

Honors Thesis

Social Media's Impact on Retaliation in the Workplace

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1. Introduction

Social media has grown to permeate every facet of our lives. It has “fundamentally shifted how people discover, read, and share news, information and content.”¹ We can now see what people across the world are doing at this very instant – what they eat, listen to, and experience first hand. New lines of communication have opened up between and among people, groups, and even cultures that never existed before. The growing number of people who use social media makes this increased connectivity possible. For example, the use of social media among adults has increased from around ten percent of adults using social media in 2005 to around 75 percent in 2015.² Social media has truly taken over our communication with others, and created an increasingly connected world.

Although this increasing connectivity to our world and the people in it can seem overwhelming at times, it would be very hard to refute the claim that social media has made the world a better place. Social media has increased the speed and efficiency of human communication leading to a greater flow of ideas between people. This has prompted advancements, for example, in medicine, government, and culture. Overall, social media has made the world a better place; however, this cultural change has also presented new problems. Those problems include cyber bullying, social media addiction, and navigating the legal problems that come from this new framework of communication. We can reap the benefits of this new communication, but we must also face the new problems it presents.

¹ Morgan, Heather A., and Felicia A. Davis. "Social Media and Employment Law Summary of Key Cases and Legal Issues." *American Bar Association*, 2013. Accessed October 5, 2015.

² Chaffey, Dave. "Global Social Media Research Summary 2015." *Smart Insights*. October 13, 2015. Accessed October 13, 2015.

Social media has changed the way we interact and socialize. This is true not only for our social lives but for the workplace as well. Employees and employers now face different challenges that didn't exist ten years ago because social media has integrated itself so deeply into our lives. Should employees access their social media accounts during their work hours? Can a company request an employee's username and password? These are just two examples of new workplace related problems arising because of social media, and although they are compelling questions, my interest, and the focal point of this paper, is to examine the impact social media has had on employer retaliation resulting from an employee's misuse of social media.

Employer retaliation is important because of the dangers it creates in the workplace. Retaliation can be dangerous because it can often be an exaggerated reaction to the simplest of misunderstandings. If we perceive we are wronged then we want to retaliate for that wrong. Here is a simple example: a 5-year-old child discovers someone has stolen his toy on the playground, so he pinches the kid he believes stole his toy. Now the workplace is much more complicated than a playground, but the nature of the reaction remains the same. Retaliation is so dangerous because we assume it is an acceptable human reaction. Amy Gibson confirms this when she says, "[M]ost people believe that retaliation happens in the workplace and is a likely response to reports of unlawful conduct."³ The workplace doesn't operate like a playground, and natural reactions are not always allowed. There are rules employers must follow, and these rules complicate an employer's job because they cannot act on impulse alone. This complication increases when more opportunities for retaliation are present; for example, the ability to easily

³ Gibson, Amy. "Retaliation Red Flags: What Can Help You or Hurt You in Preventing or Proving Retaliation?" 2015.

monitor an employee's social media account. Retaliation must be analyzed and tempered in the workplace.

2. What an Employee Can and Cannot Say on Social Media

Employees may think that a private social media account enables them to say anything they want, but this is not the case. There are limits to what an employee can publicize on social media. Laws are developing to address those limits, and they apply to every aspect of social media use in the workplace; however, I will be focusing solely on what employee's broadcast on their private accounts and more specifically, what they say about their job. This focus presents a framework to introduce the relationship between retaliation and social media.

The National Labor Relations Act (NLRA) sets forth the rules governing what employees are allowed to post on their private social media accounts. The NLRA gives employees the right to act together to address conditions at work, which extends to conversations that can be conducted on social media.⁴ This may sound vague, but since the NLRA has been enacted, the National Labor Relations Board (in charge of enforcing the NLRA) has received multiple cases that help define what employees can and cannot say on social media. In those cases the NLRB has determined whether the employer acted unlawfully by reprimanding an employee for their social media activity or whether the "communications were not protected and so disciplinary actions did not violate the [NLRA]."⁵ The NLRB has provided a clearer picture of what is

⁴ "The NLRB and Social Media." Nlrb.gov. <https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media>.

⁵ Ibid.

protected and what isn't by their ruling on those cases. Social media comments and posts are either protected speech or unprotected speech.

The defining factor of what an employee can say on social media is whether or not it is a "concerted activity." A concerted activity has been defined as "the discussion of terms and conditions of employment with fellow employees."⁶ If an employee engages in this concerted activity, then they are free to comment and post as they please because it is protected by the NLRA. Concerted activity can be tough to define, but an easier way of looking at it is what happens after the initial post.⁷ For example, if an employee posts on Facebook that she is unhappy with her workplace, and other employees comment on or share the post, which turns into a "what steps can we take to fix it" situation, then that would be considered protected by the NLRA.⁸ In this example of a concerted activity, it is an attitude shared by other employees. Judd Lees, of the National Law Review, summarizes the protection: "If the posting is couched in terms of general employee concerns and, especially if those concerns are met with social media responses from fellow employees, chances are good that the activity may be protected under the NLRA, no matter how petty or coarse."⁹ A concerted activity is protected speech and employers cannot retaliate because it is protected by the NLRA.

There are, however, instances when an employee posts a comment on social media other employees do not share. This kind of activity is not protected under the NLRA and could

⁶ "The NLRB and Social Media."

⁷ Mooty, G. (n.d.). A Legal Guide to the Use of Social Media in the Workplace. *Minnesota Department of Employment and Economic Development*. Retrieved September 15, 2015, from http://www.gpmlaw.com/portalresource/A_Legal_Guide_to_the_Use_of_Social_Media_in_the_Workplace

⁸ Ibid.

⁹ Lees, Judd. "National Labor Relations Board Issues Guidelines for Social Media Policies." *National Law Review*.com. February 5, 2012. Accessed September 30, 2015. <http://www.natlawreview.com/article/national-labor-relations-board-issues-guidelines-social-media-policies>.

warrant an adverse employment action because of the post. The NLRB's website makes this clear when it says "An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees."¹⁰ Individualized complaints not shared by other employees are unprotected by the NLRA; therefore, an employee could legally be punished because of their comments on their private social media profile.

Although the NLRB has clarified what is considered protected and unprotected speech when it comes to employees posting on social media, there is still no clear cut line to determine what is protected and what is not. An employee can express his general workplace concerns on social media if it is a concern shared by other employees and not face an adverse employment decision. On the other hand, individualized complaints are not protected, allowing employers to protect the best interests of the business by disciplining those employees who make those comments. However, it still seems hard to distinguish between concerted activity (protected speech) and the unprotected speech. For employers it is a good idea to create a clear and concise plan on how to handle an employee's posts on social media pertaining to his workplace.

3. Actions Employers Can Take

Employers assume many responsibilities, and they want to make sure the business runs smoothly. To do this they must oversee their employees. Managing people is difficult, and the increased use of social media has made it even more challenging. An employer can now see

¹⁰ "The NLRB and Social Media."

what his employees publicize all day by looking at a feed on a social media website. The employer doesn't have to monitor social media constantly, however, because he will likely hear about a potential problem and can then go back and check the site to see what was said. A comment or post can easily anger an employer because he could think it has the potential to hurt the public perception of the business, or possibly create dissension among the employees. As an employer, it is a natural and correct reaction to respond to something an employee is doing that could hurt the business; however, there are some responses that are legal and others that are illegal.

The National Labor Relations Board has set forth the possible steps that employers can take to punish employees who post something on social media the employer does not like. Ultimately, the employer should have a policy that details how to handle these situations. The NLRB limits the scope of employer's policies when it states that an "employer policy should not be so sweeping that they prohibit the kinds of activity protected by federal labor law."¹¹ In essence, the NLRB demands the employer's policy is narrowly tailored and only applies to unprotected speech. The idea of having a plan to handle these situations takes the decision making out of the employer's hands. A good plan protects the employer from illegal actions, and the employer can simply follow the plan and enforce the regulations. A good policy cannot provide the answer to every situation, but an understanding of the law and an implementation of a strong policy provide employers with the best opportunity to take the correct, legal actions.

Employers can take these steps to act in a legal manner when handling an employee's use of social media:

1. Understand the problem.

¹¹ "The NLRB and Social Media."

- Employers should understand, or at least attempt to understand their employees concerns. Is this a problem that is shared by others, or is it just an individualized complaint?
2. Understand the law.
 - The law shows how to handle the problem, and employers must understand the law before acting presumptuously.
 3. Train employees.
 - “Training employees is not only the key to managing social media behavior, but effective training reduces an organization’s exposure to legal actions.”¹²
 4. Develop a strategy.
 - A strategy enables employers to enforce a policy step by step to avoid acting illegally.

If employers follow these steps, then they give themselves the best opportunity to make sure they do not act illegally. Yet many employers do not follow these steps because they do not understand the seriousness of handling their employee’s social media use. Furthermore, even with these steps in place, an employer must remember to follow them and make good judgments. It is still a challenging task to make the correct judgments; consequently, it is still very common for an employer to punish an employee beyond the scope of NLRB rules. This overstepping of boundaries is an illegal action and is called retaliation.

5. What is Retaliation?

¹² Schultz, M. D., Koehler, J. W., Philippe, T. W., & Coronel, R. S. (2015). Managing the effects of social media in organizations. *S.A.M. Advanced Management Journal*, 80(2), 42-47,3.

Retaliation is synonymous with revenge. If someone harms an individual, then that individual retaliates by harming the person that harmed him. Retaliation in the workplace, however, advances a more elaborate definition. "Retaliation is defined as an adverse action taken by an employer against an employee as a result of the employee's act of seeking remedy from unlawful employment practices initially established in the Title VII of the Civil Rights Act of 1964."¹³ This is a wordy definition, but Congress intended for the retaliation provision of the Civil Rights Act to protect employees from adverse consequences that "may have resulted from reporting employer violations."¹⁴ Employers must assume the responsibility to make sure that they are not retaliating against an employee. If the employer does retaliate, then the employee can bring the matter to court.

If the employee believes he has been retaliated against, then the employee must first establish the prima facie case for unlawful retaliation. To do this the employee must prove that¹⁵

1. He/She engaged in a protected act.
 - In terms of social media, this would be a concerted activity, as I said earlier.
2. He/She suffered an adverse employment decision.
 - This could be anything from a demotion to a firing.
3. There was a causal link between the protected activity and the adverse employment decision.
 - In short, the employee cannot be fired for some unrelated reason and then claim that he was fired because of retaliation for another action.

The employee must prove the prima facie case because the court cannot act on a case until the

¹³ Miles, Angela, Marka Fleming, and Arlise P. McKinney. 2010. "Retaliation: Legal Ramifications and Practical Implications of Discriminatory Acts in the Workplace." *Equality, Diversity and Inclusion: An International Journal* 29 (7): 694-710.

¹⁴ Ibid.

¹⁵ Ibid.

employee proves that an illegal action did occur. Once the prima facie case has been proven the burden shifts to the employer. The employer must prove that they did not retaliate by refuting any of the claims that are present in the employee's prima facie case. For example, the employer could claim the speech was unprotected, or there was no causal connection between the punishment and the protected activity. Ultimately, a retaliation case hinges on the fact that the employee was engaging in protected speech and the employer acted out of line by punishing them. If the employer can prove that this was not the case, then there was no illegal action from the employer.

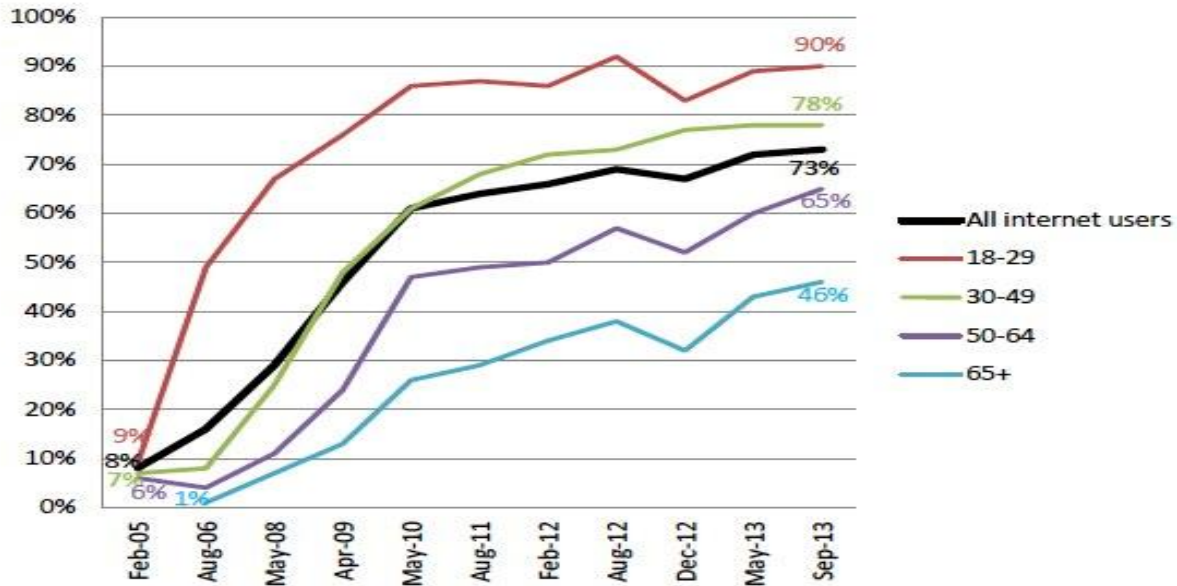
6. Social Media and Retaliation

The way social media use has risen in recent years has changed how we connect to other people in dramatic ways. Landlines are becoming obsolete and people from all generations are quickly adopting social media as a new form of communication. Social media has changed our lives, but when exactly did it start to become adopted? Figure 1 from the Pew Research Center

displays data showing when social media started to spike.

Social networking site use by age group, 2005-2013

% of internet users in each age group who use social networking sites, over time



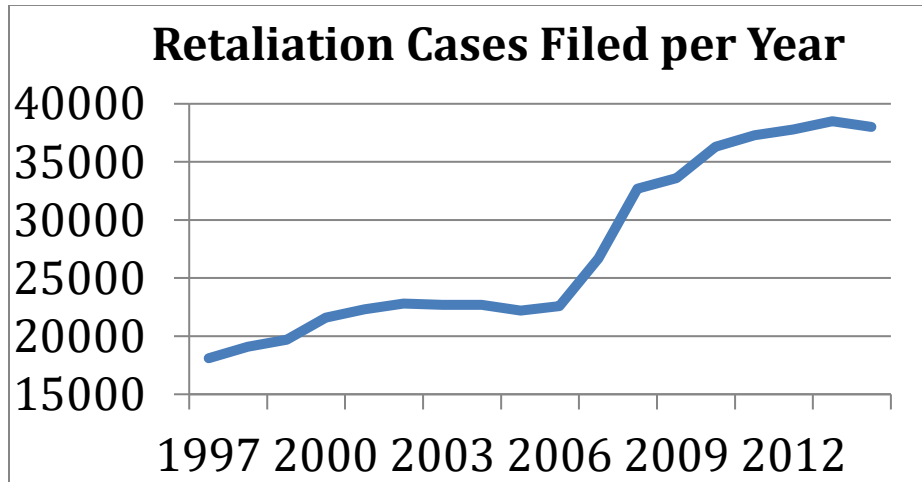
Source: Latest data from Pew Research Center's Internet Project Library Survey, July 18 – September 30, 2013. N=5,112 internet users ages 18+. Interviews were conducted in English and Spanish and on landline and cell phones. The margin of error for results based on internet users is +/- 1.6 percentage points.

[Figure 1]

From the graph, the number of social media users began to increase dramatically around 2005 and continued to rise over the past 10 years. The graph shows that of those that use the Internet, 73 percent use social media. Yet, the graph reveals the average of people we consider working age to be much higher, somewhere around 80 percent. This graph demonstrates there has been an explosion in numbers of social media users in the last 10 years, and the highest percentage of users are those of employment age. There is no way to understate the influence social media has had on our society, and this impact has carried into the workplace as well.

Retaliation claims have also risen in the past 10 years. From 2000 to 2010 alone the “Retaliation complaints in the workplace have increased 71%.”¹⁶ Figure 2¹⁷ shows statistics from The Equal Employment Opportunity Commission (EEOC) that confirms this increase in retaliation.

[Figure 2]



There is no debate on whether or not the increase in retaliation has occurred. The real question is what caused this rise in retaliation?

Retaliation cases have risen in number for many different reasons, but my belief is that social media has been a factor in that rise. A comparison of the two graphs above shows there is a correlation between the rise in social media and the rise in retaliation claims in the workplace. Furthermore, the two must be causally related on some level because social media has created new retaliation claims in the workplace. As I showed earlier, the NLRB has started to shape what employers can and cannot do because of the growing number of “retaliation as a result of

¹⁶ Miles, Angela, Marka Fleming, and Arlise P. McKinney. 2010. "Retaliation: Legal Ramifications and Practical Implications of Discriminatory Acts in the Workplace." *Equality, Diversity and Inclusion: An International Journal* 29 (7): 694-710.

¹⁷ "Charge Statistics 1997 through 2014." Eeoc.gov. <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

social media” cases. The two are undoubtedly causally related on a base level. The question then becomes a matter of scope. What is the scope of the causal relationship between social media’s increased adoption and retaliation claims in the workplace? I could not find any data to prove the scope of the causal link between social media and retaliation claims; however, I believe we will continue to see a rise in the number of retaliation claims and social media will continue to be a cause because of the public nature of social media and the tough position employers are in as they try to decipher what is protected and unprotected speech.

Several other factors could have contributed to the rise in retaliation. First, the Supreme Court ruled on a case in 2006 that created a broader definition of retaliation than other courts had used.¹⁸ This case was Burlington Northern and Santa Fe Railway Co. v. White.¹⁹ The Supreme Court ruled an employee who received any materially adverse employment action (firing, demotion, reduced vacation days, etc.) could bring a retaliation claim.²⁰ This broadened the scope of retaliation and created the opportunity for more claims, which was certainly a factor in the increased retaliation claims. Yet, the retaliation still needed to be based on an employee action. In other words, this doesn’t help define why the retaliation claims were brought in the first place. The employee could have easily been retaliated against because of something he said on social media or something he said in person. The Supreme Court ruling no doubt aided in the rise in retaliation claims, but it does not help answer the question of the origin of these claims.

Another factor possibly contributing to the rise in retaliation claims is the economic downturn of 2008. The troubled economy forced many employers to demote, lay-off, or fire

¹⁸ Tuna, Cari. 2009. "Theory & Practice: Employer Retaliation Claims Rise --- EEOC Says 23% More such Charges were Filed by Workers in Fiscal 2008." *Wall Street Journal*, Oct 05.

<http://search.proquest.com.argo.library.okstate.edu/docview/399143596?accountid=4117>.

¹⁹ See Burlington Northern and Santa Fe (BNSF) Railway Co. v. White, 548 U.S. 53 (2006).

²⁰ *Ibid*.

workers. Those workers could have easily filed a retaliation claim in an effort to recover some of the damages they received from the adverse employment decision.²¹ The impact the recession had on retaliation is furthered when employment lawyers say, “The trend [for retaliation] is accelerating in the recession, particularly among workers who have been laid off.”²²

Undoubtedly, the recession created more opportunities for employees to make retaliation claims. However, Figure 2 (data on the rise in retaliation) shows retaliation claims rising before the recession as well. Though the economic recession of 2008 may well be a cause of the increase in retaliation; it is only one factor and cannot explain the overall rise in retaliation.

Yes, social media has had some impact on the number of retaliation claims, but the link between the two is more important when you consider the implications it has for the employer. As I said earlier, the employer is in a very tough position. They must try to protect the good will of the business from the public nature of social media all while trying to determine what is protected and unprotected speech. The widespread adoption of social media has created yet another potential problem for the employer.

The employer would not be in a tough position if the laws governing social media were black and white, but those laws are not black and white. Yet, one cannot blame the lawmakers because the laws have to be vague. Social media is continually changing and the way people interact on social media is continually changing as well. Furthermore, an employee can post whatever he wants on social media and there is no possible way for the law to proactively

²¹ Martucci, William, and Brian Baggott. "Reducing the Risk of Post-Employment Retaliation Claims." Human Resource Executive Online. June 6, 2012. <http://www.hreonline.com/HRE/view/story.jhtml?id=533348566>.

²² Tuna, Cari. 2009. "Theory & Practice: Employer Retaliation Claims Rise --- EEOC Says 23% More such Charges were Filed by Workers in Fiscal 2008." *Wall Street Journal*, Oct 05. <http://search.proquest.com.argo.library.okstate.edu/docview/399143596?accountid=4117>.

determine the protected and unprotected speech. The laws governing social media and retaliation are vague, but they must be vague in order to govern all possible situations.

The necessary vagueness of social media laws has created a difficult problem for employers because “employers struggle creating social media policies that do not impinge upon an employees’ protected activities.”²³ The employer has to walk the fine line of creating the best policy for the business while still ensuring they are not inhibiting the rights of their employees. Although it is hard to determine the fine line, the law is becoming clearer as more cases come before the courts. The Cornell HR Review took a look at this developing area of the law in an effort to figure out the correct actions an employer should take. The Cornell HR Review determined:

The AGC’s latest report contains the clearest guidance available to employers on permissible social media policies by requiring that an employer’s policy include the following elements: a clearly articulated need for the employer’s social media policy; explanation that employees are free to express their own views and opinions on social media but may be held responsible for those statements; concise and detailed definition of the types of information an employee is not permitted to disclose (i.e. confidential information or trade secrets); definition with specific examples of communication that will be prohibited under the company’s policy of anti-discrimination, harassment or bullying; and a clearly worded statement that the policy will not be applied in a way that restricts an employee’s use of social media to engage in protected activities.²⁴

The employer must follow these rules as closely as they can to avoid the possibility of acting illegally and retaliating for a protected act. In addition to following these rules, I have created three more steps that I believe employers should follow to give themselves the best opportunity to avoid retaliation:

²³ Chris, Schlag. "The NLRB's Social Media Guide a Lose-Lose." *Cornell HR Review*, 2013. Accessed November 7, 2015. <http://www.cornellhrreview.org/the-nlrbs-social-media-guidelines-a-lose-lose-why-the-nlrbs-stance-on-social-media-fails-to-fully-address-employers-concerns-and-dilutes-employee-protections/>.

²⁴ Chris, Schlag. "The NLRB's Social Media Guide a Lose-Lose." *Cornell HR Review*, 2013. Accessed November 7, 2015. <http://www.cornellhrreview.org/the-nlrbs-social-media-guidelines-a-lose-lose-why-the-nlrbs-stance-on-social-media-fails-to-fully-address-employers-concerns-and-dilutes-employee-protections/>.

1. Continue to educate themselves and their employees.
 - The laws will continue to change, and employees must keep up with the changes and educate their employees as well.
2. Be willing to change their policy.
 - If the laws change, the employer must change their policy in order to avoid retaliation. It could be very easy to think that a small change in the law isn't significant enough to merit a policy change, but this naive view only creates more potential problems for the employer.
3. Provide alternative means of voicing problems.
 - Employers should strive to create a working environment where employees feel comfortable taking any workplace concerns to their employer. It is impossible to eliminate the threat of employees venting on social media; however, it can be limited by creating a welcoming and trusting workplace environment.

Ultimately, social media will always present a problem for employers; however, these steps give employers the best opportunity to avoid the trouble that social media can present in the workplace.

Social media has changed our world and is still changing the way we interact with other people. The workplace is not immune to this change – the impact on retaliation in the workplace is just one example. Social media has led to an increase in the retaliation rates, and, more importantly, put employers in a difficult situation. Employers must be proactive and recognize the tough position they are in. Yes, the laws are tough to follow, but I have provided steps employers can take to minimize their risk. Social media will continue to change the way we interact with people, view content, and express concerns. The workplace must continually change to meet the demands of our changing world.