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OVEREXPOSED EMPLOYEES

by D. Gregory Valenza

First, there were blogs. Then came Web 2.0 or "social networking." Once reserved for teenagers and geeks, websites like Facebook, Myspace, LinkedIn, Twitter, Yelp, and others have gained mainstream popularity. Among other things, these websites permit users to create personal areas where they keep online diaries; share intimate or mundane details about their lives; post pictures and to public bulletin boards; and "link" to online groups and friends. Businesses, celebrities, and ordinary citizens alike openly invite the public to "friend" or "follow" them and interact online.

Perhaps as a result of naivety about anonymity on the Internet, or maybe out of an irresistible impulse to release suppressed creativity, feelings and thoughts into cyberspace, people seem to be willing to provide limitless insight into their activities and opinions on the Internet. Some believe their Internet activities are – or should be -- "private," even though they are freely visible to anyone with a computer and Internet access.

But "anyone with a computer" includes recruiters and managers trolling the web for information about applicants and employees. Sometimes, they find what they are looking for, which can raise employment law issues that have not always kept pace with advances in technology.

The California Court of Appeal recently held that information posted on one's social networking webpage is not "private." However, employers and

recruiters should be mindful of other employment laws that could restrict or prohibit reliance on employees' and applicants' profiles, tweets, diggs, memes and the rest.

Publicly Posting on a Public Website Is Not Private

Cynthia Moreno, attending school in Berkeley, created a webpage on the popular social networking website, "MySpace.com." After visiting her home town of Coalinga, California, Moreno was moved to publish on her MySpace page, "Ode to Coalinga." Her essay begins: "the older I get, the more I realize how much I despise Coalinga."

Moreno removed her screed from MySpace a few days later, but not before the principal of her high school learned about it. He forwarded the Ode to the local newspaper, along with Moreno's full name. The Coalinga Record published the Ode as a letter to the editor.

Predictably, some Coalinga residents did not share Moreno's views about her home town. Some of the more violent residents allegedly sent death threats to Moreno's family, who still lived in Coalinga, and even shot at their home. The family ultimately moved out of town and closed up their business.

Moreno sued the newspaper, its editor, and the principal for invasion of privacy and intentional infliction of emotional distress. The court dismissed the newspaper and its editor from the case in response to a motion to strike the

lawsuit under California's "anti-SLAPP" law. (The acronym stands for Strategic Lawsuits Against Public Participation. An anti-SLAPP motion terminates litigation that lacks merit and is filed in retaliation for exercising First Amendment and other rights).

Moreno complained that the principal invaded her constitutional right to privacy by forwarding the Ode to the newspaper and supplying her name. She proceeded against him under an invasion of privacy tort: public disclosure of private facts.

The superior court dismissed the case after a demurrer. The Court of Appeal affirmed in Moreno v. Hanford Sentinel, Inc. __ DJDAR __ (2009). The court found that Moreno's decision to post her Ode on the "hugely popular" MySpace website rendered it public as a matter of law. As such, the principal's forwarding the article to the newspaper was not the disclosure of a private fact and any claim for invasion of Moreno's privacy was barred.

In Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008), Ronald Dible and his wife operated a website that featured sexual content involving Dible and his wife. His employer, a local police department in Arizona, fired him. The Ninth Circuit Court of Appeals upheld the discharge, rejecting Dible's claim that the police department violated the First Amendment. The court made short work of Dible's privacy claim, too, noting "on the facts of this case the Dibles' right of privacy claims are virtually oxymorons."

What is Fair Game?

Absent Supreme Court review of Moreno, or later conflicting appellate decisions, the Court of Appeal's opinion gives employers a green light to use information gleaned from employees' personal websites without fear of "privacy" claims. Let's say, for example, that an employee calls in sick. However, the employee uses "Twitter," a service people use to instantly transmit short answers to the implied question: "what are you doing?" If the employee tweets that she is out partying, or is extending a holiday weekend, the employer likely has every right to use that information to determine if the employee violated company policy. Along the same lines, employers freely can check whether employees are posting on company time, and whether they are making disloyal or malicious comments about their bosses or employer.

External and internal recruiters, too, surf candidates' internet activity. For example, recruiters may wish to assess whether candidates resumes are truthful by comparing them with information supplied on networking sites like Facebook or LinkedIn.

Limits on Cybersleuthing

Employers' power to glean information from employees' and applicants' web activity comes with attendant responsibilities. A privacy claim is much more likely to succeed when the employee's information is posted so it is

not accessible to the public at large. For example, in

Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 890 (9th Cir. 2002), the Court of Appeals held that the employer's secret monitoring of a password-protected website could be a violation of the federal Stored Communications Act. Because the employee's password-protected website concerned union activity, the court ruled that the employer also may have violated the Railway Labor Act by retaliating or spying.

Additionally, the court in Moreno emphasized that Moreno published her "Ode to Coalinga" on a public site visible, albeit temporarily, to anyone with a computer and Internet access. Perhaps the decision might have come down another way had it been maintained secretly and somehow "leaked."

Employers also cannot rely on information that is improper to consider, even if it is publicly disclosed. For example, unlawful employment discrimination is illegal on and off the Internet. If an employee publicly discloses his sexual orientation or religion on a social networking website, for example, the employer obviously cannot consider it in making employment decisions.

Similarly, the Labor Code prohibits retaliation against employees for engaging in political activity, for making complaints about matters of public

importance to government agencies, and for refusing to perform illegal acts. California's lawful activities statute, Labor Code Section 98.6, could protect employees' dissemination of information that a manager simply disagreed with or found distasteful. The Court of Appeal limited the law's scope to conduct otherwise protected by the Labor Code. See Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th 72, 87 (2004). Therefore, employers should not take action against employees for their lawful, off-premises activity relating to the Labor Code (such as engaging in political activity, wage and hour issues, and workers' compensation matters).

The National Labor Relations Act protects employees' right to participate in "concerted activity" relating to wages, hours, and other terms and conditions of employment. Discriminating against an employee or applicant who publicly favors unions on the Internet also could result in legal liability.

Finally, there is information available on the Internet about employees or applicants that may not have been posted by the individual. For example, it is unlawful for employers to check whether an employee or applicant appears on the "Megan's Law" website, which lists registered sex offenders. "Googling" an employee may reveal useful information, but relying on it may implicate some of the pitfalls discussed above. The many issues that arise regarding the use of information posted about third parties will be addressed in another article.

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