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## Social Media and the C-Suite: The Ethical and Legal Implications

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## **ABSTRACT**

*The last twenty years has seen phenomenal growth of social media, with companies such as Facebook, Linked In, and Twitter seeing their registered users growing into the hundreds of millions worldwide (and, in the case of Facebook, over a billion). The advantages of using social media have been touted by many, and fortunes have been made by savvy practitioners with a deft hand at using social media to their advantage. However, as with any new technology unintended consequences have begun to unfold. These consequences have been thrust to the forefront as several high-profile corporate executives and celebrities have sabotaged their own success and the success of their companies by unwise and unfiltered use of social media. Furthermore, companies have created faulty social media policies and have utilized Facebook in the employment arena in a manner that has spawned an ethical and legal minefield. This paper will examine the maze of problems generated by the unbridled use of social media in the business and employment arenas. It will also offer some commonsense solutions which could limit liability for companies and their shareholders.*

## **INTRODUCTION**

The late Associate Justice Potter Stewart once stated that “ethics is knowing the difference between what you **have** a right to do and what **is** right to do.” (YourDictionary, 1996-2018). This same logic should apply to our words as well as our actions. Just because you **can** say something does not mean you **should** say something. This advice is largely lost on the current culture in the United States. From Main Street to the C-Suite, the White House and beyond, modern society has lost its filter and all sense of decorum and restraint. Not since the 1960’s has there been such a clarion call for the freedom to do or say whatever feels “right” at the moment. The difference, of course, being that in the 21<sup>st</sup> century the results of instant gratification can be seen around the world in a nanosecond, and repercussions can soon follow. The use of social media for corporate communication can be especially problematic. This paper will present an overview of the various areas where social media can cause problems for corporate executives, board of directors, and that important, but amorphous concept known as corporate reputation.

In the first section, the example of Tesla presents the type of problems a corporation can encounter with the SEC for social media misuse. The second section presents existing legal rules against such misuse, namely, fiduciary duties owed by directors and managers, which are measured by the business judgment rule. The third section discusses the myriad of issues arising out of social media misuse such as fraudulent advertising and workplace issues, such as employment discrimination, employee privacy, protected concerted activities under Section 7 of the National Labor Relations Act, First Amendment protections, and sexual harassment. Finally, a set of recommendations of best practices for business to use in exercising good judgment and avoiding loss of reputation and profits concludes the paper. Certain tools for detecting social media misuse are mentioned as well.

## **TWEETS BY EXECUTIVES MAY VIOLATE SEC RULES: TESLA AND ELON MUSK**

Corporate messages delivered to the public through social media must be carefully considered and checked for accuracy to avoid false or misleading statements. Take for example,

the recent cautionary tale of Tesla CEO and Chairman of the Board, Elon Musk, who tweeted while driving to the airport that he was “considering taking the company private in a \$420-per-share deal” and he had “funding secured” (Ciolli, 2018). This tweet sent stock prices soaring and short sellers fuming as stock rose 13% in a single day (Ciolli, 2018) causing short sellers to lose approximately \$1.3 billion dollars (Laursen, 2018).

The rollercoaster ride continued with Tesla stock falling 19% as it was revealed that funding was not so secure after all (AP, 2018). Unfortunately for Mr. Musk, it took a mere eight days for the Securities Exchange Commission to come knocking at his door with a subpoena and questions about his motivation for the tweet (Goldstein, 2018). Many believe that given Musk’s ongoing battle with short sellers that his motivation might have been to deliberately manipulate the market to hurt the short sellers that he so loathed (Matousek, 2018). The Department of Justice soon followed requesting documents from Tesla regarding the ill-fated tweet, causing stocks to plunge even further (Kopecki, 2018)

The Securities Exchange Act of 1934 makes it a federal crime to make any untrue statement of a material fact in connection with the purchase or sale of any security (17 CFR 240.10b-5). Most agree that the “funding secured” portion of Elon Musk’s tweet is material and, if untrue, would likely be a violation of Rule 10b-5 or in laymen’s terms, securities fraud (Stewart, 2018). While there is an exception or “safe harbor” for publicly-held companies that make forward-looking statements, such as financial forecasts, safe harbor does not apply here to a statement made in connection with a going private transaction. Lawsuits from short sellers have already begun as a result of losses they sustained attributable to Mr. Musk’s tweet. (Laursen, 2018).

On Saturday, September 29, 2018, Elon Musk and Tesla agreed to settle a lawsuit filed by the Securities and Exchange Commission (Merle, 2018). According to an article in Forbes Magazine concerning the settlement:

Tesla and Musk are to pay \$40 million in fines, and to make some concessions. Among them, Musk gets to remain CEO, but steps down as chairman for at least three years. In return, the suit alleging that Musk duped investors with misleading statements about a proposed buyout will go away. The \$40 million in fines is to be split between them, \$20 million for Tesla, \$20 million for Musk. The deal was announced Saturday, just two days after the SEC filed its case seeking to oust Musk as CEO. A \$20 million payment might seem like a lot for a tweet, but arguably not to Musk, whose estimated fortune is \$20 billion. Tesla has plenty of cash too, something on the order of \$2.2 billion. (Wood, 2018)

## **FIDUCIARY DUTIES AND THE BUSINESS JUDGMENT RULE**

It may not seem fair, but Chief Executive Officers (CEOs) and members of the board of directors do not have the rights of ordinary citizens when it comes to expressing their thoughts or opinions from the C-suite. This different treatment is due to the fact that directors are considered fiduciaries, an ancient legal concept that holds such people to a higher standard than applies to ordinary people. The fiduciary has legal responsibilities to the company's shareholders that include the ethical duties of care, loyalty, and disclosure. The duty of loyalty requires that a CEO always act in the best interest of shareholders, and that she or he place that interest above her or his own personal interest when making business decisions (Petryni, 2016). The fiduciary duty of disclosure mandates that a CEO fully inform both the board of directors and the shareholders about the major

issues facing the business (Petryni, 2016). An abrupt tweet while heading to the airport more than likely does not satisfy this disclosure requirement.

Almost every lawsuit filed against an officer or director of a corporation by a disgruntled shareholder involves an allegation of the breach of fiduciary duties. Most of the time these allegations fall flat because fiduciary duties have evolved with a great deal of help from the fiduciaries.

The term "fiduciary" comes to us from Roman law, and means "a person holding the character of a trustee, or a character analogous of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires." Fiduciaries have a duty, created by undertaking certain types of acts, to act primarily for the benefit of another in matters connected with such undertaking. . . . The fiduciary duties of a corporate director are more a matter of character than of competence. Corporate directors, in performing their duties to the corporation and its owners, are under a duty of care to "conduct themselves on behalf of the corporation as a reasonably prudent person in the conduct of personal business affairs." Honest mistakes in judgment, not tainted by negligence, do not result in personal liability to members of the board. The reason for forgiving such honest mistakes in judgment is the "business judgment rule."

The business judgment rule and the fiduciary duties of directors are intertwined concepts. (Cavaliere, et al, 2004)

While the fiduciary duties put additional responsibilities over denizens of the C-Suite, the business judgment rule has evolved to create more latitude for those individuals as it is often the saving grace for many corporate executives who make a bad business decision (Cavaliere, et al, 2004) No state has profited more from an executive and director-friendly approach to the business judgment rule than Delaware. Like most Fortune 500 Companies, Tesla was incorporated in Delaware (Baer, 2014). It is the most corporate-friendly state in the United States due to its tax benefits and pro-business Chancery Courts which rule out unpredictable juries deciding a company's fate (Wink, 2014). This rule derives from the Delaware General Corporate Law and the fiduciary duties owed to the corporation. The Business Judgment Rule basically states that a CEO is not personally responsible for shareholder losses if the CEO acted honestly, openly and with the best interest of his company (Rottenstein Law Group, LLP, 2010-2014).

In 1988, in *Grobow v. Perot*, the Delaware Chancery Court created a test to determine whether the business judgment rule would be applied to protect corporate decision-makers.

[T]he court held that the business judgment rule stands if the corporate defendants:

- acted in good faith;
- acted in the company's best interests;
- were informed when they acted;
- were not wasteful;
- were not acting out of self-interest or self-dealing (Rottenstein Law Group, LLP, 2010-2014)
-

As the above test makes clear, the Business Judgment Rule will likely be a sword and not a shield for the Board of Directors of Tesla since all indicators are that the action taken by Chairman of the Board, Elon Musk, was an uninformed decision, *i.e.*, no funding secured so no actual price per share determined. It also appears that Musk's tweet derived from his self-interest and a vendetta against short sellers. Adding to Tesla's woes was the court's holding in *Smith v. Van Gorkam* whereby the Delaware Supreme Court found that directors breached their duty of care and were liable to the shareholders because they were not fully informed about a pending merger and relied on the CEO's oral statements about the adequacy of the purchase price. Does this sound familiar? Elon Musk and the Board of Directors had better "lawyer up." Companies everywhere should pay attention and consider the ethical and legal implications of any future social media rants by their Board members.

### **FRAUDULENT ADVERTISING AND POOR JUDGMENT VIA SOCIAL MEDIA: WALMART AND STARBUCKS**

Tesla is certainly not alone in making questionable ethical and legal decisions when playing with social media. Walmart put ethics on the back-burner in 2006 when it failed to reveal to customers that the cute couple traversing the country in an RV blogging about all of their positive Walmart experiences with Walmart and its employees was funded and supported by Walmart (Gunkel, 2015). The result of this public relations debacle was a change in the rules of the Federal Trade Commission which now require disclosure of material connections between the endorser and the seller of an advertised product (16 CFR 255).

One also cannot forget the Twitter campaign created by Starbucks CEO, Howard Shulz, #Race Together, which was supposed to get people talking about race relations in America while they scurried in to grab a quick cup of coffee (Kleinberg, 2015). The Twitter response was fast and brutal causing Starbucks to quickly pull the promotion. Although the company did not seem to suffer financially from the campaign, it does appear that its reputation suffered among consumers (Abitbol, 2018). A survey by BRANDfog regarding, "CEO's, Social Media and Leadership" indicated that although respondents desired CEO engagement on social media, very few Fortune 500 CEO's are active participants (Charles, 2012). Perhaps this lack of engagement is best.

### **BRAND TARNISHMENT ON SOCIAL MEDIA: THE HOLLYWOOD EXPERIENCE—ROSEANNE AND RICHMAN**

Hollywood business empires are not immune to the impact of impulsive tweeting. Self-inflicted wounds by top executives and celebrity employees have been responsible for wiping out vast swatches of shareholder wealth that have been obliterated, seemingly overnight, by misuse of social media. The story is long and growing about celebrities who have been taken to task over Internet posts that have seriously damaged their careers and the production companies behind them. For instance, ABC premiered the revival of "Roseanne" in March, 2018. The show's debut garnered 18 million viewers with advertisers buying 30-second commercial slots that had previously sold for \$166,573 per slot for as much as \$420,000 (Paquette, 2018). Within three weeks the show was canceled as a result of a racist tweet by Roseanne Barr who was the original creator and leading star of the series (Yahr, 2018). What is a show to do? It decided to drop the tweeting troublemaker, of course, and created a spinoff called "The Connors" (Holloway, 2018).

Another illustrative example involves a spin-off of the series “Man v. Food” on the Travel Channel on cable. Man v. Food starred Adam Richman who left the show in 2012 due to health concerns. After losing 70 pounds Richman was lured back by the Travel Channel which was set to debut Richman’s next endeavor, “Man Finds Food.” Unfortunately, the Travel Channel’s dreams of commercial profits based on Mr. Richman’s likeability evaporated when he went on a misogynistic and profane tirade on Instagram telling one of his followers to “grab a razor blade and draw a bath. I doubt anyone will miss you” (Kelly, 2018). Despite the risk involved with the use of social media, the fact remains that if Facebook were a country it would be bigger than China (World Economic Forum) and Twitter has 330 million active users as of January 1, 2018 (Salman, 2018). No doubt these forums will continue to be the choice of communication for those with any business savvy in Hollywood and elsewhere (Furness, 2016)

### **SOCIAL MEDIA IN THE WORKPLACE: EMPLOYMENT DISCRIMINATION**

Social media is also used as a corporate tool for employment decisions. According to CareerBuilder, 70% of employers use social media to screen employees before hiring, with 54% citing social media content as the reason for deciding not to hire a job candidate (Salm, 2017). While to some this procedure may feel like unethical snooping, employers seem to feel differently. Since most Facebook users are public, it is no different than searching the courthouse records for information. Or is it? Court house records do not have a face or a color or other indications of one’s nationality or religious or sexual preferences. Title VII of the 1964 Civil Rights Act sought to prevent such characteristics from playing a part in employment decisions. This hard-fought legislation requires that employment decisions (except when affirmative action is involved) not be based on “race, color, religion, sex, or national origin.” The Age Discrimination in Employment Act (ADEA) adds to the protected class list with a prohibition on discrimination against individuals who are 40 years or older, and the Americans With Disabilities Act of 1990 prohibits discrimination against “qualified disabled” individuals (ADEA, 1975; ADA, 1990). Employers are not supposed to ask any questions that would reveal this protected information. This raises important ethical and legal ramifications. Can or should an employer look at a prospective job candidate’s Facebook page? The protections of Title VII disappear with one scroll down a Facebook page when the employer becomes privy to discriminatory information that would be illegal to request from the individual. Despite this, a survey by LiveCareer.com, revealed that over forty-six percent of company executives believe “a company should review a candidate’s profile before extending a job offer” (Hong, 2012). There are those that argue that this belief has several justifications. First, a face-to-face interview with the candidate will reveal much of the same information about the person’s race, color, age, sex, etc. Second, if one fails to do a background investigation into a potential employee and misses important information that later causes harm to fellow workers or others, the employer can be held liable for negligent hiring. It is better to find out about Nazi party membership that was touted online before hiring the individual.

On the other hand, employers have been penalized for looking at public profiles online, but usually when the snooping has been accompanied by evidence of illegal use of the information discovered. In the case of *Gaskell v. University of Kentucky*, the plaintiff successfully argued that the university denied him employment based on his religious affiliation, which it discovered online. In *Gaskell*, the university was searching for a director to oversee its new observatory. A member of the search committee researched the plaintiff online and discovered he had written an article on astronomy and the Bible. The committee member believed the article was evidence of plaintiff’s Christian faith and belief in creationism. In an e-mail, the search committee member

wrote: ‘the reason we will not offer [plaintiff] the job is because of his religious beliefs [...]’ Plaintiff was denied the job and sued for religious discrimination. The email was used by the court to deny the university’s motion for summary judgment, and the parties eventually settled. Further, in *Neiman v. Grange Mutual Casualty Co.*, the plaintiff alleged he was not hired because of his age. The employer argued it could not have considered the plaintiff’s age because it did not know it when it made its decision. The plaintiff, however, countered that the employer must have known his age because he posted his college graduation year on his LinkedIn profile. This information was enough to get the plaintiff past the employer’s motion to dismiss (Jodka, 2013). These cases illustrate the dilemma facing employers when utilizing social media as part of their employment process. “Technology is racing way ahead of legal developments and the law is trying to keep up,” according to Charles Fournier, a partner at the law firm of Curley, Hurtgen & Johnsrud in New York. When training new employees, he warned them: “Don’t believe that your personal Facebook page is truly personal. I’m sure I can link it to your employer.” He further believes: “When developing a social media policy, it needs to be clear the employee does not have a reasonable expectation of privacy.” (Mulvaney, 2018). As IBM Corporation associate general counsel Teri Wilford Wood warned: “inconsistent or weak social media policies at companies could foster shoddy hiring practices and expose employers to discrimination claims.” (Mulvaney, 2018)

## **SOCIAL MEDIA IN THE WORKPLACE: PRIVACY ISSUES**

Another ethical question surrounding social media arises when a job candidate has his or her Facebook profile set on a password-protected privacy mode. Title II of the Electronic Communications Privacy Act (ECPA) is the Stored Communications Act (SCA). Courts have widely agreed that social networking information should be treated as electronically stored information under the Federal Rules of Civil Procedure (Bennet, 2010). One provision of the SCA prohibits access to password-protected websites without consent. Should an employer simply ask the job candidate or employee to reveal his or her password so that the employer can view the applicant’s social media content when it is password-protected? All employers would like to do so, but whether or not they can depends upon the state in which they are doing business. Twenty-five (25) states have enacted legislation to prevent such inquiries (Barreiro, 2018). The first state to do so was Maryland after Robert Collins, an employee of the Maryland Department of Public Safety and Correctional Services, was surprised to be asked for his social media password following a return from a leave of absence. The ACLU got involved, and soon Maryland had passed the first law barring employers from this questionable practice (Bohm, 2015). Texas has no such law and employers are free to ask for passwords for the time being. However, the ethics of pressuring a job candidate or employee to reveal their password has gotten the attention of the Texas Legislature. During the 84<sup>th</sup> Legislature a Bill was introduced which would have prohibited employers from accessing the personal online accounts of employees and job applicants, but it died in chamber (Texas HB1777). Why rock the business-friendly boat? Businesses want to be able to ask to look at current and potential employees’ social media, and Texas wants to remain the top state for business (Cohn, 2018).

The U.S. Congress has indicated that social media privacy is in its crosshairs. In April 2012, Representative Elito Engel introduced the Social Networking Online Protection Act (SNOPA), which is also known as House Resolution 5050.94. SNOPA would make it unlawful for an employer to require an employee or applicant for employment to provide a username,

password, or any credential information that would enable the employer to gain access to electronic media tied to the applicant, including e-mail accounts and personal accounts on social networking sites. In addition, it would be unlawful to discriminate against, deny employment, or threaten action against any applicant who declined to provide his or her online credentials. (H.R. 5050, 112th Cong., 2d Sess., 2011). A second piece of legislation, the Password Protection Act of 2012 (PPA), S.3074 and H.R. 5684, was introduced in both the Senate and the House. It would also prevent employers from compelling job candidates and/or current employees into sharing information from their social networking accounts. The PPA would amend current law to prohibit employers from coercing any person to authorize access to a protected computer. It would also prohibit discharging, disciplining, or discriminating against any person for failing to authorize access to a protected computer or from retaliating against any person who has filed a complaint or instituted a proceeding related to the above prohibitions. The PPA was referred to committee on May 9, 2012, without much action since that time. SNOA and/or PPA, if enacted, could protect employers from themselves and the irresistible urge to snoop.

### **SOCIAL MEDIA AND THE WORKPLACE: THE NLRB**

No overview of the tangled social media web would be complete without a discussion of the utterings and actions of that 1930s-era federal watchdog, the National Labor Relations Board (the NLRB). Congress created the NLRB following its enactment of the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy (NLRA 29 U.S.C. §§ 151-169). Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

Although dormant for a time, the NLRB was resuscitated as a crusader for employee rights under the Obama Administration through a variety of controversial rulings, including a number in the arena of social media. An employer that tried to punish a worker for use of Facebook was punished by the NLRB because her use of social media to attack her superiors was a form of protected "concerted activity," since other employees could use the forum to express their concerns about the company and managerial personnel. (Cavaliere, 2012). In other words, statements posted to an employee's Facebook page or similar social media can constitute protected activity when employees are discussing or trying to improve their terms or conditions of employment (NLRB Case No. 13-CA-046452, 2012). Employers must be careful when crafting social media policies to avoid stepping on the toes of their employees' Section 7 rights under the NLRA. For instance, if a company creates a social media policy that restricts negative statements by employees about the company on social media, the company must be sure the policy will not have a chilling effect on the employees.



A chilling effect occurs when employees suppress their speech due to fear of penalty. The National Labor Relations Board uses a two-step inquiry to determine if a policy provision would have a “chilling” effect: (1) whether the provision explicitly restricts Section 7 protected activities; or (2) whether the provision is ambiguous, in its application to Section 7 activity, and does not contain limiting language or context that would clarify to employees that the provision does not restrict Section 7 rights (335 NLRB 1318, 2001). In several instances, the NLRB has stated that a “savings clause” is a useful tool to prevent a broad policy from being a violation of the NLRA by expressly stating that the policy does not restrict protected activity. However, a savings clause is not always effective. If a company’s policy provision is too broad or ambiguous, a savings clause will not get the company out of hot water with the NLRB (NLRB Office of the General Counsel, 2012). For example, in *NLRB v. Lily Transportation Corporation*, the employer’s policy stated the following:

[E]mployees would be well advised to refrain from posting information or comments about [the company], the [company’s] clients, [the company’s] employees or employees’ work that have not been approved by [the company] on the internet . . . . [The company] will use every means available under the law to hold persons accountable for disparaging, negative, false or misleading information or comments involving [the company] or [the company’s] employees and associates on the internet . . . .

The *Lily* court agreed with the NLRB and found this language to be too broad insofar as the policy banned all negative comments about the company.

The Board has created turmoil by offering advice that contradicts the EEOC. While the EEOC has expressed a desire to see more companies adopt “civility codes” to cut down on the incidences of harassment, sexual and otherwise, the NLRB has expressed concerns that such codes might have a deleterious effect on employees’ rights to engage in concerted activities (Cavaliere, 2012). The Trump Administration has in many areas been disinclined to follow the lead of the Obama Administration, so it is quite likely that as one member of the five-person NLRB is replaced annually, the Board will eventually retreat from its recent activism.

## **SOCIAL MEDIA AND THE FIRST AMENDMENT**

The United States Constitution’s Bill of Rights only protects against federal governmental intrusions. The Fourteenth Amendment extends the important protections in the Bill of Rights from intrusion by state governments and their subdivisions. For the most part, private-sector employers need not be concerned about the so-called free speech rights of their employees, despite the recent controversy over silencing the speech and actions of certain players in the National Football League. The same is not true in the public sector, however, where employees do have some protections under the First Amendment. An article published by the American Bar Association Journal explores the twisted evolution of the balancing act required by public employers:

For many years, public employers did have all the power and public employees had no free speech rights. . . . The prevailing wisdom was that public

employees willingly relinquished their free speech rights when they accepted public employment on or off duty.

That view held sway until the late 1960s, when the Warren court changed free speech law for public employees with *Pickering v. Board of Education*. The high court held that Illinois public school teacher Marvin Pickering had a free speech right to send a letter to the editor of his local newspaper critical of the school board's allocation of money.

...  
 “Generally, when public employees vent on Facebook or another social media platform, they are not speaking pursuant to their official duties,” according to the U.S. Supreme Court. “They are speaking more like Marvin Pickering did when he wrote his letter. In other words, Facebook posts are the 21st-century equivalent of Pickering’s letter.” (Hudson, 2017)

But what should happen when a public employee vents frustration on Facebook and that venting goes viral or causes a problem at work?

“Public employees can and should be able to vent,” says Exeter, Rhode Island-based attorney J. Curtis Varone, who practices law in that state and Maine. “However, when the venting shows a racial animus—or gender, ethnicity, religion, disability, etc.—that is inconsistent with the ability to serve everyone in the community. They have identified themselves as having a bias that is inconsistent with what we expect from our public employees. This goes to both sides. Minority employees who harbor and espouse hate should be treated the same as white employees who harbor and espouse hate.”

Experts acknowledge that when a public worker’s speech creates actual disruptions on the job, bosses should have the ability to mete out discipline. (Hudson, Jr., 2017)

## **SOCIAL MEDIA AND THE WORKPLACE: SEXUAL HARASSMENT**

Sexual harassment in the workplace is a topic that has been in the headlines for quite a while, even spawning the “Me-Too Movement” that grew out of revelations of misconduct against Hollywood heavyweight Harvey Weinstein. Sexual harassment and assault played a starring role in the knock-down-drag-out battle confirmation hearing over Supreme Court Justice Brett Kavanaugh. Sexual harassment is defined by the EEOC as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment” (EEOC, 2002). So-called hostile environment harassment as a cause of action is not based on a specific anti-harassment statute, rather it was created by the courts and the EEOC and blessed by the Supreme Court in the case *Meritor Savings Bank v. Vinson*. The basis for the cause of action is the general prohibition against discrimination in employment “because of” race, color, religion, sex, and national origin (under Title VII of the Civil Rights Act of 1954), or because of being over the age of 40 (the Age Discrimination Act of 1967), or because of disability (under the Americans with Disabilities Act). Accordingly, harassment based on any of those characteristics may cause liability to an employer, not just for sexual harassment.

One form of harassment particularly suited to this discussion given the prolific use of cell phones in the workplace is so-called “textual harassment.” Textual harassment involves sending

offensive or inappropriate text messages. Sexual harassment delivered in the form of textual harassment in the workplace is turning into a growing liability for employers (Baldas, 2009). Although the U.S. Equal Employment Opportunity Commission (EEOC) says it has no statistics tracking the prevalence of textual harassment, it advises employers to treat it as it would any form of harassment—through clear anti-harassment policies and swift action. According to Dianna Johnston, assistant legal counsel for the EEOC, “Harassment is harassment, regardless of how it’s communicated and anything in the environment that makes the workplace hostile can contribute to liability” for the employer (Gurchiek, 2009). Employers must take this into consideration when drafting social media policies and private employers who have obtained consent should conduct random searches of company-issued devices to screen for possible online or textual harassment. As discussed above, however, such actions may create problems with the NLRB over chilling employee rights to engage in concerted activities.

The EEOC’s concern continues as reflected in a report issued in 2016 titled, “Select Task Force on the Study of Harassment in the Workplace.” The Report specifically addressed the rising significance of social media on harassment in the workplace:

An additional wrinkle for employers to consider, as they write and update anti-harassment policies, is the proliferation of employees' social media use. The Pew Research Center recently found that 65% of all adults - 90% of those 18-29 years olds, 77% of those 30-49 - use social media.[172] Safe to say, employers can expect a time when virtually the entirety of their workforce is using social media.

Arguably, the use of social media among employees in a workplace can be a net positive. As noted by a witness at the Commission's 2014 meeting on social media, social media use in the workplace can create a space for "less formal and more frequent communications." Via social media, employees can share information about themselves, learn about and understand better their colleagues, and engage each others' personal experiences through photos, comments, and the like.[173] If this leads to improved work relationships and collegiality, social media can benefit a workplace.

Unfortunately, social media can also foster toxic interactions. Nearly daily, news reports reflect that, for whatever reasons, many use social media to attack and harass others.[174] During the Commission meeting on social media, witnesses talked about social media as a possible means of workplace harassment.[175] For that reason, harassment should be in employers' minds as they draft social media policies and, conversely, social media issues should be in employers' minds as they draft anti-harassment policies. (EEOC, 2016)

## **BEST PRACTICES FOR EMPLOYERS**

Best practices for businesses can be gleaned from the various topics in this paper:

First and foremost, the Board of Directors must place controls on the information that is disseminated to the public to protect shareholders and themselves from situations such as Tesla. Knee-jerk runaway tweets by any members of the Board should be contractually disallowed with all social media being vetted prior to release. Punishments for infractions such as loss of stock options, suspension and, ultimately, termination along with liquidated damages should be initiated.

Second, the Board of Directors must always be mindful of its fiduciary duties to shareholders and be aware of the limitations of the business judgment rule.

Third, companies must disclose to the public any relationship with any endorsers of products on social media.

Fourth, employers should not ask for social media passwords of job applicants or employees.

Fifth, employers should resist the temptation to view Facebook or other social media prior to hiring an employee or making any adverse employment decisions. If they cannot resist the temptation, then they should not use that information in any way that would be considered an illegal hiring activity.

Sixth, employers should carefully review their social media policies to determine whether they need to be revised to minimize friction with the NLRB while still maintaining rules that are necessary for a courteous and lawful workplace:

- Make sure the policy is not “vague or ambiguous”. Carefully craft rules using examples of what is or is not allowed;
- Provide definitions of possible ambiguous terms;
- Frame language in a way that an employee understands he/she is still allowed to protest or criticize the employer on workplace issues; and
- Consider adding a “savings clause” which explicitly states that the rule is not intended to interfere with the employee’s protected concerted activity—and describe explicitly the concerted activity that is implicated by the rule but that is not intended to be prohibited.

Seventh, social media policies should contain clear statements against sexual harassment including textual harassment.

Eighth, public employers should be aware that their social media policies will likely be reviewed by courts through the lens of a balancing test between the interests of a citizen commenting upon a matter of public concern and the interests of the employer in promoting efficiency in the public services performed by its employees.

Ninth, harassment prevention training should be in keeping with EEOC proposals as follows:

- Championed by senior leaders;
- Repeated and reinforced regularly;
- Provided to employees at every level and location of the organization;
- Provided in all languages commonly used by employees;
- Tailored to the specific workplace and workforce;
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and
- Routinely evaluated by participants and revised as needed. (Mulvaney, 2017);

Companies must stay abreast of this quickly evolving area of the law. Patents are pending for processes and mechanisms that can help businesses identify large scale misuse of social media networks (Zarella, Jeffrey, 2019). Algorithms that pattern match for offensive keyword detection and prevent it from publishing on a social platform have been developed.

(Yadar and Manwatkar, 2015). In addition, some companies such as Facebook use machine learning, a form of artificial intelligence, to detect many kinds of fraud and abuse, including email spam, phishing scams, credit card fraud, and fake product reviews. (The Conversation, 2018).

## **CONCLUSION**

As should be abundantly clear from the foregoing recitation, social media use by employees of the company, whether members of the C-suite or not, is fraught with peril. Ignoring the potential pitfalls of social media is simply not an option. A well-crafted social media policy is called for, especially one that has been thoroughly vetted by legal counsel

The reality is that social media is popular, ubiquitous and is not going away. Common sense and fiduciary responsibility demand that the action steps outlined above must be taken to maintain the integrity of the corporate brand and reputation and to preserve company assets.

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