The Legal Intelligencer

The Effects of Social Media on the Workplace

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2012-09-26 12:00:00 AM

Giving your opinion on politics or complaining about the boss to your friends via Facebook is so commonplace and rampant that few people probably stop to think about the consequences of their posting. Less thought is given to the magnitude of a Facebook user "liking" something — a photo, a status update, a fan page, etc. Yet, these actions can have very significant consequences for the person behind such activity. The legal realm is still adapting to the changing landscape of social media with somewhat incongruous legal results, depending on who your employer is and, in some cases, exactly what your Facebook or other social media activity was.

SPEECH PROTECTION FOR GOVERNMENT WORKERS

For instance, Facebook use and freedom of speech are at the center of a highly publicized legal battle in Virginia. In that case, titled *Bland v. Roberts*, government employees of the local sheriff were fired when it was discovered that they openly supported the sheriff's election opponent, in part because one of the employees "liked" the opponent's Facebook page. The trial court ruled that "liking" something on Facebook is not protected free speech under the First Amendment. The case is now on appeal, and Facebook has filed an amicus brief, arguing that "liking" a political candidate is a form of verbal expression and/or symbolic expression similar to other constitutionally symbolic expressions such as wearing an armband or even burning the American flag. According to these groups, such activity should be protected as a substantive statement of political support. The fact that the decision ruling against protecting the activity as free speech has been so highly publicized illustrates the direction of the First Amendment with regard to social media.

SPEECH PROTECTION FOR PRIVATE COMPANY EMPLOYEES

What happens, though, when the same kind of speech is made by an employee at a private company? The First Amendment does not apply to private employers because the Constitution only protects free speech from government interference. Thus, employees can be fired or punished for almost anything they do. In most circumstances, private companies employ workers at will, meaning the companies' management decisions cannot be challenged unless those decisions discriminate against an employee because of the employee's age, gender or other protected characteristic. Therefore, a political statement, if made by an employee of a private company, could well be grounds for termination.

There is a litany of examples of employees being fired for something they said or did on Facebook. The practice is so rampant, in fact, that there are blogs and websites dedicated to such occurrences, such as The Facebook Fired (http://thefacebookfired.wordpress.com). The Facebook Fired documents such follies as a replacement NFL referee who was "allegedly" fired from his refereeing job after NFL officials found photos of him on Facebook wearing New Orleans Saints clothing. Apparently, the NFL was concerned the referee might be potentially biased against other teams.

In another instance, an emergency room doctor in Rhode Island was fired from the hospital she worked for after posting private information about a patient on Facebook. Although she did not include the patient's name, there was enough information for others in the community to identify the patient. In addition to being fired, the doctor was reprimanded and fined by the state medical board for violating HIPAA (the Health Insurance Portability and Accountability Act).

PROTECTION OF "CONCERTED ACTIVITY" FOR ALL EMPLOYEES

Despite the traditional lack of constitutional protection for free speech by employees of private companies, private sector employees appear to be gaining traction with the support of the National Labor Relations Board. The NLRB, which is the federal agency that interprets and enforces U.S. labor law, has been leaning toward protecting speech in the private sector, as long as that speech concerns certain topics, such as union organizing. A flurry of recent complaints to the NLRB with regard to discipline for social media activity showcases the NLRB's move toward speech protection.

For example, in *Hispanics United of Buffalo*, Case 3-CA-27872 (Sept. 2, 2011), an administrative law judge sided with a group of social services workers at Hispanics United of Buffalo (HUB), a private, not-for-profit corporation in Buffalo, N.Y., when the workers filed complaints with the NLRB. An employee of the organization was fired when she began a Facebook thread complaining about another co-worker. Four other co-workers posted supportive comments and were fired as well. The organization explained that the employees were fired because the Facebook conversation violated the organization's harassment policy by disparaging a co-worker.

The workers filed suit before the NLRB, arguing that their Facebook activity should be considered "protected concerted activity" under Section 7 of the National Labor Relations Act (NLRA). Section 7 protects the concerted activities of both union and non-union employees if they are for the purpose of their mutual aid and protection. Specifically, Section 7 of the NLRA provides that "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." Mariana Cole-Rivera, one of the fired HUB workers, argued that prior to posting on Facebook, she found out that a co-worker, Lydia Cruz-Moore, planned to complain to management about the work ethic of employees at the company. Cole-Rivera argued that she engaged in concerted activity to alert and agitate her co-workers about the forthcoming complaint.

The administrative law judge ruled in favor of the workers, stating that the workers "were taking a first step towards taking group action to defend themselves against the accusations that they could reasonably believe Cruz-Moore was going to make to management." By firing the employees, management prevented them from taking further group action. The judge held that under Section 7 of the NLRA, "employees have a protected right to discuss matters affecting their employment amongst themselves." This includes "explicit or implicit criticism" by a co-worker about job performance. This ruling by the NLRB was the first of its kind with respect to a Facebook posting, and was remarkable because there was no attempt to change work conditions by the employees, they did not inform the company about their concerns, and the posts were not made at work or during working hours. An appeal by the company is currently pending.

Another recent case before the NLRB has followed suit with regard to concerted activity. In Design Technology Group LLC, Case 20-CA-35511 (Apr. 27, 2012), an administrative law judge found that the non-union retailer Bettie Page engaged in unfair labor practices when it fired three employees for Facebook discussions. The employees had discussed on Facebook concerns that the manager of a newly opened store was not managing the store or its staff well. For example, the employees thought that the store was closing too late and that closing employees faced harassment from the street. The employees complained

to store personnel but ultimately took their complaints to Facebook when management did not respond. The judge concluded that the Facebook discussions were concerted activity because the employees had made efforts to complain to management about working late in an unsafe neighborhood, which was covered by Section 7 of the NLRA. As a remedy, the NLRB ruled that Bettie Page had to offer the fired employees back pay and full reinstatement to their former jobs.

These cases illustrate how widely varied court decisions can be with regard to punishment for social media use. Private employers have long enjoyed latitude to discharge employees at will, but clearly social media has changed traditional definitions of labor and employment practices. All employers, including those in the private sector, must be careful about how they handle punishments in response to complaints or negative comments posted by employees. On the other hand, employees may feel a little freer to engage in concerted activity or complain about adverse working conditions. Employers should expect to see more cases like these before the NLRB in the future.

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