Can Employees Do That?

Workplace Privacy and Social Media Issues that Leave Employers “SMH”

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What laws are in play?

- The Constitution – government employees
  - 1st Amendment – Speech
  - 4th Amendment – Search and Seizure

- Federal Law
  - The National Labor Relations Act
  - The Password Protection Act

Employees’ First Amendment Rights

- When speaking as a member of the public,
- An employee may comment on matters of public concern,
- As long as the employee’s interest in speaking is not outweighed by the government’s interest in promoting the efficiency of the public services it performs through its employees.
Employees’ First Amendment Rights

• Is the employee’s speech protected?
  ▫ Is the employee expressing views as a citizen or an employee pursuant to official duties? (If official duties, no protection)
  ▫ Is the employee speaking on a matter of public concern? (If not speaking on a matter of political, social, or other concern to the community, no protection)

• Does the employee’s interest outweigh the government’s?
  Considerations include:
  ▫ Disharmony among coworkers
  ▫ Ability of supervisors to maintain discipline
  ▫ Whether speech has negative impact on those with whom the employee must maintain loyalty and confidence to do his job
  ▫ Importance of instilling public confidence in the department

Poll: Which (if any) of these actions are subject to possible City discipline?

• 1. A court employee posts racist tweets on Twitter
• 2. A police officer posts pictures in uniform with his weapon on Facebook
• 3. A parks employee posts personal frustrations about the City Council’s decision on a new development

• None. They are all First-Amendment protected.
• 1 and 2, but not 3.

What other laws are in play?

• State laws regarding social media privacy
  ▫ Kansas?
  ▫ Other states?

• Common law – invasion of privacy
  ▫ Appropriation of an employee’s name or likeness
  ▫ Unreasonable public disclosure of private facts
  ▫ False light by publically disclosing inaccurate information
  ▫ Unreasonable intrusion into an employee’s seclusion
Three categories of social media use

Official Government Use
- Tweets from @CityofWichita, @SedgwickCoDA Twitter feeds
- Official posts to City’s Facebook page by authorized users

Employee Use for Professional Pursuits
- Connecting with colleagues from other offices on LinkedIn
- Participating in listservs, posting on a state or national organization Facebook page, etc.

Employee Use for Personal Pursuits
Personal Employee Use

- Personal Facebook pages
- Twitter feeds
- Watching videos on YouTube

Anything else?

- State laws:
  - Regarding employee monitoring
  - Regarding drug/alcohol testing
  - Regarding polygraph testing

- Don’t forget company policies

NLRB Guidance on Social Media
National Labor Relations Act

- Section 7 – Employers may not interfere with or restrain employee participation in protected concerted activity.
- Concerted activity:
  - When two or more employees act together to improve wages or working conditions.
  - Includes criticisms of management, complaints about terms and conditions of employment.
- Policies that “would reasonably tend to chill employees in the exercise of their Section 7 rights” are unlawful.

National Labor Relations Act

- Employer’s policy is clearly unlawful if it explicitly restricts Section 7 protected activities.
- If no explicit restriction, still a violation if:
  - Employees would “reasonably construe” the language to prohibit Section 7 activity; or
  - The policy was promulgated in response to union activity; or
  - The policy has been applied to restrict the exercise of Section 7 rights.

Recent NLRB Case: *Costco Wholesale Corp.* (Sept. 2012)

- Campaign to unionize the meat department.
- Union complained to NLRB that Costco unlawfully interrogated its employees.
- Union also claimed that some of Costco’s personnel policies were unlawful.
Recent NLRB Case: Costco

NLRB Decision:
- Unlawful to prohibit employees from posting statements that “damage the Company, defame any individual or damage any person’s reputation, or violate the [Employee Handbook] policies.
- Unlawful to prohibit employees from:
  - Discussing private matters of other employees (such as LOA’s, work comp injuries, and personal health info);
  - Sharing, transmitting, or storing for personal or public use, without prior management approval, sensitive info (such as membership, payroll, confidential financial, and Social Security #s); and
  - Sharing confidential info (such as employees’ names, addresses, phone #s, and email addresses).

Recent NLRB Case: Knauz BMW (Sept. 2012)

- Salesman posted pictures and critical comment re; serving hot dogs and water at BMW sales event.
- At affiliated Land Rover dealership, customer let 13-year-old sit in driver’s seat. Teen drove over customer’s foot and into a pond. BMW salesman posted picture on Facebook with caption: “This is your car. This is your car on drugs.”
- BMW fired the salesman.
- Salesman challenged termination and personnel policies.

Recent NLRB Case: Knauz

- Policy: “Employees should display a positive attitude toward their job [and] to our customers.” – Lawful
- “No one should be disrespectful or use profanity or other language which injures the image or reputation of the dealership.” – Unlawful
  - Could reasonably be construed to include criticisms of working conditions
  - Board ordered BMW to rescind the rule and post a notice reminding employees of their right to organize and engage in protected communications
- NLRB found the salesman was fired for the Land Rover posting, which was unprotected because no discussion of employment terms or conditions - Lawful
Did he really just post that?

\[\text{Image of a Facebook post showing a personal attack on a patient.}\]

Talbot v. Desert View Care Center  
(Idaho 2014)

- Desert View had social media policy:
  - Requiring respectful treatment of others
  - Avoiding threatening, intimidating, bullying behavior

- Talbot posted to Facebook:
  "Ever have one of those days where you’d like to slap the ever loving bat snot out of a patient who is just being a jerk because they can? Nurses shouldn’t have to take abuse from you just because you are sick. In fact, it makes me less motivated to make sure your call light gets answered every time when I know that the minute I step into the room I’ll be greeted by a deluge of insults."

Talbot (con’t)

- Desert View terminated Talbot
- He applied for unemployment benefits

- Idaho Supreme Court affirmed denial of benefits
  - Employer communicated policy to Talbot
  - Talbot signed an acknowledgement of policy
  - Employer subjectively believed the post was threatening
“Just send it to my work email”

Ferrer v. Stahlwerk Annahutte Max Aicher (New Jersey 2014)

• President of company used work email (on a company computer on a company server) for personal affairs, including emails with his personal attorneys
• When employment relationship fell apart and litigation ensued, the company wanted to see all of the President’s work email
• The President claimed attorney-client privilege
• Did the President have an expectation of privacy as to correspondence to/from his work email address?

Ferrer (con’t)

• Yes – expectation of privacy
  • There was no written email policy regarding the use of work email
  • There was no policy regarding use of company servers
  • There was no warning or policy that work email was monitored by the company
  • There was no evidence that company actually monitored work emails
And of course, the NLRB weighs in…

- *Purple Communications, Inc.* (2015)
  - Employers must allow employees to use company email system to discuss workplace issues during non-work hours

- NLRB reversed its 2007 decision holding that employer could ban all non-business email on company email systems
  - This included a ban on concerted activity over work email

*Purple Communications* (con’t)

- NLRB recognized competing interests:
  - Employees’ rights to communication about workplace issues
  - Employers’ property interest in their email systems

- (Supposedly) limited decision
  - Only applies to employees with access to company email system
  - Only applies to emails from employer’s email system
  - Could theoretically have a total ban on non-business email, but very heavy burden to justify it

*Pier Sixty LLC - NLRB* (2015)

- Two days before union election
- Perez upset with manager Bob’s treatment of employees
- During work break, Perez posts to Facebook:
  
  Bob is such a NASTY MOTHER F**** don’t know how to talk to people!!!!!! F*** his mother and his entire F***** family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

- Pier Sixty terminated Perez
**Pier Sixty (con’t)**

- NLRB ruled termination was unlawful
  - Facebook rant did not lose its protection as concerted activity just because it was vulgar
  - Pier Sixty workplace was rife with vulgar language
  - Post was part of series of events that were the basis for the upcoming union election

- One NLRB member dissented, arguing that such vulgarity directed at a manager’s family should not be protected

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**Would any social media post justify discipline?**

*Richmond Dist. Neighborhood Center (NLRB 2014)*

- Center prepared to hire two former employees

  - They posted on Facebook about changes they wanted to see at the Center:
    - Proposed doing “cool s***” without permission and “let them figure out the money.”
    - “F***’em. Field trips all the time to wherever the f*** we want!”
    - “No more [manager] Sean. Let’s f*** it up.”

  - Employer rescinded offers

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**Richmond (con’t)**

- NLRB ruled employees were engaged in protected concerted activity
- BUT, comments were so egregious that they fell outside the protection of the NLRA.

- Why was this case different?
  - NLRB found comments constituted “pervasive advocacy of insubordination” making the individuals unfit for service
What about my constitutional rights?

1st Amendment Free Speech

- Contrary to popular belief, employees of private employers do not have a constitutional “free speech” right to disparage their employers, managers, co-workers, and customers on social media
- But it’s a different story for government employees

Bland v. Roberts (4th Cir. 2013)

- Sheriff department employees claim they lost jobs because they expressed support for rival candidate on candidate’s Facebook campaign page
- Court: A “Like” on Facebook is “the internet equivalent of displaying a political sign in one’s front yard.”
- Employees allowed to bring First Amendment retaliation claims
4th Amendment Search and Seizure

- Protects privacy by prohibiting the government from conducting unreasonable searches and seizures

- Searches in public workplaces:
  - Does the employee have a reasonable expectation of privacy?
  - Did the employer have a reasonable work-related reason to conduct the search?
  - Was the scope of the search no broader than necessary?

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Rosario v. Clark County Sch. Dist. (D. Nev. 2013)

- Student tweets while off-campus:
  - “Mr. Isaacs is a b****”
  - Used extremely vulgar language to expresses hope that his coach gets sexually assaulted
  - Other profane posts about teachers and administrators

- School expelled student, who claimed First and Fourth Amendment violations

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Rosario (con’t)

- First Amendment:
  - One tweet was so obscene it was not protected speech
  - School officials have the authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial disruption

- Fourth Amendment:
  - No reasonable expectation of privacy
  - Doesn’t matter if Rosario’s Twitter account was private because tweets were disclosed by one of Rosario’s followers
  - When you tell your friend something, you take the risk that friend will tell the government
Takeaways - #checkyourpolicies

• Make sure your work email policy includes statements regarding:
  - No expectation of privacy
  - Reserve right to monitor
  - But make sure policy does not “chill” concerted activity

Takeaways - #carefullydiscipline

• Social media posts available to anyone on the internet are fair game for discipline
  - UNLESS post constitutes concerted activity

• Private social media posts voluntarily given to you by a co-worker are probably fair game
  - UNLESS post constitutes concerted activity

• Private, password-protected social media posts are off-limits

Questions?

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