Use of Social Media and Privacy Concerns

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SOCIAL NETWORKING IN THE WORKPLACE

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I. Use of Social Media and Privacy Concerns

One must also note that all potential claims of invasion of privacy necessarily rely on a showing by the claimant that he or she possesses a reasonable expectation of privacy. *See City of Ontario v. Quon*, 560 U.S. ____, 130 S.Ct. 2619 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.") (slip op. at 11); *compare with U.S. v. Jones*, 565 U.S. ____, 132 S.Ct. 945 (2012) ("This Court has to date not deviated from the understanding that mere visual observation does not constitute a search.") ("It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.") (slip op. at 11); *see also California v. Greenwood*, 486 U.S. 35, 41 (U.S. Supreme Court 1988) ("Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeal."). Still, one should expect that disgruntled applicants will examine the Fourth Amendment to the U.S. Constitution and possibly assert that employer investigations into their private lives may constitute an illegal search and invasively intrudes on their right to free space. But, without a reasonable expectation of privacy, as possibly evidenced by the self-promotional aspects of social media usage, it is far from clear that any non-statutory privacy claim will carry the day.

A. Social Media Profiles and Anti-Discrimination Laws

Employers may not use social media profile data or any other information in hiring decisions in a manner that violates anti-discrimination laws, such as federal laws prohibiting discriminatory hiring decisions based on the race, color, religion, sex, national origin, or disability of the applicant. See, Title VII of the Civil Rights Act of 1964, 42 USC §§2000e to 2000e-17; Americans with Disabilities Act, 42 USC §§12111-12117. Federal law also bars discriminatory hiring decisions based on applicants' ages of 40 or greater. Age Discrimination in Employment Act, 29 USC §§621-33a. Illinois law expands even farther in barring employers from discriminating against applicants because of their race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge

from military service in connection with employment, real estate transactions, access to financial credit and the availability of public accommodations. 775 ILCS 5/1-102(A). As of January 1, 2010, the cited Illinois statutory provision will also bar discrimination against applicants due to their order of protection status. (Public Act 096-0447 amending 775 ILCS 5/1-102(A)). The amending language defines "order of protection status" as meaning "a person's status as being a person protected under an order of protection issued pursuant to the Illinois Domestic Violence Act of 1986 or an order of protection issued by a court of another state." (Public Act 096-0447 amending 775 ILCS 5/1-103 so as to insert new statutory provision (K-5) effective January 1, 2010 and again specifically inserting "order of protection status" as within category of unlawful discrimination as designated in Public Act 096-0447 amending 775 ILCS 5/1-103(Q)).

What this quick statutory review possibly indicates is that while privacy interests of prospective applicants in their social media site data may currently be on the thin or not fully developed side, employers should monitor regulatory advances undertaken by state and federal Departments of Labor, among others, as well as standards implemented in the countries or jurisdictions outside of the United States from whom employers may recruit prospective employees. In addition, however, should employers consider using social media site data to screen applicants, care should be taken to avoid using any social media site data in an unlawful discriminatory manner, or as the sole basis for a hiring decision.

One may currently analogize to employers who check the criminal records of applicants. While such practices are not illegal, to the extent that any hiring or employment decisions are consistent with "business necessity" and do not negatively impact a category of applicants in a disparate manner, other concerns may exist. For example, 40 or more states have prohibited the use of arrest records for use in employment decision making processes. Steven F. Befort, "Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place," 14 Hofstra Lab. L. J. 365, 404-05 (1997) (rationalizing that "conviction records are more reliable… because the criminal justice system has established that misconduct actually occurred"). As a result, a majority of states restrict or prohibit the use of arrest records by employers over concerns that the lack of established guilt will be used in a potentially discriminatory manner. Rochelle B. Ecker, Comment, To Catch a Thief: The Private Employer's Guide to Getting and Keeping an Honest Employee, 63 U.N.K.C.L. Rev. 251, 255-56 (1994).

In a somewhat similar fashion, unless otherwise authorized by law, under Illinois law, it is a civil rights violation for any employer, employment agency or labor organization to inquire into or use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded under Section 5 of the Criminal Identification Act, as grounds to not hire or segregate an applicant with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privilege or

conditions of employment. 775 ILCS 5/2-103(A). The cited section exempts state agencies, local governmental units or school districts, and private organizations from requesting or utilizing sealed felony conviction information obtained from the Department of State Police under Section 3 of the Criminal Identification Act or under other federal or state laws or regulations that compel the performance of criminal background checks in evaluating the character or qualifications of prospective employees or employees. *Id.* Moreover, one must also note that the cited statutory prohibition is not to be construed as barring an employer, employment agency or labor organization from obtaining or using other information which indicates that an applicant or employee actually engaged in the conduct for which he or she was arrested. 775 ILCS 5/2-103(B).

An additional pre-employment screening concern may arise with the Fair Credit Reporting Act. The FCRA prohibits employers from procuring credit reports on job applicants without previously receiving the consent of the individual applicant. 15 USC §§1681-1681t. For example, the Fair Credit Reporting Act compels an employer to "clearly and accurately" inform applicants in writing that they will be the subject of a consumer credit report that a consumer reporting agency will prepare. 15 USC §1681d. Moreover, if the credit report is used in making an unfavorable hiring decision, the applicant must receive notice of such use of the credit report. 15 USC §1681m. In addition, employers may not base their hiring decision solely on the results detailed in the credit report and may incur liability if their decisions based on such reports impact a protected class in a disparate manner. *Id.* See also 11 USC §525(b) (Bankruptcy Act's prohibition against private employers terminating an employee solely because he is a debtor or because he is bankrupt).

B. Do Common Law Privacy Claims Apply?

Still, the Illinois Supreme Court explained how the common law tort of intrusion upon a person's seclusion may lead to a former employer sustaining liability in tort for compensatory and punitive damages. In *Lawler v. North American Corp. of Illinois*, 2012 IL 112530 (Ill. 2012), the former employer hired detectives who impersonated as the plaintiff in order to obtain her phone records. The Illinois Supreme Court cited and quoted from the Restatement (Second) of Torts as follows:

> Section 625B of the Restatement (Second) of Torts provides: 'One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.' Restatement (Second) of Torts §652B (1977). For purposes of illustration relevant to the facts in this case, comment b to Section 652B of the Restatement provides, in pertinent part:

> b. The invasion may be … by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the *** information outlined. Restatement (Second) of Torts §652B.

Lawlor, 2012 IL 112530 at ¶33. The *Lawlor* court affirmed plaintiff's compensatory damage award of $65,000, but further reduced the jury award of $1.75 million in punitive damages to $65,000. *Id.* at ¶¶1, 76.

C. Illinois Statutory Protections

Illinois enacted the Right of Publicity Act in 1999. 765 ILCS 1075/1. The Right of Publicity Act recognizes an individual's "right to control and to choose whether and how to use [that] individual's identity for commercial purposes …" 765 ILCS 1075/10. The Act defines "Identity" to include personal characteristics that include but are "not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice." 765 ILCS 1075/5 (Definition of "Identity"). The Act covers live and deceased persons, whether or not their identity was "used for a commercial purpose during the individual's lifetime." 765 ILCS 1075/5 (definition of "Individual"). The Act broadly defines "Name" to mean "the actual name or other name by which an individual is known that is intended to identify that individual." 765 ILCS 1075/5 (definition of "Name"). The Act also characterizes a wide range of media and materials as part of a protected "Work of Fine Art." 765 ILCS 1075/5 (definition of "Work of Fine Art.").

Not surprisingly, the Act broadly defines "Commercial Purpose" to include publically holding out or using a person's "Identity" for fundraising purposes among the covered activities, in addition to offering for sale or selling products, merchandize, goods, and services, and advertising or promoting such offers or sales. 765 ILCS 1075/5 (definition of "Commercial Purpose").

The Act explains that the individual's right of publicity is freely transferable by a "written transfer," as well as by way of a will or intestate succession. 765 ILCS 1075/15. The individual, or his or her authorized representative, or written transferee, or person who possesses such rights after the individual's death may pursue remedies that the Act provides. 765 ILCS 1075/20(a). A deceased individual's rights terminate when there is no written transferee and no living spouse, parents, children, or grandchildren. 765 ILCS 1075/25.

The result is that one may not use an individual's identity for commercial purposes without having the written consent from the appropriate persons or their

authorized representatives. 765 ILCS 1075/30(a). For an individual who dies after the January 1, 1999 effective date of the Act, that identity may not be used for 50 years after the date of death in the absence of written consent. 765 ILCS 107/30(b).

The Act does not apply to the use of an individual's identity in a work of fine art, or for non-commercial news purposes, or when identifying the individual as the author of a "work or program or the performer in a particular performance." 765 ILCS 1075/35(b)(1)-(3). Promotional materials, ads, or commercial announcements related to such uses also fall outside the scope of the Act. 765 ILCS 1075/35(b)(4).

Special circumstances and conditions apply to professional photographers which allow them to use an individual's identity, with "photographs, videotapes, and images…," "to exhibit in or about the professional photographer's place of business or portfolio, specimens of the professional photographer's work, unless the exhibition is continued by the professional photographer after written notice objecting to the exhibition has been given by the individual portrayed." 765 ILCS 1075/35(b)(5).

A successful plaintiff who establishes a violation of the Act may recover the greater dollar sum of:

> "(1) actual damages, profits derived from the unauthorized use, or both; or
>
> (2) $1,000."

765 ILCS 1075/40(a)(1),(2). Punitive damages are available to be awarded against a person who willfully violates the limitations the Act imposes on the use of an individual's identity. 765 ILCS 1075/40(b). A successful plaintiff may also obtain injunctive relief against a violator, and recover attorney's fees and costs. 765 ILCS 1075/50; 765 ILCS 1075/55.

The plaintiff bears the burden of proving damages or gross revenues associated with the unauthorized use. 765 ILCS 1075/45(a). Defendants are "required to prove properly deductible expenses." 765 ILCS 1075/45(b). The Act supplements, and does not replace, any common law rights an individual may also possess. 765 ILCS 1075/60.

Toney v. L'Oreal USA, Inc., 406 F.3d 905, 910 (7th Cir. 2005).

The court discussed the following analysis in response to a plaintiff's claim that her photograph was used to advertise a hair product that Johnson Products Company marketed. Plaintiff claimed that she consented to a limited time use of her photograph, but not the later use of her photograph by a successor company which she claims was done without her permission. Plaintiff sued and claimed that the successor company had violated her right of publicity. The trial court had

dismissed her claim upon finding that federal copyright law preempted her cause of action. The U.S. Court of Appeals reversed.

> "Clearly the defendants used Toney's likeness without her consent for their commercial advantage. The fact that the photograph itself could be copyrighted, and that defendants own the copyright to the photograph that was used, is irrelevant to the IRPA claim. The basis of a right of publicity claim concerns the message – whether the plaintiff endorses, or appears to endorse the product in question. One can imagine many scenarios where the use of a photograph without consent, in apparent endorsement of any number of products, could cause great harm to the person photographed. The fact that Toney consented to the use of her photograph originally does not change this analysis. The defendants did not have her consent to continue to use the photograph, and therefore, they stripped Toney of her right to control the commercial value of her identity."

Brown v. Acmi Pop Div., 375 Ill.App.3d 276, 873 N.E.2d 954, 962 – 63 (1st Dist. 2007).

The Illinois Appellate Court later answered two certified questions regarding the extent of protections provided by the Illinois Right of Publicity Act. In sum, the Appellate Court found that the trial court had properly denied a motion to dismiss the plaintiffs' causes of action that relied on the Illinois Right of Publicity Act. The court also found that the U.S. Copyright Act does not preempt Illinois publicity and privacy claims.

> "In light of the vast difference of opinion regarding the interpretation of the definition of what Corbis sells and the legal effect of such sales, we cannot say that the facts are undisputed that Corbis's display of the photos of James Brown on its Web site did not in some way constitute an improper commercial use under either the Illinois common law or the Publicity Act. We therefore cannot conclude that the trial court erred in denying Corbis's motion to dismiss.
>
> Brown argues that the images of James Brown advertised for sale on Corbis's website do, in fact, constitute fixed work on the Internet in that the "licenses" result in a tangible photograph to the end-user. Brown distinguishes *Laws* [*v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1136 (9th Cir. 2006], noting that there, the plaintiff had contractually released control and copyright of her recording to Sony. By contrast, Brown never consented to any sale of his photographs and never possessed control of the copyright interest to release.

> Under the circumstances, where it is possible that the photos as displayed on Corbis's Internet Web page can be interpreted as tangible, the Publicity Act as applied here would not preempt copyrights. As such, we answer the second question certified to this court in the negative."

Trannel v. Prairie Ridge Media, Inc., 2013 IL App (2d) 120725 at ¶¶25, 26, 987 N.E.2d 923, 931 (2nd Dist. 2013).

The Illinois Appellate Court held that one use of photograph of plaintiff was for a "news" purpose and therefore was not covered by the Illinois Right to Publicity Act. In contrast, the defendant's use of the same photograph for a second purpose, specifically as a cover page of a media kit, did violate the Illinois Right to Publicity Act.

> "Contrary to defendant's argument, we believe that the two publications of the subject photograph were for entirely different purposes, one covered by the Act, one not. [....] In this respect, 'news' is broader than reporting on public affairs, that is, politics and public policy. The subject photograph appeared in the autumn 2009 issue of the magazine in connection with the announcement of the garden-contest winners. Reporting who won the contest was reporting a recent event and new information. Thus, the use of the subject photograph to accompany the article was for the purpose of 'news' and was exempted from the Act. Indeed, such types of events are regularly reported on the local nightly news broadcasts.
>
> On the other hand, as we demonstrated above, the use of the subject photograph on the cover of the media kit was for commercial purposes, as defined by the Act. Consequently, defendant needed plaintiff's written consent to use the subject photograph on the media kit. Defendant contends that such consent can be found in the rules for the garden contest and in the emails plaintiff exchanged with members of defendant's staff. Nowhere in the rules is there any language that would advise a contest entrant that, by entering the contest, he or she agreed to the unlimited use of his or her likeness for commercial purposes. Nor do the emails establish such consent. Plaintiff's email served as her entry form. Defendant advised plaintiff by email that she was a finalist and would be contacted by Pendergrast. This email mentioned the photographer but did not reference any uses to be made of the photographs. The email in which defendant advised plaintiff that she was a winner contained the information that the autumn issue of the magazine was 'chock-full' of photos and details about the gardens. That email made no mention of the subject photograph or using it for purposes other than in connection with the article announcing the winners. Accordingly, we conclude that

use of the subject photograph on the cover of the media kit without plaintiff's written consent violated section 30 of the Act."