprang* also argued that plaintiff should produce all of her email communications via MySpace in order to review for plaintiff's admissions or for impeachment purposes.[113] This argument failed as well on similar relevance and overbreadth concerns,[114] but the court did not preclude the employer from obtaining *some* of the private messages. Instead, it suggested that the employer "serve upon [p]laintiff properly limited requests for production of *relevant* email communications."[115] The court stressed that it was not preventing the employer from "serving such discovery requests on [p]laintiff to produce her Myspace.com private messages that contain information regarding her sexual harassment allegations . . . or which discuss her alleged emotional distress and the cause(s) thereof."[116]

In sum, the *Simply Storage* and *Mackelprang* decisions find a balance between producing *all* social media information and *no* social media information. Instead, they dictate that social media information is discoverable when adequately tailored to satisfy the relevance standard.[117]

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[109] *Id.* at *3.
[110] *Id.* at *2.
[111] *Id.* at *6.
[112] *Id.*
[113] *Id.*
[114] *Id.* at *6-7.
[115] *Id.* at *8.
[116] *Id.*
[117] *See also McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524 (N.Y. App. Div. 2010) (denying defendant's motion to compel plaintiff to turn over "authorization for plaintiff's Facebook account information . . . [because] defendant essentially sought permission to conduct 'a fishing expedition' into plaintiff's Facebook account based on the mere hope of finding relevant evidence"); *Bass ex rel. Bass v. Miss Porter's Sch.*, 3:08cv1807 (JBA), 2009 WL 3724968, at *1 (D. Conn. Oct. 27, 2009) (employer's document request for information on Facebook related to plaintiff's complaint was relevant as it "depicts a snapshot of the user's relationship and state of mind at the time of the content's posting."); *Muniz v. United Parcel Service, Inc.*, No. C-09-01987-CW (DMR), 2011 WL 311374, at *9 (N.D. Cal. Jan. 28, 2011) (defendant's request for postings on social media sites by plaintiff's attorneys relating to "work" and "effort" for use in determining attorneys' fees was "not appropriately geared toward revealing information relevant to the fee dispute . . . .").

2. *Privacy Objections*

As noted by the *Simply Storage* court, it is difficult for an objecting party to successfully object to producing social media information on privacy grounds. Social media users affirmatively place information about themselves on sites to be shared with other users. A few recent state courts have even found individuals have no privacy protections even when individuals take affirmative steps to limit who can view their social media sites. *Romano v. Steelcase Inc*, for example, is a personal injury case with the plaintiff claiming "permanent injuries" resulting from the defendant's conduct.[118] The defendant sought social media information about the plaintiff after portions of the plaintiff's publicly available site revealed plaintiff still maintained an active lifestyle and traveled during the relevant time period.[119] The court rejected the plaintiff's argument that the defendant's attempt to secure access to the "non-public" portions of her site, stating "[t]o deny [d]efendant an opportunity [to] access . . . these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone [p]laintiff's attempt to hide relevant information behind self-regulated privacy settings."[120] Further, the very fact that the social media sites at issue – Facebook and MySpace – remind users that postings are not private when plaintiff signed up, "she consented to the fact that her personal information would be shared with others, *not withstanding her privacy settings.*"[121] Even assuming plaintiff did have a privacy interest in her "non-public" site, the court concluded that such an interest was outweighed by the defendant's need for the information.[122]

A similar holding occurred in *McMillen v. Hummingbird Speedway Inc.*, another personal injury case with the defendants seeking information to disprove plaintiff's injuries.[123] In *McMillen*, the defendants sought and successfully obtained plaintiff's *login* and *password* information. The court specifically relied upon the terms of use for Facebook and MySpace to dismiss plaintiff's privacy objections: "[R]eading their terms and privacy policies should dispel any notion that information one chooses to share, even if only with one friend, will not be disclosed to anybody else." This is because both sites reserve the right to collect and disclose information. Regardless of the steps users take to limit the information flow on social media sites, "their communications could nonetheless be disseminated by the friends with whom they

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[118] 907 N.Y.S.2d 650, 653 (N.Y. App. Div. 2010).
[119] *Id.*
[120] *Id.* at 655.
[121] 907 N.Y.S.2d at 657 (emphasis added).
[122] *Id.* An interesting side note to the court's order – the court granted access to plaintiff's *entire* Facebook and MySpace pages without engaging in the detailed relevance analysis conducted by the *Simply Storage* court. *Id.*
[123] No. 113-2010 CD (Pa. Ct. Com. Pl. Sept. 9, 2010).

share it, or even by Facebook at its discretion." The court then ordered plaintiff to provide his login and password information to the defendants for their review.[124]

B. Subpoenas to Social Media Sites

In addition to seeking discovery from party participants, may a party seek to enforce third party subpoenas? Facebook will not disclose "user content (such as messages, Wall posts, photos, etc.) in response to a civil subpoena."[125] Instead, it will only provide "basic subscriber information . . . 'where: 1) the requested information is indispensable to the case and not within the party's possession; and 2) you personally serve a valid California or federal subpoena on Facebook. Out-of-state civil subpoenas must be domesticated in California and personally served on Facebook's registered agent.'"[126]

A recent decision from a California federal court supports Facebook's policy that subpoenas to social media sites are generally not enforceable to the extent they seek private user content. In *Crispin v. Christian Audigier, Inc*, an artist sued several licensees and the defendants subpoenaed several social media sites seeking plaintiff's "basic subscriber information" as well as a communications, in part, about the defendants.[127] The plaintiff filed a motion to quash arguing, in part, that the SCA prohibited such disclosure.[128] Generally, the SCA prohibits the disclosure of "private communications to certain entities and individuals."[129] The court quashed the subpoenas on SCA grounds.

There are several significant holdings in *Crispin*. First, the plaintiff had standing to quash the subpoenas.[130] The court reasoned that "an individual has a personal right in information in his or her profile and inbox on a social networking sit and his or her webmail inbox in the same way that an individual has a personal right in employment and bank records."[131] Second, the court found that the social media providers at issue – including Facebook and MySpace – constituted electronic communication service ("ECS") providers under

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[124] *See also Dexter v. Dexter*, 2007 WL 1532084, at *6 (Ohio Ct. App. May 25, 2007) (rejecting a claim of privacy to MySpace postings where "appellant admitted in open court that she wrote these on-line blogs and that these writings were open to the public to view").

[125] May I obtain contents of a user's account from Facebook using a civil subpoena?, http://www.facebook.com/help/?safety=law (last visited March 6, 2011).

[126] May I obtain any information about a user's account using a civil subpoena?, http://www.facebook.com/help/?safety=law (last visited March 6, 2011).

[127] 717 F. Supp. 2d 965, 968-69 (C.D. Cal. 2010).

[128] *Id.* at 969.

[129] *Id.* at 971-72.

[130] *Id.* at 976. *See also Mancuso v. Fla. Metro. Univ.,* No. 09-61984-CIV, 2011 WL 310726, at *1-2 (S.D. Fla. Jan. 28, 2011) (plaintiff in FLSA action had standing to quash subpoena directed to social media sites, but refusing to do so on jurisdictional grounds).

[131] *Id.* at 974.

the SCA.[132] Under the SCA, ECS providers are prohibited from disclosing information contained in "electronic storage."[133]

Most significantly, the court determined that the information sought by the defendants was "electronic storage" and thus quashed the subpoenas to the extent that they sought "private messaging" not readily accessible to the public.[134]

While *Crispin* is likely not the last word on whether the SCA prohibits subpoenas directed at third party providers like Facebook and MySpace,[135] its lesson appears to be that parties should alternatively craft appropriate discovery requests within the parameters discussed in the prior section.[136] Indeed, Facebook suggests as much:

> Parties to civil litigation may satisfy discovery requirements relating to their Facebook accounts by producing and authenticating contents of their accounts and by using Facebook's "Download Your Information" tool, which is accessible through the "Account Settings" drop down menu.
>
> If a user cannot access content because he or she disables or deleted his or her account, Facebook will, to the extent possible, restore access to allow the user to collect and produce the account's content. Facebook preserves user content only in response to a valid law enforcement request.[137]

C. Duty to Preserve

There is currently no court decision discussing the duty to preserve evidence maintained on social media sites. Given the possible relevance of material contained within social media websites and an individual user's ability to control information on social media – including altering, restricting, or deleting information – this area is likely to be confronted by the courts in

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[132] *Id.* at 980. The court did so in large part by analogizing to private electronic bulletin board services due to the private messaging capabilities of the social media sites, including the ability to restrict access to only certain users.

[133] 18 U.S.C. § 271(a).

[134] *Crispin*, 717 F. Supp. 2d at 987-88, 991. The court also found on alternative founds that "Facebook and MySpace are RCS providers" for the purposes of "wall postings and comments" because individuals may limit accessibility to select users. *Id.* at 990.

[135] *See also O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1447 (2006) (third-party subpoenas require consent from owner of information, not the transmitter's or service provider's).

[136] *But see Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-cv-01958-WYD-MJW, 2009 WL 1067018, at *2 (D. Colo. April 21, 2009) (enforcing subpoena to Facebook, MySpace, and Meetup.com, without discussing the SCA).

[137] May I obtain any information about a user's account using a civil subpoena?, http://www.facebook.com/help/?safety=law (last visited March 6, 2011).

short order. That said, it appears logical and fairly straight-forward that a party has an affirmative duty to maintain data stored on social media given recent e-discovery discussions.[138]

[138] *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003) ("Zubulake IV").

IV. BEST PRACTICES

A. Adopt a Comprehensive Social Media Policy

Employers must adapt to these new risks, and so far, they have not. A recent worldwide survey conducted by Manpower found that only twenty percent of employers have adopted a social media policy.[139] Yet the social media websites of Facebook, MySpace, YouTube, and Twitter are four of the five most universally blocked websites.[140]

Considerable thought and care must be given to adopting a social media policy. First, as a practical matter, one may be able to generate a policy by merely revising old policies to include social media language. Second, an employer must determine its approach to the use of social media in the workplace: should it completely prohibit the use of social media on company resources, encourage it, or find middle ground by laying ground rules for participation if employees choose? Third, with any other policy, make sure that it is appropriately disseminated to all and consistently enforced. Fourth, in union settings, such a policy is likely an "other term and condition of employment" and thus a mandatory subject of bargaining.

Although there is no "one size fits all" policy, the following should be considered when adopting a social media policy:

- Determine the scope of the policy. What types of online communications and conduct are covered?

- Address whether employees may use company-issued equipment and company provided webspace, as well as whether employees may use social media during work hours. Be sure that this is consistent with your general Internet policy. If you allow employees to do so, consider (1) reserving the right to monitor data transmitted through this equipment and webspace and (2) stating that the employee has no expectation of privacy to this use;

- Emphasize that the personal use of social media should not interfere with work;

- Decide on whether employees can use employer names, logos, discuss clients/customers, or post pictures of the workplace;

- If you decide to allow employees to write about your company's products or services, be sure to require them to include a conflict of interest disclaimer identifying that the employee is an employee *and* that the employee is

[139] Tim Devaney, *Companies slow to create social media rules*, Det. News, Aug 2, 2010.
[140] *Open DNS 2010 Report Web Content Filtering and Fishing*, OpenDNS (2010).

speaking not on behalf of the employer but instead on behalf of the employee as recent regulations promulgated by the Federal Trade Commission;[141]

- Encourage employees to engage in professional and respectful conduct towards all and remind them that posts on social media are public and are often permanent. Stress that employees should avoid disparaging comments about all (including competitors);

- List what types of information should not be disclosed (like financial, confidential, sensitive, or proprietary information);

- Remind employees that other employment policies, guidelines, and laws apply to their usage of social media;

- Consider restricting supervisors abilities to post information on subordinate's social media sites, especially those relating to performance reviews or recommendations;

- Given the recent unfair labor practices related to social media policies, consider adding reservation language clarifying that the policy is not to be applied or interpreted as interfering with employees' rights to engage in protected concerted activities. At the least, policies should be specifically crafted so as to avoid some of the recent overbreadth challenges to employer's social media policies discussed above;

- Provide a mechanism for allowing employees to report violations of the policy; and

- Cover the types of disciplinary action that may occur if an employee violates the policy.

All told, an employer's social media policy should be a reflection of the corporate culture and values. All policies come with benefits and risks and a policy that works for one company may not work for another.

B. Hiring Best Practices

- Consider modifying current hiring processes to include a defined process for how to evaluate an applicant's online presence. Account for such things as accuracy of information presented, verifiability, and how the information is obtained – publicly available or only accessible to certain users;

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[141] *See* 16 C.F.R. § 255.5 (2009).

- Emphasize an employer's obligation to not use information about an applicant's protected status gathered from social media in making a hiring decision. One way to mitigate this is to designate a neutral party, instead of the decision-maker, to conduct the search and filter out protected status information; and

- Maintain a record of *how* information was gathered via social media and *what* information was gathered. Social media is dynamic and can be changed, deleted, or restricted by the user. Consider printing or otherwise storing snap shots of particular social media sites, especially if the content posted led to an applicant not receiving a job interview or offer.

C. Recruitment and Searches Best Practices

- Utilize social media to enhance job recruitment and searches, but not exclusively;

- Consider the value and risks associated with utilizing social media networks geared towards certain demographic traits;

- Ensure recruiting material placed on or linked to social media sites track other recruiting material. This includes emphasizing the employer is an "Equal Opportunity Employer" and accurately describing the job's essential functions and minimum qualifications; and

- Keep records of all recruitment efforts utilizing social media, including a list of what networks and the specific advertisements used.

D. Adverse Action Best Practices

- Seek counsel to determine whether your state has either an "off-duty" statute or an electronic monitoring statute that could apply to social media use;

- If you choose to take adverse action against an employee for a social media posting, take steps to evaluate whether other similarly situated individuals engaged in similar conduct, and if so, how the company responded;

- Ensure employee policies are updated and include language prohibiting harassment on social media sites;

- Consider whether you should adopt specific policies and/or trainings regarding the interaction between supervisors and their subordinates on social media. Think about issues relating to the problems of blurring the line

between supervisors and subordinates especially in the context of harassment and performance issues;

- Monitor social media sites, but be sure to take complaints made by employees seriously and investigate them if necessary. "Complaints" means anything relating to discrimination, harassment, retaliation, and any other protected activity as discussed above;

- Under no circumstances should an employer (or in most cases, a supervisor) use their own social media sites to target specific employees, particularly where the employee has engaged in a protected activity;

- Employees likely have a right to discuss work issues on social media and thus any action taken against employees for doing so should be done with consideration and care—whether you are a union employer, a non-union employer, or a public employer; and

- Take great care when accessing private or restricted sites, if at all.

V. SAMPLE POLICIES

Attached are sample social media guidelines from the IBM, Intel, and the Mayo Clinic. The University of Michigan Health System recently created a "Social Media Toolkit" for its employees and is available at: http://www.med.umich.edu/prmc/services/socialmedia/. Other samples are available at: http://socialmediagovernance.com/policies.php.

APPENDIX