Business Horizons (2015) 58, 571—579

Available online at www.sciencedirect.com

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BUSINESS LAW & ETHICS CORNER

Fired for Facebook: Using NLRB guidance to craft appropriate social media policies

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KEYWORDS
Social media;
Facebook;
Terminations;
NLRB;
Organizational policies

Abstract Online social media websites have become a major way by which people communicate. This communication can include information deemed relevant to work, in both positive and negative ways. There has been a rise in workers fired for posts they have made on social media. With such terminations come questions of their legality, especially when they involve workers discussing work-related matters and work conditions. These discussions can also include multiple workers chiming in with comments or Facebook 'likes.' A number of such termination cases have been brought to the National Labor Relations Board (NLRB) with different rulings made based on the nature of the social media content and the amount and type of response by fellow workers. This article reviews NLRB cases related to social media terminations and common guiding principles that emerge across cases. We give four recommendations to organizations as to how to engage in legal terminations and create social media policies that will pass muster with the NLRB. We discuss general guidelines for crafting social media policies. Finally, we discuss what we still need to know and research in this new and rapidly changing work context.

1. Social media-based worker discipline

Triple Play Sports Bar is a bar and restaurant in Watertown, Connecticut. In 2011, former Triple Play employee Jamie LaFrance posted the following status update on Facebook after she discovered that she owed money on her state income taxes. "*Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money. . .Wtf!!!*" Current Triple Play employee Vincent Spinella 'liked' LaFrance's post. Triple Play waitress and bartender Jillian Sanzone then posted: "*I owe too. [The boss is] Such an a**hole.*" Spinella and Sanzone were terminated from their positions at Triple Play as a result of their posts (Gordon & Argento, 2014). This is just one of several cases involving social media-related terminations of employment that have come before the National Labor Relations Board (NLRB, or "the Board") since 2011.

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0007-6813/$ — see front matter
http://dx.doi.org/10.1016/j.bushor.2015.05.008

Social media are Web applications that allow users to create and share user-generated content (Kaplan & Haenlein, 2010) and have become one of society's major means of communication. As a result, personal social media usage has unavoidably become intertwined with the workplace. Research by Weidner, Wynne, and O'Brien (2012) found in an adult working sample that 60.1% of participants were connected with a colleague through a social media site and in fact 40.5% were connected with their immediate supervisor.

Management disapproval of employees' social media posts has resulted in a number of terminations of employment, a phenomenon called by some in the popular press 'Facebook Fired' (Hidy & McDonald, 2013). Such circumstances are commonly publicized by local and national media outlets, often due to societal notions of injustice or individual concerns about privacy (Zremski, 2013). Social media-based terminations have also led to several wrongful termination lawsuits, which organizations have had to commit both time and resources to defend. Proper procedures for terminating employees are vital for organizations (Plump, 2010), and questionable employee social media use is a new issue that organizations need to consider in the termination decisions that they make.

Social media posts related to employee discipline or termination can pose other particular challenges to employers and can depend greatly on the facts and circumstances of each case. One of the foremost issues is whether a social media-based termination of employment is appropriate in every situation, or whether situations exist where terminating an employee might constitute an unfair labor practice in violation of federal law. Also, with the growth in popularity of social media policies, an issue exists as to the policy language that is used by an organization. While organizations certainly have an interest in drafting a comprehensive, clear social media policy, that policy must also not infringe on their workers' right to organize or freely discuss their working terms and conditions.

This article reviews pertinent social media-based termination cases, as well as the Board's recent rulings with regard to social media policy language. We offer four major recommendations to organizations and outline several policy-drafting considerations. Finally, we discuss what we still need to know about social media-based terminations and suggest areas for future scholarly work. With the prevalence of social media use, it is necessary for organizations to know the law related to social media, and it is an area that has been underexamined in the academic management literature (Davison, Maraist, & Bing, 2011).

2. Legal background

Most private sector workers in the United States are at-will employees, which means that employers are able to terminate their employment at any time. Though there are exceptions to the at-will employment doctrine, there are relatively few protections for workers who are terminated for their social media activities (Lucero, Allen, & Elzweig, 2013). The common misperception is that the First Amendment applies to protect free speech in all matters. However, free speech protections cover terminations of employment only when public sector employees are speaking about matters of public concern. The First Amendment will likely not shield at-will employees from employer discipline (Fulmer, 2010). Nevertheless, some protection may be found in the National Labor Relations Act, or NLRA (Montgomery, 2012).

The NLRB is an independent federal agency that was created to carry out the NLRA (National Labor Relations Board, n.d.). The NLRA protects the rights of employees to act together to address conditions of their employment; in addition, it protects employees' right to organize and collectively bargain (National Labor Relations Act, 1935). Accordingly, the NLRA applies to both union and non-union workplaces (Montgomery, 2012).

The NLRB is composed of five members and a General Counsel, whose job it is to investigate and decide unfair labor practice cases. Each of these members is appointed by the President, with the consent of the Senate. NLRB members are appointed to 5-year terms, and the General Counsel is appointed to a 4-year term. The NLRB is charged with overseeing nearly every aspect of employer-employee relations, receiving between 20,000 and 30,000 employee complaints per year (National Labor Relations Board, n.d.).

In 2011, the NLRB first extended protection to employees' work-related conversations conducted on social media sites (Purcell, 2012a). Specifically, the NLRB cited Section 7 of the NLRA, which protects "the right. . .to form, join, or assist labor organizations. . .and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] Section 7 further states that private employers may not "interfere with, restrain, or coerce employees in the exercise of" their employee's Section 7 rights. Such interference would constitute an unfair labor practice. Notably, even as the U.S. Supreme Court recently invalidated approximately 331 NLRB decisions due to the

[1] All quotes from the National Labor Relations Act, or NLRA, may be accessed at http://www.nlrb.gov/resources/national-labor-relations-act