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A Monthly Newsletter from the Hamilton County Law Library May 2012

Lessons Learned from Acting General Counsel Reports on Social Media

By Ellen J. Shadur of Baker Hostetler. Reprinted with permission.

The Acting General Counsel of the National Labor Relations Board ("Board") has now released two reports compiling Board decisions addressing work-related communications by non-supervisory or managerial employees via the Internet or social media. While it is impossible to discern the full contours of the Board's approach, there are some clear lessons that can be learned.

OVERVIEW

The issues, as they pertain to the Internet and social media, can be grouped into three areas. First is whether there is something unique to the medium used for employee communication that has driven the Board's decisions. Are employee communications more or less likely to be deemed "protected" under the National Labor Relations Act (the "Act"), and is protected communication more or less likely to lose its protected status because of the effect of the speech on the workplace, or on the employer's reputation or business?[1]

In brief, the cases do not reflect a clear trend regarding the existence of protected concerted activity. But when looking at whether communications may lose protection under the Act, the Board has articulated a new standard that does take into account both the greater potential for harm to the employer's reputation or business but also minimizing the importance of the location of speech in determining whether it is protected, because employees often use social media while away from the employer's premises.

The second question is how to articulate an effective and lawful policy restricting or limiting the use of the Internet or social media? Here, the cases show that clarity and context are paramount. Broad brush attempts to prohibit employee communications, particularly on-line communications identifying the employer, likely will be found unlawful. But narrowly tailored policies designed to prohibit unlawful speech, or to prevent violations of other laws, such as securities laws or laws prohibiting false advertising, may be upheld, even if they contain

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Free Fastcase Webinars

Did you know that remote access to Fastcase comes with your Law Library subscription? Join us this summer for free Fastcase training! We will be hosting the following webinars:

Introduction to Fastcase
Monday, June 4
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Fastcase Legal Research for Paralegals
Tuesday, July 3
10:00-11:00am

Tips for Enchanced Legal Research with Fastcase
Wednesday, August 8
1:00-2:00pm

Keyword (Boolean Search) for Lawyers
Monday, August 27
1:00-2:00pm

For more info, or to register, call 946.5300 or email reference@cms.hamilton-co.org

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Free Loislaw Training

Law Library subscribers have remote access to Loislaw/Aspen treatises on a variety of subjects including Family Law, Employment Law, Product Liability, Real Estate and others. (For a complete list, click here.)

Join us on Thursday, May 24 from Noon-1pm for a free training session.

For more info, or to register, call 946.5300 or email reference@cms.hamilton-co.org

***Note: this is not a CLE program.**

Free CLE

Due to increased attendance, registration in advance is now required for all Law Library CLEs.

To register, call 946-5300 or via email at masweeney@cms.hamilton-co.org.

Researching Private Companies

Thursday, May 17th, 2012
2:00 - 3:00 pm

Shannon Kemen of University of Cincinnati Law Library will present on finding private company information. Highlights will include:

- Challenges of finding info on private companies
- Database Resources
- News Sources
- Internet/Social Networking Resources

Approved for 1.0 hour of general CLE in Ohio and Kentucky.
Free to subscribers; $35 for non-subscribers.

What Are We Missing?

We are continually striving to improve our services and we want to hear from you! Please contact us with any suggestions you have to improve our resources and programming. 513.946.5300 or reference@cms.hamilton-co.org.

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broad language that might run afoul of the Act in other contexts.

Finally, one of the more recent cases addresses the topic of surveillance, suggesting that this may be the next frontier in cases involving employees' use of the Internet or social media.

WHAT IS PROTECTED AND WHEN: SOME NEW THINKING

The Board defines protected concerted activity as "encompass[ing] those circumstances where individual employees seek to initiate or to induce or to prepare for group action."[2] Employers may violate the Act when they discipline or discharge employees for engaging in protected conduct or for "engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act."[3]

The cases described in the General Counsel's report did not break much new ground defining of what subject matters are protected. Some of the cases did grapple with how the Internet and social media sites such as Facebook and Twitter change the manner in which employees communicate and whether this could affect the concerted nature of these communications. Internet "conversations" typically begin with a lone remark from a single individual. This can raise a question as to whether the communication seeks to initiate or induce or to prepare for group action.

The Board seemed to reject the obvious approach of limiting its focus to whether, for example, co-workers "like" Facebook comments, or respond to them in ways that suggest support. Rather, the Board found protected conduct where postings furthered discussions that had begun at work or where there was no specific plan to act, but the posting "sparked a collective dialogue that elicited a response . . . over important terms and conditions of employment."[4] Moreover, in one case, the Board considered the employer's response in deciding that a lone employee's speech constituted protected conduct. That is, the employer terminated the employee in order to silence her; therefore the employer prevented protected concerted activity which the Board assumed was likely to occur or could have occurred but for the termination. [5]

Sometimes, protected employee communications and conduct lose their protection under the Act. Speech or conduct in the workplace is not protected when it is "opprobrious."[6] In deciding whether employee speech has moved into the realm of opprobrium, the Board considers "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." [7] These factors must be "carefully balance[d]."[8] In addition, communications directed at third parties, or made within earshot of third parties, may also lose protection when they disparage the employer's product or business policies "in a manner reasonably calculated to harm the [employer's] reputation and reduce its income."[9]

Looking at whether speech made over the Internet or via social media is more or less likely to lose its protected status, the Board signaled that a new framework is necessary. In considering whether speech is "opprobrious", the Board announced that the current standard does not take into account the likelihood that speech will be read by third parties and might harm an employer's business. The Board therefore concluded that a standard that "borrows from" the framework used to analyze disparagement of an employer's products and services "more closely follow[s] the spirit of the Board's jurisprudence regarding the protection afforded to employee speech." [10]

At the same time, the cases place less emphasis on or do not consider at all the place of the speech or whether the speech was provoked by an unfair labor practice of the employer. This makes sense, given that em-

ployees are likely to be at home when they communicate on-line. Therefore, the threat to the physical workplace is less immediate. And, it could be argued, the employee has more time to reflect before typing and sending a message into cyberspace.

The report contained only one case in which the Board applied this hybrid standard, and much remains to be learned about how the Board will use it in the future. That said, it appears to create an avenue for employers to argue which type of speech a particular posting or on-line statement resembles (i.e., workplace speech or speech made to third parties), and then to argue from there how the appropriate standard should be modified.

POLICY DRAFTING: NOT EVERY ITCH CAN OR SHOULD BE SCRATCHED

Employer policies raise some different concerns than do the discipline cases, where the Board can determine whether protected activity was prohibited as opposed to whether future protected activity may be chilled. A rule or policy is unlawful if it explicitly prohibits its protected activities. It also violates the Act if it is not explicit in prohibiting protected activity but where (1) employees would reasonably construe the rule to prohibit protected activity; (2) the employer adopted the rule in response to union activity; or (3) the employer has applied the rule to restrict protected activity. [11]

The report summarized a number of cases in which the Board analyzed employer policies aimed at limiting or restricting speech made via the Internet. Review of these cases suggests that the Board is struggling to decide what it thinks about the greater impact of Internet speech when compared with activities such as picketing or leafleting. On the one hand, the Board upheld policies clearly designed to prevent violations of securities laws, or false advertising, or unlawful harassment of co-workers, even when the policies included vague terms that the Board has found, in other contexts, unlawfully to chill speech protected under Section 7. On the rejected policies that prohibit employees from posting pictures of themselves in company uniforms, or from identifying themselves as employees of a particular employer, or from posting company logos. The Board found blanket prohibitions on the posting of pictures to prevent employees from communicating about protected activity, such as lawful picketing. In addition, the Board noted the useful function of profile pages on sites such as Facebook, which allow co-workers to communicate with each other.

One final word of caution on policies: the Board soundly rejected an argument that a "savings" clause, which states that a policy is not intended to prohibit protected concerted activity, will save a policy from being found to violate the Act. Employees cannot be expected to know what the Act protects.

SURVEILLANCE: THE NEW FRONTIER?

The final case in the recent report raised the question whether the employer engaged in unlawful surveillance by looking at an employee's postings on Facebook. The employee in question had "friended" his supervisor, and the Board concluded that in so doing, he invited her to view what he wrote. The Board suggested that it might have been improper for the employer to tell the supervisor to monitor the employee's Facebook page, or if the supervisor had been on Facebook to monitor employee postings.

LESSONS LEARNED

Employers are well-advised to act deliberately in tackling social media. Employers who have not formulated new policies should consider doing so to avoid applying older policies that were not intended to account for new behavior. If it is necessary broadly to prohibit certain types of communications in order to avoid violations of the employer's legal obligations, such as under securities laws, or laws prohibiting harassment, then it is important that the policy state as clearly and as narrowly as possible the types of communications, and the time, place and manner of communications, it

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the types of communications, and the time, place and manner of communications, it wants to limit. Context will be key. Finally, employers may want to consider policies that guide supervisory and managerial employees in their social media interactions with other employees.

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If you have any questions about this alert or how the Board's decisions may affect your business please contact Ellen Shadur (eshadur@bakerlaw.com or 310.442.8816) (http://www.bakerlaw.com/ellenjshadur/) or any member of Baker Hostetler's Labor Relations Team.

1] 29 U.S.C. § 151 et seq. Section 7 of the Act protects the rights of non-supervisory or managerial employees "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." 29 U.S.C. § 157. Policies that unlawfully prohibit or chill such protected activity may violate Section 7, and also Section 8(a)(1), which prohibits employers from "interfer[ing] with, restrain[ing], or coerc [ing] employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). Disciplining or terminating employees who engage in protected activity may violate section 8(a)(1) and Section 8(a)(3), which prohibits discrimination against employees who engage in protected activity.
[2] Meyers Industries, 281 NLRB 882, 887 (1985).
[3] The Continental Group, Inc., 357 NLRB No. 39, slip op. at 4 (2011)
[4] Memorandum OM 12-31 (January 24, 2012) p 22.
[5] The employee in that case was known to be a "go to" person for employee complaints and often either gave advice or interjected herself into the complaints. She was dismissed for "getting emotionally involved in things that did not concern her." This suggests that the speech the employer sought to stifle was of a broader, and more recurring, nature. Id. p 20.
[6] See Atlantic Steel Company, 245 NLRB No. 814, 816 (1979).
[7] Id.
[8] Id.
[9] NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers, 346 U.S. 464 (1953) (Jefferson Standard)
[10] Memorandum OM 12-31 (January 24, 2012) p __.
[11] See Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004)

You and the Legal System: VA Benefits-The Golden Promise and the Ugly Truth

Michael J. Mooney is our next speaker in the *You and the Legal System* Series for the public. Mr. Mooney will address VA Benefits on Friday, May 18, 2012 at 12:00 noon at the Law Library. The program will focus on how to qualify for service connected disability benefits through an agency that is determined to deny the claim.

The program is free to the public. To register, call 513.946.5300.

Please note that this is not a CLE event; it is intended for the general public. However, attorneys are welcome to attend and may want to pass along the program announcement to clients, staff and community organizations. If you would like more information, please contact Laura Dixon-Caldwell at 513-946-5302.

You and the Legal System is brought to you as a public service by the Hamilton County Law Library, in conjunction with the Cincinnati Bar Association's Lawyer Referral Service.

Save the date for the next event in the *You and the Legal System* Series. Details forthcoming.

Online Employment & Labor Law Resources

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Onsite Access

BNA Employment Law Library-contains cases, articles, federal and state laws and regulations and news on labor law topics such as:

Disabilities Law
Employment Discrimination
Individual Employment Rights
Labor Arbitration & Collective Bargaining
Labor Relations
Occupational Safety
Wages, Hours & Leave

CCH-Contains arbitration decisions, cases, federal and state laws and regulations, newsletters and titles such as:

Disabilities Management Guide
COBRA Handbook
EEOC Compliance Guide
Employment Practices Guide
Employee Benefits Answer Book
Employee Benefits Management
Flexible Benefits Answer Book
Health Insurance Answer Book
Health Savings Account Answer Book
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Mandated Benefits Compliance Guide
Multistate Guide to Benefits Law
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State By State Guide to Human Resources Law

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Aspen/Loislaw -contains the following titles:

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Sexual Harassment in the Workplace: Law and Practice
Civil Rights In the Workplace
Employee Relations Law Journal
Also includes articles and forms and checklists.

Employment Law Library

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Employee Dismissal Law & Practice
Covenants Not To Compete
Employment Law Answer Book
Immigration Law In the Workplace
Also includes articles and forms and checklists.

CCH Newsletters

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Labor and Employment Law
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Pension

The library also offers bi-monthly topical updates on labor and employment law. To subscribe, contact Laura Dixon-Caldwell at LDixonCaldwell@cms.hamilton-co.org

Upcoming Events

May 17: CLE: Researching Private Companies

May 18: You and the Legal System: VA Benefits

May 24: Loislaw/Aspen Training

June 4: Introduction to Fastcase Webinar

Law Library Holidays

The library will be closed Monday, May 28 in observance of Memorial Day.

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