

Employer Liability for Improper Computer and Internet Use by Employees

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Abstract _ Organizations also use social media to engage employees and foster productivity. This use goes beyond new technological equipment and improved communications. The advantages of the use of technology in the workplace have also come with risks to businesses. The risks involved include the leakage of private company information by employees, the use of work facilities for personal undertakings, and the inappropriate use of computer and Internet by employees. This use has augmented the potential for unethical and illegal practices by employees. Technology has also made it simple to engage in unethical activities such as the theft of private information about other individuals and downloading inappropriate content from the Internet. These problems are far reaching and businesses have developed ethics and training programs for its employees to assist in reducing the occurrence of unethical activities.¹

This paper discusses the influence of computer technology and the Internet in the workplace and provides a context of Internet defamation law. In addition, the paper covers the doctrine of respondeat superior and provides an understanding of the doctrine, the application of the doctrine to defamation as well as negligent retention of employees.

Index Terms _ Employer, Employment, Internet, Legal, Liability, Negligent, Respondeat doctrine, Security information.



1. BACKGROUND

1.1 Influence of computer technology and the Internet in the workplace

The use of computers and the Internet in the workplace has become more prevalent in the past decade. Current advances in information technology and the proliferation of the Internet have had enormous effects on both employers and employees. This has affected the way businesses conduct their activities. The downside of the increased use of the Internet and computers in the workplace is the need to constantly keep up to date with the changing technologies. Businesses must constantly react to changes in technology in order to remain competitive. Moreover, an important aspect of the use of computers and the Internet in the workplace is managing the ethics that regulate the use of technology. Thus, technology has become an integral part of many organizations such that organizational culture and employee skills are redefined by the changes in technology.²

In addition, the use of computers and the Internet in the workplace has occasioned positive results for both employers and the employees. The largest impact of computers and the Internet on the workplace is improved connectivity. Employees enjoy greater flexibility associated with the use of computer technology while employers benefit from increased productivity. This shift increases the power of employers as it allows them to monitor the activities of its employees. On the other hand, employees are empowered as their

communications reach is increased. Constant Internet access means that employees are always in constant contact with the workplace. Therefore, the ability to communicate electronically has greatly reduced face-to-face communications in the workplace.

Also, the dual effect of the use of computers and the Internet in the workplace raises ethical and legal issues. The definition of unethical has become more unclear with the use of computers and the Internet. Some traditional ethical notions have been rendered obsolete with the use of technology.³

The use of the Internet has eroded the boundary between non-work time and work time. Prevalent issues that arise include employee use work time to engage in personal and non-work related communications. Employees often use social media for personal communications but sometimes they include information and comments related to work. These communications include unfavorable comments, which contravene company policies or ethics and result in termination of the involved employees or litigation. Ethical issues that may arise due to the use of computers and the Internet include employee privacy concerns.⁴

Privacy issues include the appropriateness of employers monitoring the use of the Internet and emails by its employees. In order to reduce the risks associated with the use of technology in the workplace, employers adopt measures to monitor the activities of employees. These activities

significantly affect employer-employee relationships. Privacy concerns are so rife in the current workplace context such that laws have been proposed to deal with privacy. Additionally, there are concerns with customer privacy, copyright violations, intellectual property rights education and telecommuting. Employee activities can also affect the reputation of organizations, especially when employees share inappropriate information using company resources.⁵

In response, companies and organizations have developed courtesy clauses in their employment contracts, which may prohibit or restrict the use of distasteful criticism, inappropriate remarks and colorful language by employees. In addition, companies use training programs to emphasize company standards and ensure employees follow socially acceptable business practices. Even where these policies are set in place, they differ from one organization to another. Some companies, for example, prohibit the use of computers and the Internet in the workplace for personal business while others may allow the use of these facilities during work breaks.⁶

1.2 The Internet and Defamation law

As businesses increasingly adopt the use of computer technology in business activities, the question arises as to how to apply legal principles developed for the offline world to the Internet. One such area is defamation. Defamation is a legal principle, which allows an individual to sue and recover damages for harmful false statements. The law in the US distinguishes two forms of defamation. Slander is false information uttered orally while libel is false information made in writing. Defamation covers both libel and slander.⁷ This distinction is important in establishing the amount of damages in case of defamation. While many Internet related legal disputes can be addressed with already established principles, changes in technology affect the application of some doctrines and may require changes.⁸

There have been several defamation cases arising out of the use of the Internet, which has led to the question of how to deal with these issues. Despite these issues, the principles of defamation applicable to the offline world also apply to the Internet.⁹

Defamatory statements made over the Internet are considered both libel and slander because they can either be written or oral. These

statements require publication in order to be actionable. In defamation, publishing means making the information accessible to a third party. In the context of the Internet, publication of defamatory statements includes comments, blog posts and tweets. Podcasts and videos can also include defamatory statements.⁹

Furthermore, defamation on the Internet is a mere extension of the ordinary defamatory rules. However, the nature of publication is affected with the use of the Internet because individuals can easily publish information to a huge audience. In other words, for a post or Internet publication to constitute defamation, it must have some elements. The first element is that the statement made is a false statement of fact. It is important to distinguish an opinion from a fact, as opinions are not actionable. The false statement should also harm the reputation of the other party. With the use of the Internet, there are many false statements made but for a statement to be actionable it must cause harm to the reputation of an individual or organization. This statement should also be made without proper investigation into the reliability of the statement. On the other hand, a statement can be actionable if the party making it was fully aware of its inaccuracy.¹¹

The Internet has made it possible for anonymous posting. Such activities have made it impossible to identify the individuals who make such a post and the Internet service providers are often subpoenaed to reveal the identity of these anonymous individuals. Unless a court orders the identity of an individual, it is possible for one to defame another individual or organization and remain behind the curtain of anonymity. In such a case, without the intervention of the court discovery becomes impossible. With the advent of the Internet some of the established rules on defamation have become complicated. The main contention is the identity of anonymous Internet users who make defamatory statements.¹²

Therefore, when employees make defamatory statements on the Internet they can affect other individuals as well as organizations. Although the employees can be held personally responsible for defamatory statement they make, it is also possible to hold their employers liable under the respondeat superior doctrine. This doctrine allows the employer to be held responsible for the actions of its employees as the employees are agents.¹³

2. DOCTRINE OF RESPONDEAT SUPERIOR

2.1 Understanding the Doctrine of Respondeat Superior

The doctrine of respondeat superior was established to define the legal liability that exists between an employer and an employee for the actions of the employee. It offers better chances for the injured party to recover damages from the employee because it holds that an employer is liable for employee's actions done in the course of employment. Also, the doctrine relieves the injured party of the burden of showing that an employer was directly responsible for a tort.¹⁴

Proving an employee was responsible for a tort suffices to hold an employer liable. This doctrine follows that is if an employer creates a work environment, where employee can injure other parties, then the employer is liable without proof that the employer is negligent. In other words, an employee's actions are deemed the employer's actions. Therefore, the legal relationship that exists between the employer and the employee is that of agency where the employer is the principal while the employee is the agent. The idea behind this doctrine is that the principal controls the agent and is responsible for the actions of the agent.¹⁵

Moreover, the doctrine requires proof of all the elements necessary to establish negligence. These elements are a duty of care owed to the injured party, a breach of the duty and a harm or injury resulting from the breach of duty. Additionally, three considerations are applicable in establishing respondeat superior. The first consideration requires that the injury or harm occurred within the scope of employment. Second, it is important to show that the act occurred while the employee was performing an activity they were employed to perform. Third, that the employer benefited to some degree from the acts of the employee. The basic problems that occur in the application of this doctrine are establishing whether employee actions were within the scope of employment, the relationship between the employer and the employee, and the negligent acts.¹⁶

Indeed, it is crucial to establish that the employee was acting within the course of employment because employers are not liable for the actions of the employees while they are not at work. The important question to ask concerning the scope of employment is whether the employee

was acting on behalf of the employer at the time or at the place where the tortious act was committed. An employee's actions are not outside the scope of employment because they did things they should not have done. Additionally, an employer cannot avoid liability by proving that the employee was prohibited from engaging in an act.¹⁷

With respect to the relationship between the principal and agent, the doctrine only applies to employees and does not apply to independent contractors. The distinction is important because only employees are subject to the control of the principal unlike independent contractors where they are in control of the workplace.¹⁸

The doctrine applies to both negligent and intentional acts by the employees but it is important to distinguish between a detour and a frolic. While a detour is considered within the scope of employment, a frolic serves personal interest and the employer cannot be held vicariously liable. An employee deviates from the scope of employment if the acts by the employee were solely for the employee's benefit.¹⁹

2.2 Doctrine of Respondeat Superior as it Applies to Defamation

The doctrine of respondeat superior holds that an employer who provides its employees with Internet access is liable for the acts or omissions of the employee. This is especially if the employee's conduct is within the scope of employment. Where an employee defames another individual in the course of employment, the employer is liable. An employer who provides Internet access to its employee, but does not put in place measures to restrict the type of activities in which the employee engages is facilitating the acts of the employee, especially if it is done in the course of employment.²⁰

In *Mercado v. Hoefler*, the court established that a principal is liable for the malicious torts of his employees committed within the scope of employment notwithstanding any contentions that the employee did not have authority to engage in such conduct.²¹ Also, in *Correia v. Santos*²², the court found that if an employee while acting within the scope of employment and in furtherance of the employer's interests defames another individual the employer is vicariously liable for the defamatory remarks made by the employee.²³

In addition, an employer can be held liable if an employee publishes or transmits false and defamatory material. For instance, in *Gavrilovic v. Worldwide Language Resource Inc.*, it was held that

an email by a coworker containing defamatory statements about another employee was sufficient for the employee to recover from the employer for defamation as required by the respondeat superior doctrine.²⁴

Furthermore, in *Blakey v. Continental Airlines*, the issue was whether an employer who provides an Internet forum has a duty to monitor electronic postings to ensure there is no harassment between employees. The plaintiff also brought an action to hold the employer liable for the providing a hostile working environment due to the defamatory statements made by other employees. The Supreme Court considered whether a computer forum could be considered as an extension of the workplace so that Continental Airlines should be held responsible for any harassment that occurs on the forum.²⁵ Also, the court in its decision inquired whether the computer forum was an integral part of the workplace. It held that a computer forum in the Internet was an integral part of the workplace and could create a hostile environment even if the forum was not in the jurisdiction of the employer.²⁶

The case was the first on how the courts should address harassment in the workplace. The outcome of the case made it clear that an employer will be held liable for unmonitored blogging and this can be extended to other online situations. Additionally, the decision showed that an employer could be held liable even where the Internet forum is not provided by the employer as long as the forum is considered integral to the workplace. The decision in this case acknowledged privacy concerns that might arise from the decision but emphasized that the outcome was not to make employers monitor their employees but rather to take any necessary steps to ensure they stop any form of harassment in the workplace.²⁷

2.3 Doctrine of Respondeat Superior as it Applies to Negligent Retention of Employees.

Negligent retention theory provides that an employer is liable for retaining an employee who is unfit for the position. The doctrine places a duty of care on the employer to undertake reasonable investigations of information that an employee is unfit for the job and respond appropriately to the information regarding the unfitness of the employee. Conduct or information that may interfere with the job or the welfare of

coworkers, clients or other individuals requires timely intervention by the employer.²⁸

The retention of an employee whose harmful conduct was known or should have been known exposes the employer to liability under the negligent retention theory. This theory considers the employer responsible for the knowledge that shows that an employee is unfit. It is also the employer's responsibility to investigate, discharge or reassign an employee to reduce the risk. In order to establish negligent retention, it is essential to show that the employer owed a duty of care to the plaintiff to use reasonable care in the retention of the employee. It is also important to show that the employer breached this duty by retaining an employee who was not fit for the job. Additionally, the plaintiff must have been injured and the employer's actions were a proximate cause of the injury.²⁹

In *Longen v. Federal Express Corp*, the plaintiff brought a negligent retention claim against FedEx for the behavior of its employee. The employee asked the plaintiff to assist him in offloading boxes from a truck and then groped the plaintiff. The court pointed out that the employee had been involved in previous sexual harassment incidents against female customers. Given this previous behavior, the employer should have been aware that the driver posed a threat to others. The court in finding FedEx liable for negligent retention, noted that the standard required to establish negligent retention is not actual knowledge of the behavior but rather that the employer should have been aware of the employee's conduct.³⁰

In *Yunker v. Honeywell Inc.*, Honeywell hired an employee who strangled a coworker to death. The employee served time and after his release was reemployed by Honeywell as a custodian. The employee expressed interest in a coworker but the coworker avoided him. The employee made death threats against the coworker and subsequently shot and killed the coworker. The court found Honeywell liable for negligent retention. The court observed that if an employer does not take action against an employee once it is established that the employee is on notice then the employer is liable for negligent retention. Because the concerned employee had a history of violence against coworkers, the employer should have taken necessary action against the employee to avoid escalating the situation.³¹

Thus, the employer owed a duty of care to provide a safe working environment and the

employer breached this duty when he failed to take action against the employee after he issued the death threats to the coworker.³² The employee's actions were reasonably foreseeable to the employer and, therefore, the employer was negligent in retaining the employee.³³

3 RECOMMENDATIONS

Because computers and the Internet are mandatory in the current work environment, it is necessary for employers to adopt measure that reduce their liability for the acts of employees. In order to prevent invasion of employee privacy, employers should adopt policies that are in agreement with legal provisions regarding the right to privacy. It is imperative for employers to inform its employees on when they are being monitored in order to reduce invasion of privacy claims.³⁴

Also, it is important for employers to set guidelines on how their employees perform their duties, how they interact with customers and workplace conduct. Employers should also provide training for employees in proper job performing standards. Training sessions for employees are important in refreshing the knowledge of employees and training them on updated policies and methods. Employers should also observe employee activities while they are on the job to ensure that employee behavior does not become harmful to coworkers or customers.

In addition, it would be very helpful to review company policies with the employees, especially after a breach has occurred to prevent further breach. The positive work relations play a critical role in preventing employer liability and employers should foster good relations to facilitate effective communications in the workplace.

In reducing vicarious liability and workplace harassment, employers should implement comprehensive policies to address these issues. The employer should consult with employees in developing measures that prohibit employee harmful actions. In particular, the employer should create policies that prohibit inappropriate use of the Internet and computers in the workplace. Developing policies to address the use of computers and the Internet in the workplace will reduce the improper use of computers and the Internet in the workplace. The policies will set out the employer's ownership and control of its equipment and therefore the employer's authority to monitoring the use of computers and the Internet by the employees.

Moreover, important measures include proper training on the appropriate workplace ethics and the code of conduct. Compliance training will significantly reduce the risks of finding an employer vicariously liable for employee actions. The employer must take necessary actions to provide an effective investigation process into employee misconduct as soon as the employer finds out about the conduct. The employer can also prevent vicarious liability in exercising due care in the prevention of unlawful acts by employees. As a measure to reduce liability, employers should use software and other technological tools to monitor employee's computer use and Internet activity. Monitoring provides preventive measures against improper use and provides the employer the opportunity to monitor employee's use of time.³⁵

4 CONCLUSION

The increased use of computers and the Internet in the workplace has advantages and disadvantages. Particularly problematic in the use of technology in the workplace is the liability that arises due to improper use of these facilities. Employers can be held liable for the harmful actions of its employees. Employers can be held liable under the doctrine of respondeat superior for defamatory statements made by its employees. Employer can also be held liable for defamatory statements made by its employees under the theory of negligent retention. Additionally, employers face the risk of liability for the actions of its employees under the negligent hiring theory for the actions of its employees.

There are, however, some circumstances where the employer is immune to such liability. Such cases include where the employer enjoys qualified privilege, where the employer hired an individual with a certificate of employment or where the employer exercised reasonable care in hiring an individual. Qualified privilege makes the employer immune to liability under the doctrine of respondeat superior. A certificate of employability makes an employer immune to liability because of negligent hiring while the exercise of reasonable care makes an employer immune from liability under negligent hiring and retention. In order to prevent liability for the acts of its employees, employers should adopt measures to prevent such liability.

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