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The "Facebook Firing" case—Employer limits on restricting employee use of social media

By Julie Krupa and Gregory G. Thiess

The new generation of young adults currently in or soon to enter the workforce includes tech-savvy individuals with a desire to be connected and share their life experiences with friends, family and the world at large. Even the most mundane details of their lives can become a tweet or update on social media tools such as Twitter and Facebook. This sharing extends to comments about work—who they work with, how much they make, what they like and dislike about their employer, their supervisors and the people they work with—the list is endless. In response to this trend of employees publishing information or complaints about their companies and work on the internet, many employers have adopted or updated employment policies that prohibit or limit their employees from making such posts. As these policies are enforced through disciplinary actions taken against employees who post comments or criticisms their employers believe violate their policies, employers will face challenges to their enforcement efforts that will define the limits of permissible and impermissible employee comments. In addition, companies will be challenged to determine how to draft policies protecting their confidential data and private information, as well as their image and reputation, while simultaneously protecting the rights of their employees to engage in protected employee activities.

An example of this dilemma can be seen in a recent NLRB case often referred to as the "Facebook Firing" case. American Medical Response of Connecticut, Inc., Case No. 34-CA-12567. The issue in this case stemmed from an employee's negative comments about her employer posted on the employee's Facebook page. The problem started when the employee was informed that she would be interviewed regarding a customer complaint. The company denied her request for union representation during the planned interview, prompting the employee to take to her Facebook page with complaints about her supervisor. Several of the employee's co-workers posted supportive comments, leading the employee to post further negative remarks. The employee was then fired from the company, for violation of a company policy that stated in relevant part:

(a) Blogging and Internet Posting Policy

• Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

• Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

(b) Standards of Conduct [prohibiting the following conduct]:

• Rude or discourteous behavior to a client or coworker.

• Use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature.1

In response to her termination, the employee filed a complaint with the NLRB, alleging that AMR terminated her in violation of Section 7 of the National Labor Relations Act. The NLRB subsequently initiated a charge against AMR, alleging that the employee was engaging in protected activity in her on-line posts. Specifically, the NLRB charged that the terminated employee was exercising her protected right to discuss terms and condition of her employment with her co-workers and that she could not be terminated for such protected activities. Ultimately, the case was settled by AMR on the eve of trial, with AMR agreeing to (1) revise what were claimed to be overly broad company rules on the limits of employee comments concerning the company, (2) ensure that new or revised company rules do not restrict employees in their rights to discuss wages, hours and work conditions with co-workers away from work, and (3) not discipline employees for participating in such activities.

This case highlights the difficult problem of how employers should structure their employment policies relating to employee use of social media, so that employees know the limits of acceptable behavior and employers have the ability to impose discipline when employees go beyond the prescribed limits. There are risks as well as benefits to giving employees the freedom to discuss their employer on social media tools. Employees' positive comments and reviews about a company's workplace or products and services can boost a company's image and reputation and build brand awareness. On the other hand, negative comments are inevitable; people have bad days and often vent via blogs, Twitter, Facebook and similar social media sites. There are obvious concerns about the effect these types of comments' have on a company's reputation, yet employers must ensure that they do not limit their employees' ability to discuss the terms and conditions of the work place with their co-workers.

In an age where the use of social media has become so prevalent, companies need to be aware that employees will likely comment (both positively and negatively) on their employers, supervisors and work environment. Given the inevitable use of social media for such comments, employers also need to review their social media policies and similar policies addressing employee discussion of internal company information outside of the workplace, to assure that employees will know what they can and cannot say on social media and the consequences if those policies are violated. Clear and well communicated social media policies are the key; employees should be able to easily access the company policies and understand what they can and cannot post about the company. For example, management needs to clearly list the types of confidential and proprietary information that employees should refrain from discussing on social media tools.

If employers seek to limit the types of information employees discuss about supervisors, co-workers and their workplace on social media, they also need to avoid policy wording that could be deemed to interfere with protected communication between employees. The AMR social media policy quoted above provided that employees could not make "disparaging, discriminatory or defamatory comments when discussing [AMR] or the employee's superiors, co-workers and/or competitors," and that "[e]mployees are prohibited from posting pictures of themselves in any media, including ... the Internet, which depicts [AMR] in any way..." without AMR's permission. Though a social media policy containing similar language to this was approved in an NLRB advice memorandum in Sears Holdings, C.A. 18-CA-19801,2 in ARM's case the policy's language was alleged by the NLRB to be "overly broad," and it is not clear whether these types of limitations will be upheld if an employee is fired for a violation in the future.

As a result of the unclear picture that these cases paint for employers and their policies on employee use of social media to discuss work related issues, employers should include wording in their policies that such policies will not be applied in a manner that interferes with an employee's rights under Section 7 of the NLRA. In addition, when considering a termination or other disciplinary action for employees who have published inappropriate remarks about their employers, supervisors, co-workers or other conditions of their jobs, employers should carefully review the facts and circumstances of each situation to assure that their policies and disciplinary decisions will withstand the type of scrutiny that AMR's decision brought in the Facebook Firing case. ■

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Julie Krupa is a second year law student at DePaul University College of Law where she serves as the executive board secretary of the Student Bar Association. She currently interns with the Robert Bosch LLC Legal Department, assisting Bosch lawyers in ongoing commercial and product liability litigation, commercial transactions and general corporate legal issues. She is also a 2007 graduate of Marquette University, where she received a Bachelor of Science degree in Business Administration. She can be reached at julieakrupa@gmail.com.

Gregory G. Thiess is Vice President, Assistant General Counsel of Robert Bosch, LLC, the North American affiliate of the Bosch Group of Companies, a leading global supplier of automotive, industrial, consumer and building technology products. He is General Counsel and Secretary to Robert Bosch Tool Corporation and several other Bosch Group companies and is responsible for commercial and product liability litigation, claims and recalls, commercial agreements, M&A, corporate governance, regulatory compliance and environmental claims. He is also a member of the Corporate Law Departments Section Council.

1. See American Medical Response of Connecticut, Inc., Case No. 34-CA-12567 (Complaint and Notice of Hearing on file with author).

2. "While the ban on 'disparagement of company's . . . executive leadership, employees, or strategy . . .' could chill the exercise of Section 7 rights if read in isolation, the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct. The Policy covers a list of proscribed activities, the vast majority of which are not protected by Section 7. . . The Policy preamble further explains that it was designed to protect the Employer and its employees rather than to 'restrict the flow of useful and appropriate information' . . . [T]he Policy contains sufficient example and explanations of purpose for a reasonable employee to understand that it prohibits the online sharing of confidential intellectual property or egregiously inappropriate language and not Section 7 protected complaints about the Employer or working conditions. . . [T]here is no evidence that the Employer implemented this Policy in response to protected activities." Nor was there evidence that they Policy had been "utilized to discipline Section 7 activity." See Sears Holdings, C.A. 18-CA-19807, quoting Tradesmen International, 338 NLRB 460 (2002).