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Legal Trends in Organizational Online Social Media Use

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The growth in the popularity of social networking websites (SNSs) has resulted in many organizations using such platforms for organizational activities, including recruitment, employee selection, employee monitoring, and termination. However, the legality of organizations using social networking for these purposes is unclear. Although many researchers have touched on the potential legal implications of organizations using these tools (see e.g., Brown & Vaughn, 2011), no empirical studies have examined how the court system views their use in organizational settings. Thus, the current study examined federal court cases related to the use of SNSs in various employment practices.

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How Are SNSs Used by Organizations?

SNSs are commonly used by employers as a screening tool in the employee selection process. For instance, Kennedy and Macko (2007) found that 27% of employers had used either Google or SNSs to screen their applicant pool. Four years later, similar research saw this number double to 45% (Davison Maraist, Hamilton, & Bing, 2011). From this trend, it is clear that a growing number of organizations are using these tools in their selection practices (also see Chamorro-Premuzic, Winsborough, Sherman, & Hogan, 2016).

However, whereas selection seems to be the focus of many organizations using SNSs, termination and employee monitoring also appear to be common uses of SNSs. As noted by Davison et al. (2011), however, there has been little research on how employers are using SNSs for these purposes. Notably, one study indicated that 72% of senior executives were uncomfortable with “friending” the people they have managed (Karl, Peluchette, & Schlaegel, 2010). Likewise, Skeels and Grudin (2009) found that when people are uneasy about being friends with an organizational representative, they usually self-monitor or limit the types of things they post. In this way, people are participating in impression management when their personal network mixes with their professional network.

In terms of SNS use for employee recruitment, according to Society for Human Resource Management (SHRM) surveys, in 2008, 34% of organizations used SNSs as a recruitment tool, and by 2013, this number had quickly risen to 77% (SHRM, 2013). Of those using SNSs for recruitment purposes in the 2013 survey, 94% were using LinkedIn, 58% used Facebook, 42% used Twitter, and 3% used MySpace.

As it is clear that organizations are using SNSs across the employment cycle, an examination of the legal implications of such an approach is warranted.

Legal Implications and Privacy Concerns Regarding SNS Use

Currently, there are no federal laws tailored specifically toward the use of SNSs by organizations, but the National Labor Relations Board (NLRB), a federal agency charged with enforcement of the National Labor Relations Act, has recently issued several reports to help guide employers within this arena (NLRB, n.d.). On a state level, however, we are beginning to see social media-related legislation take form. In 2012, several states introduced legislation prohibiting employers from requesting or requiring employees or applicants to disclose a username or password for a personal social media account. To date, 25 states now have such legislation (National Conference of State Legislatures, 2016).

Although this legislation is a step toward stricter SNS privacy laws, it is important to note that these laws only affect the disclosure of personal

account information. This is an important distinction, as organizations are still within their rights to obtain publicly available information. By using the built-in privacy features of Facebook, the user can control what information is available to others; however, privacy features are often overlooked and may not prove to be effective in protecting all of a person's sensitive information.

Whereas state laws may protect individuals working within the private sector, whether these laws will be able to protect state employees is yet to be determined. For instance, Kennedy and Macko (2007) discussed a case of a Louisiana State University student applying for an internship with a state agency. The student made his Facebook profile private before searching for employment, but during his interview he was unexpectedly asked about information found on his profile. According to the interviewer, as a state agency, the recruiters were able to access his Facebook account by going through the PATRIOT Act (Kennedy & Macko, 2007). Therefore, although some states provide limited protection for SNS users, the legal ramifications for organizational social media use in employment decisions are unclear.

In terms of privacy concerns, a study conducted by Deloitte (2009) found that 53% of employees considered it "none of the company's business what was on their SNS," whereas 60% of business executives felt they had "the right to know" how employees portray themselves online. The evidence highlights a disconnect between what employers and employees perceive as fair. Thus, the current study aimed to provide some insight into the legal trends regarding organizational SNS use to aid organizations in better understanding the current legal environment.

Method and Results

Based on a search conducted on March 11, 2015, 25 relevant court cases were identified from the Google Scholar and LexisNexis databases using the following keywords: "Facebook," "MySpace," "Twitter," "LinkedIn," and "federal court." Three graduate student researchers coded each case on the following factors: social media website used, employment practice in question, geographic location, prevailing party, presence of a formal SNS policy, and whether the SNS played a primary role in the case. There were eight ratings that were not unanimous across coders; in each case, the second author made the final rating determination.

As illustrated in Table 1, results indicated that 92% of the cases involved Facebook (as opposed to other SNSs), and 84% of the cases involved employee terminations. Notably, the defendant prevailed in 84% of the cases, which spanned across the United States. Of the eight court cases in which the organization had a social media policy in place, the defendant prevailed in 75% of cases, and for organizations without a social media policy, the defendant prevailed 88% of the time.

Table 1. SNS Court Case Details

Court case	SNS used	Employment practice	Geographic location	Prevailing party	Formal SNS policy	Key SNS role
Augustus v. Nassau, 11-CV-0015 (E.D.N.Y. 2013)	FB	termination	West Virginia	defendant		yes
Austin v. Preston County Commission, 1:13CV135 (N.D.W. Va. 2014)	FB	termination	West Virginia	defendant		yes
Barella v. Village of Freeport, 12-CV-0348 (E.D.N.Y. 2014)	FB	promotion	New York	plaintiff		
Berrett v. Clark County School District, 12-CV-00626 (D Idaho, 2014)	FB	termination	Idaho	defendant	yes	yes
Clafin v. Shaw, 13-5023-CV (W.D. Mo. 2014)	FB	termination	Missouri	defendant	yes	
Debord v. Mercy Health System of Kansas, Inc., 737 F.3d 642 (10th Cir. 2013)	FB	termination	Kansas	defendant		yes
DePriest v. Milligan, 12-CV-00235 (E.D. Ark. 2015)	FB	termination	Arkansas	defendant		
Gilbert v. Department of Corrections	MS	termination	Connecticut	defendant	yes	yes
Graham v. City of Hopkinsville, 12-CV-23 (W.D. Ky. 2013)	FB	termination	Kentucky	defendant		yes
Graziosi v. City of Greenville Mississippi, 13-60900 (5th Cir. 2015)	FB	termination	Mississippi	defendant		yes
Guevarra v. Seton Medical Center, 13-2267 (N.D. Cal. 2013)	FB	termination	California	defendant		yes
Hanners v. City of Auburn, 13-CV-735 (M.D. Ala. 2014)	FB	termination	Alabama	defendant		
Hartman v. Dow Chemical Company, 13-cv-14774 (E.D. Mich. 2014)	FB	termination	Michigan	defendant		

Table 1. Continued

Court case	SNS used	Employment practice	Geographic location	Prevailing party	Formal SNS policy	Key SNS role
Howard v. Clyde Findlay Area Credit Union, Inc., 12 CV 752 (N.D. Ohio 2013)	FB	termination	Ohio	defendant		
Judeh v. Louisiana State University System, 12-1758 (E.D. La. 2013)	FB	termination	Louisiana	defendant		yes
Kirst v. Grays Harbor Hospital, C14-5014 BHS (W.D. Wash. 2015)	FB	termination	Washington	defendant		yes
Knox v. Union Township Board of Education, 13-CV-5875 (D. NJ 2015)	FB	other	New Jersey	defendant	yes	yes
Ley v. Novelis Corporation, No. 14-CV-775 (N.D.N.Y. 2014)	FB	employee monitoring	New York	plaintiff	yes	yes
Mendenhall v. Hanesbrands Inc., 856 F. Supp. 2D (M.D.N.C. 2012)	T	other	North Carolina	plaintiff	yes	yes
Meyer v. McBurney, 13-CV-27 (E.D. Ky. 2014)	FB	termination	Kentucky	defendant		yes
Rodriguez v. Widener University, 13-1336 (E.D. Pa. 2013)	FB	termination	Pennsylvania	defendant		yes
Rodriquez v. Walmart Stores Inc., 13-10154 (5th Cir. 2013)	FB	termination	Texas	defendant	yes	yes
Snipes v. Volusia County, 14-CV-413 (D. Fl. 2014)	FB	termination	Florida	defendant	yes	yes
Swann v. Office of Architect of the Capitol, 12-CV-01320 (D.C. 2014)	FB	termination	Washington, DC	defendant		
Verga v. Emergency Ambulance Service, Inc., 12-CV-1199 (E.D.N.Y. 2014)	FB	termination	New York	plaintiff		yes

Note. SNS = social networking website; FB = Facebook; T = Twitter; MS = MySpace.

Discussion

This review of court cases highlights the disproportionate number of federal cases involving Facebook in organizational settings. This may be in part due to the primary goals of various SNSs. For example, LinkedIn is seen as a professional social networking tool, whereas Facebook houses much more personal or work-unrelated information. Likewise, Twitter has a greater degree of anonymity than Facebook, which may help explain why cases involving Twitter were less prevalent.

Also noteworthy is that the vast majority (i.e., 84%) of the court cases reviewed were employee termination cases. This could be due to a combination of the sensitivity of termination in terms of feelings of procedural injustice (Bies & Tyler, 1993; Wanberg, Gavin, & Bunce, 1999) and feelings of privacy invasion (Deloitte, 2009). Of the 21 cases involving termination, 17 involved organizations terminating the employee over information found on an SNS, whereas four involved an employee terminated due to being on an SNS during work. Whereas injustice perceptions and feelings of privacy invasion can also be present in other employment practices, it may be the case that in these other contexts, individuals may not be aware of whether or how SNSs were used by the organization. Therefore, there may be less risk of legal action, as the individual does not possess the knowledge that such a practice occurred.

In a large majority of the reviewed cases (i.e., 84%), organizations successfully defended their case, which is consistent with the higher probability of organizations prevailing against individuals in cases not associated with SNSs (Songer, Sheehan, & Haire, 1999). However, perhaps a more interesting finding relates to the impact (or lack thereof) of organizations having a formal social media policy. With the limited sample size, it is difficult to determine whether formal policies provide organizations with more power in court. Given that it is reasonable to believe that having a formal SNS policy should provide more protection to the organization at a minimal cost, organizations may consider implementing such policies as a precaution.

SNS policy guidelines have been put forth by several sources. Two main themes present in reports provided by the NLRB (n.d.) are that (a) organizational SNS policies should not ban employees from engaging in actions protected by federal labor laws, such as having conversations about pay or the work climate, and (b) disparaging remarks made by employees on SNSs that are unrelated to group activities at work are not generally protected. Likewise, SocialMedia.org (2011) created a series of checklists that provide guidance to organizational social media policy developers, including recommendations such as training employees who use SNSs as part of their job, training employees about appropriate SNS use when that use is not work related, and monitoring employee SNS use for policy infractions. In addition, [Social](#)

[Media Governance \(n.d.\)](#) has a database of employer social media policies that organizations can use as points of reference.

Conclusion

The use of SNSs as an organizational tool has grown in popularity. The validity and the legal implications of their use, however, are yet to be determined. Based on the small number of cases to date, there appears to be a focus on employee terminations, with Facebook as the most frequent SNS involved. However, due to the limited number of cases on which to establish legal precedent, it is recommended that organizations continue to use caution when utilizing SNSs when making personnel-related decisions.

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