
Social Media

Old Laws In The New World

Presented by: Mark D. Downey, Esq.

Board Certified in Labor and Employment Law
by the Texas Board of Legal Specialization

mdowney@munsch.com

MUNSCH HARDT
KOPF & HARR PC

Dallas | Houston | Austin | munsch.com

Understanding Social Media

Social Media's Influence:

“It took radio 38 years to reach 50 million listeners.
Terrestrial TV took 13 years to reach 50 million users.
The internet took four years to reach 50 million people.
Less than four years after Facebook became available to the
general public, the social networking site had over
500 million users.”

“Social Media Usage Toolkit,” Practical Law Company 2011

Understanding Social Media

- **What is Social Media?**
 - Blogs
 - Social and Business Networking Sites
 - Digital Media sharing sites
 - Wikis
 - Virtual Worlds and Multiplayer Online Role Playing Games
 - Intra-net system

Understanding Social Media

- **Benefits:**

- Relatively inexpensive way to mass market
- When done correctly, it creates loyalty
- Can create a more direct communications link to clients and customers
- Is a source of background information about individuals that may not otherwise be available
- Means to quickly respond to issues or negative publicity
- Communications can reach large audiences quickly
- Intra-net systems allow you to quickly connect with employees/related parties and creates a true collective knowledge base

Understanding Social Media

CNN.com -- May 17, 2011

“Workplace Rants on Social Media Are a Headache for Companies”

By Stephanie Chen

Understanding Social Media

- **Risks:**
 - Can be difficult to discern between official “company” communications and people who are not authorized to speak for the company
 - When done incorrectly, it can quickly destroy or damage loyalty, image
 - Hacking and other security risks
 - Intellectual property violations are greatly increased

Understanding Social Media

- **Risks:**
 - Communications can reach large audiences quickly
 - Opportunity to run afoul of regulatory laws (FTC, SEC) and/or other laws (invasion of privacy, harassment, FCRA, NLRA)
 - Increased opportunity for disclosure of trade secrets or other confidential/proprietary information of company
 - Is another potential source of information for discovery in litigation

Understanding Social Media

- **Risks:**
 - The “expanded workplace”
 - The Catch 22 – Negligent hiring claims

Understanding Social Media

MSNBC.com News Headline, March 6, 2012

“Govt. Agencies, Colleges Demand Applicants’ Facebook Passwords”

By Bob Sullivan

Proposed Legislation

- **California Assembly Bill 1844**

Would prevent employers in California from asking their workers or job applicants to disclose their social media passwords and user names.

The bill would further shield employers who don't vet their potential hires online accounts from claims for negligent hiring.

National Labor Relations Act

- NLRA Section 7:

“Employees shall have 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.”

Cyber-bullying Case

- Employee of non-profit began making statements to a co-worker about the lack of effectiveness of the organization
- She further made statements criticizing her co-workers, both verbally and via text message, eventually criticizing one co-worker directly to her face
- As a result of this criticism, the two employees decided to take the matter to their Executive Director to settle it
- After the employee who was the subject of the criticism discussed the matter with some other co-workers, she started a discussion on Facebook that related to the criticism she had received, in order to prepare for the meeting with the Executive Director
- Four other employees joined the Facebook discussion; cursing and swearing was involved
- The criticizing employee (*i.e.*, the employee who was the subject of the Facebook discussion) then complained to the Executive Director that she had been subjected to what she considered to be 'cyber-bullying' and harassment

Cyber-bullying Case

- When the employee who started the Facebook communication tried to go see the Executive Director to discuss the other employee's claims, the Executive Director refused
- Later that same day, the employees who participated in the Facebook communications were all terminated

Cyber-bullying Case

- **NLRB Findings:**
 - NLRB found that the communications by the discharged employees were concerted activity since they were clearly an appeal by the employee for the assistance of her co-workers in anticipation of a meeting with the Executive Director
 - The Board further stated the employees on Facebook were engaged in concerted activity, in that they were discussing terms and conditions of their employment
 - The Board further found the employees were acting “with or on the authority of other employees and not solely by and on behalf of the employee himself,” since the discussions were directly related to the initial criticisms presented by the one employee

My Supervisor is Scum

- In response to her supervisor's request to prepare an incident report concerning a customer complaint, the employee requested the assistance of a union representative, which the employer refused to allow
- After work, the employee posted a negative remark on her Facebook page about her supervisor
- The Facebook post drew supporting responses from co-workers and led to further negative remarks about the supervisor by the employee

My Supervisor is Scum

- Employee was subsequently terminated for violation of the company's internet and blogging policy – specifically, the employee's reference to her supervisor as a “scumbag”
- Employer's internet and blogging policy specifically prohibited the posting of disparaging remarks by employees when discussing the company or supervisors, and from depicting the company in any media, including but not limited to the internet, without company permission

My Supervisor is Scum

- **NLRB Findings:**
 - Employee had *Weingarten* right to a union rep, which was denied
 - Employee had engaged in protected activity by asking for a union rep
 - Employee had also engaged in protected concerted activity by discussing her supervisor's actions on Facebook
 - Employee's reference to her supervisor as a "scumbag" did not take her out of this protected status
 - Employee's Facebook posting was provoked by the supervisor's unlawful refusal of a union rep and threat of discipline

My Supervisor is Scum

- **NLRB further analyzed the Policy and found:**
 - The language violated NLRA Section 8(a)(1) because it would broadly prohibit lawful activities, such as an employee carrying a picket sign or wearing a company logo in connection with a protest involving terms and conditions of employment
 - Policy prohibiting employees from making disparaging remarks was not limited to allow concerted activities that are protected under Section 7 of the NLRA
 - Finally, prohibition of “offensive conduct” and “rude or discourteous behavior” was so broad as to also prohibit conduct protected under Section 7 of the NLRA

The Pond and the Hotdog

- Car dealership's salesperson posted photos and commentary of an accident that occurred where a car was driven into a pond in front of the dealership
- Salesperson also posted photos and comments that criticized a sales event that the car dealership was hosting
- In particular, the salesman posted pictures of the food (hot dogs) offered by the dealership at the sales event, which other salespeople had also been critical of

The Pond and the Hotdog

- The dealership terminated the salesperson, initially saying they could not understand what the employee was thinking in making his post and comments about the sales event
- Several months later, the employer said that the termination was the result of the salesperson's posting of and comments about the picture of the car in the pond, because it made light of a serious accident

The Pond and the Hotdog

- **NLRB Findings:**
 - The photos and comments about the dealership's food choices for the sales event were “vocalizing the sentiments” of the salesman's co-workers and was “continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting”
 - The posting was clearly a concerted activity that related to the terms and conditions of employment since the employees were all on a 100% commission and were concerned about the impact of the employer's choice of refreshments on the sales, and therefore, their commissions

The Pond and the Hotdog

- **NLRB Findings:**
 - The NLRB further found that the posting and comments were not so disparaging, reckless or maliciously untrue that they could fall within an exclusion to the general rule that comments about an on-going labor dispute are protected
 - In fact, the NLRB found that the comments were not disparaging or disloyal of the dealership's products

The Pond and the Hotdog

- **NLRB Findings:**
 - Conversely, the post related to the car accident was not protected, since the employee posted it without discussion with other employees and without connection to any terms or conditions of employment
 - Ultimately, the employer got lucky – the NLRB concluded that the employer had lawfully terminated the employee because of the car accident post, and not because of the hot dog posts

Sports Bar Withholding

- Former employee of a sports bar initiated a Facebook conversation about the employer's tax withholding practices
- The post included some explicit statements and expressed extreme dissatisfaction with the withholding practices
- One employee "Liked" the statement
- Two other employees made comments similar to the former employee's comments
- Two customers then joined the conversation, along with another employee who referred to the employer as an "a—hole"

Sports Bar Withholding

- All of the employees who participated in the conversation were subsequently terminated
- The employer further had letters sent demanding the “defamatory” statements be retracted and threatening to sue

Sports Bar Withholding

- **NLRB Findings:**
 - Concerted activity includes:
 - ✓ activity engaged in with or on the authority of other employees
 - ✓ activities where employees seek to initiate or to induce or to prepare for group action
 - ✓ situations where individual employees bring truly group complaints to management's attention

Sports Bar Withholding

- **NLRB Findings:**
 - Facebook postings were clearly about a term/condition of employment and were truly a group complaint (employer's improper calculations)
 - Postings noted a desire to discuss the withholding with the employer and therefore demonstrated the employees' contemplated future group activity
 - As for the defamation – the communications did not lose their protected status unless they were not only false, but maliciously false

Sports Bar Withholding

- **NLRB Findings:**
 - Employer's threat to sue was a violation of Section 8(a) of the NLRA because it is reasonable that such a threat would tend to interfere with the employees' Section 7 rights, even though there was a reasonable basis for potential legal action by the employer
 - Employer was also found to have violated Section 8(a) in that it maintained a work rule that reasonably tended to chill employees in the exercise of their Section 7 rights, since it broadly prohibited employees from participating in "inappropriate discussions"

Some Good News: Critical Newsman Case

- After being encouraged to do so by the newspaper he worked for, an employee (news writer) set up a Twitter account
- Employee mentioned his employment by the employer-newspaper and had a link to the newspaper's website in his Twitter profile
- Employee posted a tweet criticizing the newspaper copy editors, but no evidence existed to show the employee discussed the matter with any co-workers, and no comments were made by co-workers
- After HR approached him and asked him to stop, the employee later posted another tweet criticizing the area television station

Critical Newsman Case

- The employee was later terminated and informed that the termination was based on his failure to refrain from making derogatory comments on his Twitter account that could damage the goodwill of the newspaper, and that the newspaper was no longer confident the employee could sustain the newspaper's expectation of professional courtesy and mutual respect

Critical Newsman Case

- **NLRB Findings:**
 - Employee's Twitter posts did not constitute protected concerted activities, because he was not discussing terms and conditions of his employment, nor did he seek to involve other employees in issues related to employment
 - The rule forming the basis for the termination was also not a violation, because it was only communicated to the employee in the specific context of the discipline and was responsive to specific inappropriate conduct of the employee

Bartender Tipping Case

- A bartender posted a message on his Facebook page that was critical of the employer's tipping policy
- This Facebook conversation involved communications with another bartender-employee, but no mention was made about discussing the criticism with management
- Soon thereafter, the bartender had a Facebook conversation with a relative who was not an employee, wherein he complained about not getting a raise, called the employer's customers "rednecks," and said that he hoped they "choked on glass as they drove home drunk."
- The bartender subsequently received a Facebook message from the employer stating the bartender would no longer be needed

Bartender Tipping Case

- **NLRB Findings:**
 - There was no evidence that the bartender engaged in concerted activity
 - While the discussion was about the terms and conditions of his employment, there was no evidence that any other employees responded to the posting or attempted to initiate a group action
 - While one other employee did make a comment on the policy, the “conversation” that led to the termination did not grow out of that earlier communication

Complaint to Her Senator

- Employee worked as a dispatcher for a medical transportation and fire protection service, and her husband was an EMT
- When the employee's Senator posted a notice about federal grants to some fire departments, the employee posted on the Senator's wall a statement complaining that her employer was winning contracts by paying its employees \$2 less than the national average, and that the states were looking for cheaper companies to farm work to
- The employee further complained that her employer only had two trucks for an entire county and had sent people who knew CPR to respond to a cardiac arrest call

Complaint to Her Senator

- Employee did not discuss the posting with any other employees, not even her husband
- Employee also said that she made the posting to let the Senator know that she disagreed with how the state was administering emergency medical services and to express her feeling that her company was part of the problem
- Employee said she did not think the Senator could help with her employment situation, nor did she raise any of the issues with her co-workers in an effort to ultimately bring them to her employer's attention
- Employee was terminated for posting disparaging remarks about the employer and confidential information about a specific call

Complaint to Her Senator

- **NLRB Findings:**
 - No violation
 - Employee did not discuss the posting with any other employee
 - There were never any employee meetings or any attempt to initiate group action
 - Employee was not trying to take the issue to management and admitted that she had no expectation the Senator would help her situation
 - The posting was merely an attempt to make a public official aware of the condition of medical services in the state

Gripes About Manager

- Employee's Facebook postings referred to her manager's actions as "tyranny" and stated the employer would get a wake-up call when several employees quit
- Several co-workers responded with emotional support and inquiry into why the employee was so wound up
- Employee responded with specifics about being chewed out and further called the manager names
- Co-workers responded to these comments, telling the employee to hang in there

Gripes About Manager

- When the manager got a print-out of the conversation, the employee was told his actions were slander
- Employee was suspended and told he would not be eligible for a promotion for one year
- Employee then deleted the postings

Gripes About Manager

- **NLRB Findings:**
 - Employee's postings were expressions of an individual gripe and not concerted activity
 - Employee did not seek to initiate or induce co-workers to engage in group action but was merely expressing frustration regarding his dispute with the manager
 - Responses by the co-workers further indicated that they had interpreted the employee's posting as nothing more than a gripe
 - Employee's postings were further not found to be part of a logical outgrowth of any prior group activity

Bad Rule Case

- Policy prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity
- Rules further prohibited any communication or post that constituted embarrassment, harassment or defamation of the employer or any employee of the employer, officer, board member, representative or staff member
- Statements that lacked truthfulness or that might damage the reputation or goodwill of the employer, its staff or its employees were also prohibited

Bad Rule Case

- When several employees complained about a colleague's absences and nothing was done about it, one employee posted the details of the complaint on Facebook and asked for anyone with additional information to contact her
- Employee was subsequently terminated for violating the various policies that prevented the employee from 'talking badly' about the employer

Bad Rule Case

- **NLRB Findings:**
 - Policy was overly broad – employees could reasonably construe the policy to prohibit protected activity under the NLRA
 - Policy did not provide a definition or guidance as to what was considered private or confidential, and absent such limits, the rule could easily be interpreted to prohibit employee discussions of wages and other terms and conditions of employment
 - The broad terms of the policy, which were applied to prohibit expressions of frustration regarding the employer's failure to address a complaint, were in effect a prohibition of complaints about working conditions

Bad Rule Case #2

- Policy prohibited employees from using on their own time a micro-blogging feature to talk about company business on their personal accounts; from posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy; from disclosing inappropriate or sensitive information about the employer; and from posting any pictures or comments involving the company or its employees that could be construed as inappropriate

Bad Rule Case #2

- **NLRB Findings:**
 - Policy lacked limitations to allow for activities protected by the NLRA
 - Policy hindered employees from being able to find and communicate with each other
 - Employer could not present a legitimate business reason for many of the prohibitions created by its policy

Not All Bad Rule Case

- **Employer's rules prohibited:**
 - employees from pressuring their co-workers to connect or communicate with them via social media
 - employees from revealing – including through the use of photographs – personal information regarding co-workers, company clients, partners, or customers without their consent
 - employees from using company logos and photographs of the employer's stores, brands or products without written authorization

Not All Bad Rule Case

- **NLRB Findings:**

- Employer's admonition to not pressure others to connect via social media was reasonable, in that it did not prohibit anything more than pressuring employees and clearly applied to only harassing conduct
- HOWEVER, by not stating specific examples, the remaining rules were overly broad, in that they could be interpreted to prohibit conversations regarding terms and conditions of employment

Good Rule Case

- Policy stated that the company's public affairs office was responsible for all official external communications, since it was important for the employer to deliver an appropriate message and avoid misinformation
- The policy further stated that employees were expected to maintain confidentiality about sensitive information
- The policy also prohibited employees from using cameras in the store or parking lot without prior approval
- Employees were further directed to respond to all media inquiries by stating they were not authorized to comment for the employer or did not have the information asked for, and to call the public affairs office

Good Rule Case

- **NLRB Findings:**
 - Because the policy did not prohibit employees from speaking with reporters about the terms and conditions of their employment, but simply required that any statements for the company be directed to the public affairs office, the policy was not overly broad
 - A media policy that seeks to ensure a consistent, controlled company message and limits employee contact to effectuate that result is appropriate
 - Employer's prohibition of cameras was also not overly broad since the prohibition, as written, logically dealt only with news cameras not the personal cameras of employees

General Rule on Rulemaking

- **Two main points:**
 - An employer's policy cannot be so overreaching that it prohibits the kinds of activity protected under federal labor law, such as discussing working conditions or wages with other employees
 - An employee's comments on social media are not protected from action by the employer if they are merely gripes and are not made in relation to an activity of a group of employees

Conclusions

- **These cases are extremely fact specific**
- **The rules on social media are continuing to evolve**
- **Employers can do something and should do something, but err on the cautious side**

Conclusions

- **What should an employer do?**
 - Create policies but don't use vague terms and broad prohibitions – “disrespectful”, “unprofessional”, or “inappropriate”
 - Encourage managers not to interact or “friend” their subordinates
 - Training and education on risks

Questions and Answers

Mark D. Downey, Esq.

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(214) 855-7596

mdowney@munsch.com