Tweet freely! Employers get some guidance about social media

By Robin E. Shea on August 19, 2011

DEAR READERS: If you enjoy this blog, we'd be most grateful if you would nominate it for the 2011 Blawg 100 list of the American Bar Association. (Blawg = blog + law . . . get it?) Attorneys and employees of Constangy are not eligible to vote. All entries must be submitted by September 9. While you're at it, please cast another vote for our sister blog, Employee Benefits Unplugged. Thank you for your support!

A number of employers, non-union as well as union, have been burned recently by the National Labor Relations Board for their social media policies, or the application of those policies.

The National Labor Relations Board issued yesterday a memorandum summarizing its findings on social media cases from the past year. The memo is well worth a read, and provides helpful guidance on the Board's position.

First -- for you non-union folks, a quick summary of "protected concerted activity." The National Labor Relations Act protects even non-union employees who act together in matters related to the terms and conditions of their employment. This can include group activity (a "group" is defined as more than one employee), or even the activity of a single employee, if the employee is acting on behalf of a "group" or preparing for "group" action.

For example, in an employee meeting, two employees may complain that the company is scheduling too much overtime and that it's hindering their safe performance of the job. This is "protected concerted activity," and it would generally be unlawful for the employer to take action against the employees because they raised these concerns.

Protected concerted activity has become a big concern, thanks to the internet and social media, which make it so much easier for employees to complain "in concert," and for employers to find out about it. Anti-employer rants on Facebook, Twitter, and personal blogs are not uncommon. If your gut reaction to this is the same as my gut reaction, you are thinking, "Why in the world *can't* I fire an employee who calls me a 'scumbag' or an 'as**ole' on the internet?"

Because it may be "protected concerted activity," that's why.

Here is a quickie reference to the guidance provided by the NLRB. As I said, reading the full memo will be well worth your time. The memorandum also contains guidance for employers on developing social media policies that will pass legal muster.

PROTECTED:

*Employee of non-profit was scheduled for a meeting with her executive director to discuss a dispute about her job performance. She posted about it on Facebook and got feedback from her co-workers.

*Emergency medical technician was asked by her supervisor to respond to customer complaint and was denied a request for union representation. EMT posted negative comments about her supervisor on Facebook, received responses from her co-workers, and called her supervisor a "scumbag."

*Car salesman posted on Facebook photos and criticism of food offered by dealership at sales event, saying that food was too chintzy for their clientele and would adversely affect sales commissions. Co-workers commented their agreement.

*Restaurant employees posted on Facebook comments about employer's allegedly improper tax withholding practices, and one employee said employer was "[s]uch an as**ole."

NOT PROTECTED:

*Newspaper reporter tweeted (on Twitter, *duh*) criticisms of his copy editors and was instructed to stop it. He did, but he continued to tweet about local homicides and sexually oriented topics. Finally, he tweeted a criticism of a local television station, drawing a complaint from the TV station to the newspaper. Presumably the criticisms of the copy editors might have been protected, but there was no indication that the newspaper had terminated him for that. The other tweets were not about terms and conditions of his employment, and he didn't seek to involve other employees.

*Bartender griped to a relative on Facebook about employer's tipping policy, calling customers "rednecks," and saying he hoped they would choke on glass as they drove home drunk.

*Employee criticized employer on Facebook wall of her Senator but no one else, and was not seeking to involve other employees.

*Employee who worked in program for people with mental health problems posted on Facebook about alleged mental illnesses of the clients, saying that it felt "spooky" being alone in mental institution, that a client "was cracking her up," and making similar comments. The only "friends" who responded were not co-workers.

*Retail employee posted on Facebook about management "tyranny" and called his assistant manager an obscene name, and said that a lot of employees were ready to quit. Although he received

generally supportive comments from co-workers (like "hang in there"), the Board's regional office found that it was an "individual gripe."

NOT PROTECTED, AND ILLEGAL:

*Union business agent and three organizers went to worksite of non-union employer and began interrogating workers as to whether they were legally authorized to work in the United States, and threatening to call immigration and have the employees deported. One of the union representatives videotaped the event, and an edited version was posted on YouTube and Facebook. The regional office found that the Union unlawfully interfered with the employees' rights by interrogation, threats, and coercion, and also interfered with the rights of other employees who might have seen the video on the internet.

. . . AND IN OTHER NEWS . . .

EEOC office issues directive on preservation of electronic evidence. The St. Louis office of the Equal Employment Opportunity Commission is issuing written instructions to companies about the preservation of electronic evidence. We don't know whether other EEOC offices are doing this. On one hand, it is not a bad idea for the Commission to remind employers of their obligations in this area and may prevent them from getting into trouble with a spoliation instruction later. On the other hand, will this just give the EEOC one more weapon against employers?

He may have a superior legal mind, but he has a fool for a client. The *ABA Journal* reported this week that a first-year associate who was fired from his law firm job for sending an all-attorney email touting his "superior legal mind" (and related "ego" issues) is now suing his ex-firm for $77 million. Not surprisingly, he is representing himself. Pretty big case for a first-year going solo . . . one third of $77 million is, what, a little more than $25 million?

My head is spinning so fast, I feel like I'm Linda Blair. (Or, "Keepin' up is hard to do.") Remember *Ricci v. DeStefano*, in which the U.S. Supreme Court said that the city of New Haven, Connecticut, could not throw out the results of a firefighter promotion exam because of a racial disparity in the results? After that decision, the city complied and promoted the white guys (and one Hispanic guy), and got dismissal of a lawsuit filed by some African-American firefighters who contended that the test had a racially disparate impact. The trial court threw out the black firefighters' lawsuit on the ground that the town was doing what it had to do to comply with *Ricci*. Now, a three-judge panel of the U.S. Court of Appeals for the Second Circuit (which handles appeals from federal courts in Connecticut, New York, and Vermont) has vacated the dismissal -- allowing the black firefighters' lawsuit to proceed, at least for now. Poor New Haven is damned no matter what it does.

Check us out! *Employment & Labor Insider* was included in the August Employment Law Blog Carnival, hosted by Jon Hyman (scroll down to "Say you're sorry when you hurt somebody," but read the other fine posts, too).

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