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Briefly

January 2022 Volume 22, Issue 1

CYBER LIABILITY AND SOCIAL MEDIA POLICIES

J. Eric Harrison

"Social media policies should be crafted with caution … Problems arise when employers are overly vague, overly broad, do not provide examples, or do not provide business justification explanations."

Social Media is everywhere in the 21st Century, including the workplace, and there are pros and cons to its use in that setting. Popular social media platforms such as Twitter, Facebook, Instagram, and Snapchat are widely used by employees and employers today. How can this technology be useful to employers? On the contrary, how can it be harmful? What is it that employers should know and do to protect themselves?

Some of the benefits that social media can bring to employers are marketing profitability, ease of recruiting/hiring, and betterment of employee relations. Over 70% of job seekers are looking online. In addition, over 75% of millennials found jobs through social media. Social media also gives the employer a wealth of accessible information to make recruiting/hiring decisions. *Inc. Magazine* published on January 9, 2020, that 54% of employers declined to hire someone because of information found on social media, and the same article reported that 44% of employers had found information on social media that influenced in favor of hiring.

Some negative aspects of social media in the workplace are that employees can use it as a platform for criticism and complaints about management and/or the company, as well as to post inappropriate comments, and harass others. The use of social media in the workplace can also expose the company to data breaches.

When deciding whether to use social media in connection with hiring, there are several key factors that employers should consider. Hiring managers should designate one person within HR or risk management to conduct these social media searches, and then share the relevant information with the hiring manager/team. Additionally, searches do not need to be done for all hires but should be consistent across the board – the same search process should be used with all candidates. It may be worthwhile to consider a non-decision maker to filter out prohibited information, and if information is found that results in not hiring a candidate, the employer should retain that information.

Employee's usage of social media and the vocalization of employee opinions can often cause headaches to employers. Employees have opinions, and like to share them, and many of these opinions/issues are divisive in the polarized society we live in today. When employers receive information about employee social media activity that does, or may, impact the workplace, they should follow an analytical process. Some employee comments may be legally protected, so employers need to be methodical and consistent in addressing every such problematic communication. Privacy laws, such as the Tennessee Employee Online Privacy Act (2014), and other legislation, such as the National Labor Relations Act ("NLRA"), can dictate the scope of monitoring and addressing certain social media communications.

Electronic communications devices that are provided by, or paid for by, the employer, grant the employer a wide latitude of access to monitoring and policing cyber communications. Employers also have the right to restrict or block access to certain sites. They can also investigate specific information about unauthorized transfers of employer/company information. However, employers under the Tennessee Employee Online Privacy Act are prohibited from certain activities or actions, such as requiring disclosure of passwords to personal employee internet accounts, requiring an employee to add the employer to a personal account, or forcing access to a personal internet account in the employer's presence.

The scope of employee protection does not extend indefinitely, however. Employee social media commentary may be protected under various workplace laws such as

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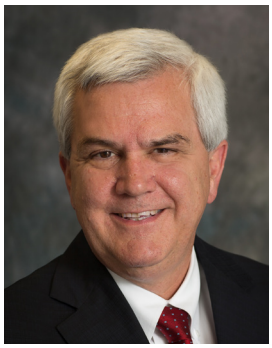
SEXUAL HARASSER? OR VICTIM OF A SCAM?



Howard B. Jackson

"Employers must be aware, and in proper circumstances must consider, that a report [of sexual harassment] may be based on unlawful motivations."

Anyone accused of sexual harassment, particularly in a university setting, should be summarily discharged. Right? Well, maybe even there, it's a good idea to look before you leap. Consider the case of *Michael Weinik, D.O. v. Temple University, Shivani Dua and Phillip Acevedo* as described below.

Summary of Allegations from the Lawsuit Complaint. Dr. Weinik was an experienced and renowned physiatrist. He was a full professor at the Temple University medical school. He had trained hundreds of residents. He had worked with professional and Olympic athletic teams. And in fact, he had been named Interim Director of the Department.

One of his duties as Interim Director was apparently to find a way to replace the then-current Director, Dr. Ian Martin. It seems Dr. Martin got wind of this and was not happy about it. The allegation is that he recruited residents with whom he was friendly to bring false allegations of sexual harassment by Dr. Weinik. Certainly, allegations of harassment were leveled at Dr. Weinik.

There was an investigation. According to allegations by Dr. Weinik, it was conducted ineptly and by persons not trained for the task.

The investigation team recommended to discharge Dr. Weinik.

After the investigation, a hearing committee was formed to make a final decision on the team's recommendation. There were three on the committee. One person acted as both prosecutor and Chair of the Committee.

At the hearing, Dr. Weinik presented witnesses who testified that he did not commit the harassment of which he was accused. One of them testified specifically with respect to an occasion when Dr. Weinik was alleged to have improperly touched someone that the witness was present for the event and no such touching occurred.

One of the key accusers refused to sign a statement under oath, refused to sign an e-mail that contained allegations that the witness had related, and did not appear at the hearing. Another witness knowingly refused to appear at the hearing despite clearly having received the request to do so. In short, there were no witnesses at the hearing who supported any harassment allegation.

The committee voted to overturn the discharge recommendation. Even so, a medical school committee, none of whom had attended the hearing, voted to uphold the discharge.

Dr. Weinik sued for denial of due process, as well as for defamation and other similar torts. He sued the University as well as persons alleged to have helped perpetrate the falsehoods against him. The defendants attempted to get the case dismissed on the basis of statute of limitations and certain asserted privileges. The trial court denied the motion and the Court of Appeals agreed with the trial court. As of this writing the case is ongoing.

Lessons Learned? Since the case is from an academic setting it seems appropriate to consider what lessons astute HR professionals may glean from the circumstances.

An allegation of sexual harassment should not be considered automatic grounds for discharge. Rather, conducting a proper investigation before deciding on the proper response is critical.

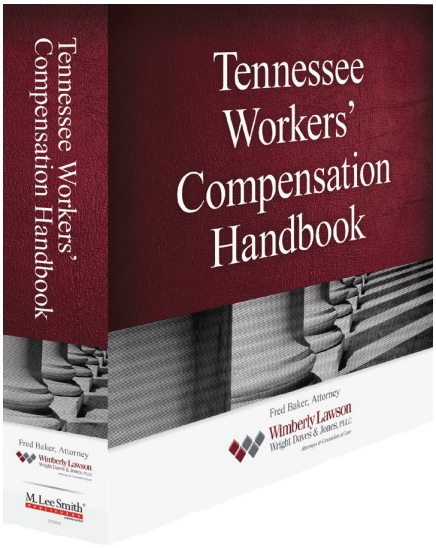
Employers must be aware, and in proper circumstances must consider, that a report may be based on unlawful motivations. Some of these motivations may be clearly unlawful, such as a desire to have an employee discharged because of membership in a protected class, or for retaliatory reasons. Some may be for personal reasons that may or may not be unlawful.

To counter the possibility that the investigation is tainted by unlawful bias or inappropriate motivations of any kind, a wise employer will have the investigation conducted by the right people. The investigators should be properly trained, and should be independent of the situation. Often this will be someone from the HR team, but that is not automatic. There are times to utilize another person in the organization, or to bring in a third-party investigator.

Employers handling harassment allegations and investigations often face risks on more than one front.

- If the employee has legitimate concerns they should of course be addressed; failure to do so can lead to significant risks.
- On the other hand, if the stated concerns are bogus, or if the accused is mistreated in the process, other liability concerns arise. Being falsely accused of harassment and then railroaded via a shoddy or illegally-motivated process can lead to viable claims on behalf of the accused.

Conclusion. Of course, you have to address harassment concerns when they are raised. Prepare in advance by having well-trained team members to conduct investigations, as well as outside resources lined up so that help can be brought in when needed. Last but not least, when the investigation is done, consider whether it has been handled in a competent and independent manner. If so, the decision regarding the appropriate follow-up action is often clear.



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the ADA, ADEA, Title VII, FMLA, OSHA, and NLRA, but there is no expectation of privacy in using the employer's equipment or accounts at any time, regardless of whether the employee is at home or using the device after hours.

If employee commentary is deemed protected, then the employer must be very cautious about taking any adverse action based on those protected comments. Sometimes the best option is to do nothing; other times, a friendly conversation can be effective. If it is determined that a conversation is in order, it needs to be done by the right person, and in a private, low-key manner and setting. It is not something that should be publicized. If it is determined that a conversation is not enough, and the employer wishes to discharge or discipline the employee, this is allowed, unless the comments are protected. This determination is not always simple or clear. For example, if the employee has made blatantly racist, sexist, or violent/violence-advocating remarks, employers can reasonably conclude the communication is not protected. When it is not that clear, get the facts, talk to the employee, and make a reasoned decision, preferably with input from legal counsel.

The National Labor Relations Act ("NLRA") protects concerted activity for mutual aid and protection regarding wages, hours, and working conditions. This applies to almost all workplaces. The determination of whether social media commentary is protected under NLRA is not always obvious. This is exemplified in *Knauz BMW*. In that case, there was an event to introduce a new model for a vehicle. The dealership served only hot dogs and water for refreshments, and customers complained. As a result, a salesman complained on Facebook that he could not make sales because the customers were upset. Another salesman responded, agreeing that the dealership's actions hurt his ability to make commissions. The first salesman also posted a picture of a Land Rover in a pond, along with a humorous comment. The same group that owned the BMW dealership owned the Land Rover dealership, did not see the humor, and discharged the salesman. The salesman filed an NLRB charge. The NLRB found the comments to be protected, but the picture and joke were not. The employee could have been fired for the picture and joke alone; therefore, the charge was dismissed.

Discrimination and harassment, or other violations of policy that occur online, can expose the employer to the same liability as if it had occurred in person. The rules for these are the same; the only difference is the way it is communicated. Employers should monitor and be aware of what is being posted on company-sponsored social media by employees, or even third parties. Effective, written social media policies are an important way to limit employer liability.

Social media policies should be crafted with caution. An employment policy is unlawful if employees would reasonably understand it as prohibiting NLRA-protected activities. Problems arise when employers are overly vague, overly broad, do not provide examples, or do not provide business justification explanations. When forming social media policies, employers need to determine what amount of non-work-related social media use is appropriate for the position, such as usage during breaks only, safety considerations, or a total prohibition of such on employer-owned equipment. Again, if an employee is using an employer's equipment or computer network, there is ***no*** reasonable expectation of privacy from employer monitoring. Employers should draft clear written policies that state there is no expectation of privacy, what is prohibited, and provide examples. Employers should include prohibitions against harassment, illegal activities, violence, and discrimination. The policy should include clear consequences for violation and reiterate the prohibition on disclosing confidential information. Employers should document clear communication of policies and obtain written acknowledgement of understanding from employees.

In summary, employers should have a well-written policy governing the use of social media in the workplace; they should communicate and train employees and managers on the policy; and they should use careful, analytical, and uniform policies in implementation, use, and discipline resulting from social media in the workplace.