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EMPLOYER PITFALLS OF MONITORING SOCIAL MEDIA



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From Facebook, Twitter, LinkedIn and MySpace to Classmates.com, social media is everywhere. As of January 28, Wikipedia documented hundreds of social networking websites, covering every topic you can imagine. The electronic age has made communication effortless, instantaneous and boundaryless. No longer must employees gather at the water cooler to discuss work — they don't even have to be on the same continent.

Instead, employees post to Facebook; they text; they email; they blog. Communications previously limited to co-workers are now shared with anyone who has Internet access and Googles the correct search term. Workplace incidents go viral with the touch of a smartphone screen and an upload to YouTube. Business trade secrets are laid bare to the world with a few strokes of the keyboard.

And not just employees are using social media.

Companies now have websites, Facebook pages and Twitter accounts, through which they market their products. Human Resources departments run background checks

on applicants by perusing social media sites. Companies set Google Alerts to monitor Internet mentions of the company and key management.

Is all this instantaneous communication good? Could there be a downside to having a company Facebook page or employee chat group? Can accessing public information on the Internet be a liability for an employer?

The answer to all these questions is, Yes.

Pitfalls of Monitoring Social Media

Discussions between coworkers on Facebook that result in derogatory posts about the employer can be deemed protected concerted activity under the National Labor Relations Act. Private employers — regardless of whether it is a unionized workforce — are impacted in two ways by recent National Labor Relations Board's positions: First, having an overly broad social media policy discourages employees from engaging in concerted activity; second, terminating an employee who posted criticisms of a supervisor is an attempt to discourage employees from engaging in protected concerted activity. In precisely such a case, the NLRB filed a complaint

against the employer, seeking an order requiring reinstatement of the employee and payment of back-wages, interest and any other relief needed to remedy the unfair labor practice.¹ Employers should monitor this case closely and, where necessary, make adjustments to the language and enforcement of social media policies.

Invasion of privacy claims can arise when employer decisions — including failing to hire an applicant and disciplining or terminating an employee — are based on information gathered from social media sites.

Claims under the Stored Communications Act, Wiretap Act and Electronic Monitoring Statutes can arise when an employer accesses an employee's private email account. Consider this example: An employee uses his work computer to access his private email account or check his Facebook page — the passwords are now stored on the company's computer.

The employer determines the employee's behavior violated its confidentiality agreement and accesses the employee's private email — or maybe his secure Facebook site. This company may now have a problem on its hands.

Claims can be made under off-duty conduct laws, which say an employer cannot take action against an employee or applicant for lawful off-duty behavior, such as lawful drinking or lawful political activity. Think twice before firing an employee or not hiring an applicant because of Facebook pictures, because partying — assuming legal age and substances — is lawful behavior.

Discrimination, retaliation and whistleblowing claims can be made under Title VII, Sarbanes-Oxley and state laws, alleging social media conduct is just a pretext to fire the employee. Be careful when reviewing an employee's social media site; you might discover information you'd be better off not knowing, like an employee being out

on FMLA-qualified leave to care for a family member — leave that you failed to designate as FMLA, because before you visited the social media site you had no knowledge of the need for the leave. Or, you might find out that an employee has cancer (think: disability); you have failed to provide a reasonable accommodation, because you didn't know accommodation was needed. Now you do.

Social media is a mixed blessing for employers; use it wisely. Review your company's use of social media carefully. Use information gathered from social media judiciously — and only when it has a direct impact on work performance. Stay informed on federal laws regarding access to and privacy of electronic information. Ensure your policy is not overly broad as to be seen as preventing or prohibiting concerted activity. ■

¹ American Medical Response of Connecticut, Inc. v. International Brotherhood of Teamsters, Local 443, Case No. 34-CA-12576 (Oct. 27, 2010 NIL Region 34)

THE SUPREME COURT CONTINUES TO EXPAND PROTECTION FOR EMPLOYEES IN RETALIATION CASES



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On January 24th, a unanimous Supreme Court (Justice Kagan did not participate in the decision) held that firing an employee's fiancé could constitute illegal retaliation. In *Thompson v. North American Stainless, LP*, the Court reversed the Sixth Circuit's affirmation of the district court's award of summary judgment to the employer. In the case, Thompson's then fiancé (now his wife) filed a complaint with the EEOC claiming she was being discriminated based upon her sex. Mr. Thompson was fired less than one month later, with the company taking the position that he was fired because of his job performance, not because of his fiancé's complaint. Both the district and appellate courts had held that Title VII did not permit third party claims. Writing for the Court, Justice Scalia stated: "We think it obvious that a reasonable worker might be dissuaded" from filing a discrimination claim "if she knew that her fiancé would be fired." Not surprisingly, the Obama administration submitted a brief supporting the fiancé. The Court held that Thompson did have standing to sue his employer for its violation of Title VII because he is a "person aggrieved" under the statute. An individual is a "person aggrieved" if he falls within the "zone of interests" protected by Title VII. The Court declined

to identify exactly what relationships would create a "zone of interests" that would establish standing. "We expect that firing a close family member will almost always meet the test," and "inflicting a milder reprisal on a mere acquaintance will almost never do so..."

This decision should not come as an enormous surprise to employers after the *Burlington Northern v. White* decision in 2006, which vastly expanded the types of employer actions that could constitute retaliatory behavior. Since that decision, employees have found it much easier to survive summary judgment where there is evidence of disciplinary actions, negative performance evaluations and other types of actions, which, prior to *Burlington*, had not constituted "ultimate adverse actions". While courts have tried to parse what constitutes retaliatory actions from trivial slights, that line has become increasingly difficult to draw.

In 2009, the Supreme Court sided with the employee again in *Crawford v. Metropolitan Government of Nashville*, and held that the anti-retaliation provisions protected an employee who was interviewed as part of her employer's investigation of a discrimination claim made by another employee. The plaintiff acknowledged she was not the target

of any discrimination, but she claimed her employer discriminated against her for providing corroborating information to the other employee's complaint. It is worth noting that, on remand, the plaintiff was awarded \$1.5 million.

Next up is *Kasten v. Saint-Gobain Performance Plastics Corp.*, which was argued on October 13, 2010. The issue in that case is very simple: Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the FLSA's anti-retaliation provision, 29 U.S.C. §215 (a)(3). Again, the Obama administration submitted a brief in support of the employee. At oral argument, while a number of the Justices were obviously concerned about Kasten's position that there were no formal requirements for filing an internal FLSA complaint that would trigger a retaliation claim, another favorable decision for the employee would not be surprising.

In sum, the *Thompson* case reminds employers that suspect timing is a huge hurdle to overcome. Terminations based upon work performance, which closely follow a complaint (and broadly defining what constitutes a complaint) will be closely scrutinized by the court. ■

STRIKE THREE FOR EMPLOYERS—SQUEAKY WHEELS AT WORK ARE ALSO PROTECTED FROM RETALIATION¹



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On March 22, 2011, the United States Supreme Court held that the scope of the phrase “filed any complaints” in the antiretaliation provision of the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. § 215(a)(3), includes oral, as well as written complaints. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 2011 U.S. LEXIS 2417 (2011), the Court found that the employee, Kasten, could proceed with his antiretaliation lawsuit based on the oral complaints about the location of a time clock that he made to his employer Saint-Gobain.

Kasten claimed he made several complaints to his shift supervisor and human resources concerning the location of the time clock at the Saint-Gobain plant. Specifically, Kasten complained that the location of the time clock prevents employees from counting their time for donning and doffing their required protective gear. Saint-Gobain denied that Kasten ever made any significant complaint about the time clock location and none of Kasten’s alleged complaints were in writing. Kasten had also received several written warnings because he failed to clock in and out during his shifts as required by company policy. After his fourth warning, Kasten was suspended and then terminated for violating the timekeeping policy. Kasten filed suit claiming he was terminated in retaliation

for his complaints regarding the location of the time clock. The trial court granted Saint-Gobain’s motion for summary judgment finding that the FLSA did not protect mere oral complaints. The Seventh Circuit Court of Appeals agreed with the trial court.

The Supreme Court reversed the Seventh Circuit and held that despite the statute’s wording, oral complaints can fall within the scope of the FLSA’s meaning of “filed any complaint.” The FLSA includes an anti-retaliation provision that prevents employers from “discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act].” 29 U.S.C. § 215(a)(3). The sole question discussed and decided by the Court was whether the term “filed any complaint” includes oral as well as written complaints.

The Court considered the plain meaning of the text and basic definitions of the word, “filed.” They also reviewed different definitions and found that some definitions of “filed” imply the existence of a written instrument while other definitions use the term in conjunction with oral materials. The majority concluded that “dictionary meanings, even if considered alone, do not necessarily limit the scope of the

statutory phrase to written complaints.” In a concerted effort to find for the employee, the Court also examined a multitude of state statutes and federal agency regulations in which the word “filed” is used in conjunction with oral statements and permit the filing of oral complaints. Overall, the Court noted that while the term filed is more often used in the context of something made in writing, the word “any” acted to convert what might be a narrow reading of the word “complaints” into a broad interpretation of the phrase that could include oral complaints.

The Court also examined the use of the word “filed” in the FLSA context. While the word “filed” appears in numerous other provisions of the FLSA, the other uses of the word did not satisfactorily resolve the linguistic question nor did the language in other statutes containing anti-retaliation provisions resolve the question because non-FLSA anti-retaliation provisions contained much broader language than the phrase before the Court, “filed any complaints.”

Because an interpretation of the plain text did not resolve the question, the Court considered Congressional intent in enacting the FLSA. The majority found that several functional considerations indicate that Congress intended the antiretaliation provision of the FLSA to include oral complaints. The language

of the FLSA states that the Act seeks to prohibit “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” The Court’s majority believed that a narrow interpretation of the phrase “filed any complaint” would undermine this basic objective of the Act.

The Court also gave the Secretary of Labor’s past interpretations of the provision some degree of weight in its analysis because Congress delegated to the Secretary of Labor the power to enforce the FLSA. The Secretary of Labor’s interpretation that “filed any complaint” includes oral complaints led the majority to conclude that the phrase encompasses oral complaints as well as written. The Court found accordingly against the employer and contrary

to the plain meaning of a statute, expanding employee rights such that oral complaints fall within the scope of the phrase “filed any complaint” in the FLSA’s anti-retaliation provision, and remanded the lawsuit to the lower court.

This is the third case expanding employee rights decided by the Supreme Court since January, 2011. In January, the Court unanimously held that third-party or associational retaliation claims may be brought under Title VII of the Civil Rights Act.² Shortly thereafter on March 1, 2011, the Court unanimously found Plaintiff’s “cat’s paw” theory case was viable in a USERRA case.³ Here the Court expanded the meaning of a key FLSA phrase opening a new door for future FLSA claims and leaving employers to wonder whether a complaint is a filed complaint protecting

an employee from retaliation. As Justice Scalia noted in the *Kasten* opinion, “while the jurisprudence of this court has sometimes sanctioned a living Constitution, it has never approved a living United States Code.” Based on the Supreme Court’s recent opinions, the United States Code appears alive placing a much heavier burden on employers.

Based on the *Kasten* opinion, employers are encouraged to train managers on wage and hour laws so they can recognize potential complaints. Employers might also require every employee who has such a complaint to document it so that, as with *Kasten*, the complaint does not transform over time through selective memory and employers can appropriately address real concerns. ■

PROVING IMPAIRMENT IN ADA CASES : DO YOU NEED A NOTE FROM YOUR DOCTOR?



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Under the first test for disability, the Americans with Disabilities Act requires the existence of a physical or mental impairment that substantially limits one or more of an individual’s major life activities. 42 USCA §12102(2) (A). The Supreme Court has held that, at a minimum, “it is insufficient for individuals...to merely submit evidence of a medical diagnosis of

an impairment” to prove a substantial limitation. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (partially superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008)).

Until recently, the Circuit Court trend has been to require corroborated medical evidence or opinion which supports a

plaintiff’s subjective testimony regarding an alleged substantial limitation.

However, The Seventh Circuit recently handed down a decision affecting the level of proof a plaintiff must provide to demonstrate a substantial limitation of a major life activity. In *EEOC v. Autozone, Inc.*, 2010 U.S. App. LEXIS 26410 (7th Cir., Dec. 30, 2010), the

Court found that medical testimony is not required to establish that a plaintiff suffered a substantial limitation under ADA requirements.

Autozone, Inc. asserted that “an employee must provide medical evidence of his or her substantial limitations to satisfy the terms of the ADA.” The Seventh Circuit court found that subjective testimony, which is specific and not vague or conclusory, was sufficient. The plaintiff was specific about his limitations, testifying that he required assistance bathing and brushing his teeth four to five times per week. This testimony was corroborated by the plaintiff’s wife. The court found that this specificity established a substantial limitation, and that therefore no medical evidence was necessary.

This was contrasted by an earlier Seventh Circuit case where the plaintiff “described vague generalities how he had less stamina to be as mobile as he once was.” *Fredricksen v. United Parcel Service*, 581 F.3d 516 (7th Cir. 2009). There, as plaintiff’s subjective evidence was too vague and without objective medical evidence, his claim of a substantial limitation failed.

As discussed below, the extent of proof required to establish a substantial limitations varies from a hard line approach in the Second Circuit to the newer, large picture approach seen in the Seventh Circuit.

In the Second Circuit, “when a plaintiff fails to offer any medical evidence substantiating the specific limitations to which he claims he is subject due to his condition, he cannot establish that he is disabled within the meaning of the ADA.” See *Farina v. Branford Bd*

Of Educ., 2010 U.S. Dist. LEXIS 99730, 43 (D. Conn. Sept 22, 2010); *Villanti v. Cold Spring Harbor Cent. Sch. Dist.*, 2010 U.S. Dist. LEXIS 85806 (E.D.N.Y. Aug. 20, 2010) (stating that a plaintiff must “describe how...life activities are limited” and “support this description with competent medical evidence”); *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 722-23 (2d Cir. 1994) (requiring medical evidence to show substantial limitation under the Rehabilitation Act’s parallel statutory requirements).

The First and Fourth Circuits also follow the rule that limited and subjective evidence is insufficient to demonstrate a substantial imitation. See *Barber v. Verizon New England*, 2006 U.S. Dist. LEXIS 88397, *15-16 (U.S.D.C. R.I., Dec. 6, 2006) (plaintiff’s sole evidence of a substantial limitation is his subjective report of decreased sexual activity, but provided no medical evidence or opinion to support his assumption that his Hepatitis C was the cause of his diminished sexual activity); *Faiola v. APCO Graphics, Inc.*, 2019 U.S. App. LEXIS 25229, *12 (1st Cir. Dec. 10, 2010) (absent a medical restriction for air travel, the plaintiff’s claims that her ability to work was substantially impaired due to her claimed inability to fly was insufficient); *Vailes v. Prince George’s County*, 39 Fed. Appx. 867, 869 (4th Cir., 2002) (plaintiff failed to provide medical evidence that the plaintiff’s subjective reports of painful coughing and gagging sensation caused danger to plaintiff).

Other Circuits, such as the Third, Sixth, Eleventh and D.C. Circuits, preclude a cause of action under the ADA where a plaintiff presents only subjective, uncorroborated evidence or conclusory

medical statements of a substantial limitation. See *Benko v. Portage Area Sch. Dist.*, 241 Fed. Appx. 842, 847 (3d Cir. 2007) (plaintiff failed to offer either subjective or medical evidence regarding the extent of his alleged impairment, and accordingly has failed to demonstrate the existence of a substantial limitation); *Simpson v. Vanderbilt Univ.*, 359 Fed. Appx. 562, 567 (6th Cir. 2009); *Greathouse v. Westfall*, 212 Fed. Appx 379, 383 (6th Cir. 2006) (holding that general statements from plaintiff and his doctors, without more specific evidence, were insufficient to establish a substantial limitation); *Henderson v. Fed Ex Express*, 2010 U.S. Dist. LEXIS 29528 (U.S.D.C. Middle Dist. Georgia, Macon Div., March 26, 2010) (plaintiff’s “subjective self assessment that he ‘was unable to really do [his] job like [he] really needed to’ does not show a substantial limitation on his ability to work.”); *Bonieskie v. Mukasey*, 540 F. Supp. 2d 190, 201 (U.S.D.C. for D.C., March 31, 2008).

Finally, the Ninth Circuit abides by the Seventh Circuit’s reasoning, at least for motions for summary judgment. In *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 2009 U.S. App. LEXIS 2856, 18 (9th Cir. 2009), the Court ruled that “a plaintiff’s testimony may suffice to establish a genuine issue of material fact” as to the existence of a substantial limitation. However, the subjective testimony must “contain sufficient detail to convey the existence of impairment.” *Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1058 (9th Cir. 2005).

Given this emerging trend, it is expected that there will be further challenges on the level of proof in substantial limitation cases, especially in the Circuits where a bright line rule has yet to emerge. ■

INVESTMENT AND FINANCE INDUSTRY EMPLOYERS BEWARE: YOUR EMPLOYEE HAS A FINANCIAL STAKE IN SEEING YOU PROSECUTED



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The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was enacted in July 2010. This act affects public and private employers who engage in transactions either governed by the federal securities and disclosure laws and/or subject to regulation by the SEC. Such employers can expect their employees to turn them in to the SEC, or other administrative enforcement bodies, if the employee suspects their employer has engaged in a securities law violation. Such whistle blowing is far better pay than most employees earn since the employee will be entitled to a reward equal to 10 to 30 percent of any monetary sanction exceeding \$1,000,000. That is small potatoes in this day and age of multi-million and multi-billion dollar swindles, fiascos and other corporate financing misunderstandings and miscalculations.

1. Section 922: The Financial Incentive Package For Your Employee

By amending the Securities Exchange Act, Section 922 of the Dodd-Frank Act builds in a big financial incentive for employees who bring to the SEC “original information,” meaning information gained privately by the whistleblower themselves that is not already known by the SEC. In that event, and the information leads to the

imposition of more than \$1 million in monetary sanctions, then the employee has a monetary stake. At the discretion of the SEC, such whistleblowers will be awarded 10 to 30 percent of the collected monetary sanction. Under Section 748, the same goes for whistle blowing to the Commodities Futures Trading Commission (CFTC).

The SEC and CFTC have 8 months to publish regulations that will implement the incentives and protections of Section 922(a) and 748.

2. Your Whistle Blowing Employee Has a Direct Pass to Federal Court for Double Back Pay if You Retaliate in Any Way or Discriminate in Any Way

If you suspend, threaten, harass, demote, discharge or engage in any discriminatory conduct, then your employee (or former employee) can skip all administrative remedy exhaustion procedures, file in federal court, and seek double back pay with interest, expert witness fees and reasonable attorney fees. This is true for any employee who reports, or participates in the investigation or prosecution of violations of the securities laws, including disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (SOX).

SOX retaliation claims may be tried before a jury regardless of any previously entered agreement to arbitrate claims.

3. Title X of the Dodd-Frank Act: Consumer Fraud Protection Act of 2010

Whistle blowing employees who act to disclose violations of the Consumer Fraud Protection Act of 2010 -- Title X of the Dodd-Frank Act -- are also relieved of any previously entered arbitration agreement, and may seek remedies with the Secretary of Labor including reinstatement, back pay, compensatory damages, expert witness fees and attorney fees.

PRACTICE TIP FOR THE EMPLOYER:

If you don't already have a company hotline for lodging anonymous complaints of all kinds, please do. This may help some in identifying and investigating potential problems hopefully before they become large, high risk problems. And, set up twice yearly seminars to teach business ethics and best practices at all levels, and to communicate a clear commitment to support those who put you on notice first of potential violations, rather than going directly to the new federal lottery. ■

RIGHT TO ORGANIZE



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American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443 (the National Labor Relations Board Region 34) (Case No.: 34-CA-12576) is a case that concerns social media and the right to organize.

American Medical Response of Connecticut, Inc. (hereinafter “employer”) provides emergency medical services at various facilities in the State of Connecticut. This employer had an Employee Handbook that stated in pertinent part as follows:

7(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 co-worker.
- Use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature.

(c) Solicitation and Distribution Policy

- It is the policy of the Company to prohibit solicitation and distribution by non-employees on Company premises and through Company mail and e-mail systems, and to permit solicitation and distribution by employees only as outlined below.
- Solicitation of others regarding the sale of material goods, contests, donations, etc., is to be limited to approved announcements posted on designated break room bulletin boards.

An employee named Dawnmarie Souza posted on her Facebook page comments that were critical of her supervisor, Frank Filardo. She posted the critical comments from her home, on her personal computer, and on her Facebook page. The negative comments drew the support of co-workers who joined in the criticism of Filardo.

Ms. Souza was ultimately terminated for violating the aforesaid Rule 7(a) and 7(b).

The International Brotherhood of Teamsters, Local 443, filed a Complaint against the American Medical Response of Connecticut, Inc. alleging that the employer had engaged in unfair labor practices in violation of Section 7 of the National Labor Relations Act and Section 8(a)(1) and (3).

The NLRB held that employee posting from her home on her computer on her Facebook page of a negative remark about her supervisor that drew the support of co-workers constituted “protected concerted activity, i.e., acting in concert to address the terms and conditions of their employment. ■

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