Chapter 6

THE ANTI-SOCIAL NETWORK: FACEBOOK, SMART PHONES, AND OTHER SOCIAL MEDIA IN THE WORKPLACE

The emergence of social media as a major workplace tool and a significant means of communication across society has inevitably raised novel questions for employers, employees, and labor organizations about the appropriate regulation, if any, of this new medium. The law has only recently begun to take notice of the distinct issues presented by the ability to instantly express thoughts, share photos, and elicit reactions in an uncontrolled and uncontrollable environment. The National Academy of Arbitrators invited three of the Midwest's top practitioners to examine and discuss the infant stages of labor law's response to social media.

The first portion of this presentation was a panel discussion of the issues. While guided by hypothetical fact situations, the floor was open for any and all questions and reactions from the audience.

The second portion of the presentation consisted of outlines of the law, or predictions of the law, in three areas of intersection between labor relations and social media. In Part I, Professor Martin Malin of Chicago-Kent College of Law outlined the regulation and protection of social media users under the general provisions of the National Labor Relations Act (NLRA), including the General Counsel's initial memos on the subject. In Part II, Jennifer Dunn of the Chicago firm of Franczek Radelet addressed the more specific question of how the duty to bargain over wages, hours, and working conditions would apply to efforts by employers to limit the use and rein in the abuse of social media. Finally, in Part III, Timothy Hawks of the Milwaukee-Madison firm of Hawks Quindel examined how these efforts at controlling employee use of social media would be analyzed and resolved under the traditional just cause standard for discipline, including unusual

evidentiary and procedural issues associated with social media as the cause and evidence of misconduct.

I. Panel Discussion

Social media is just what it sounds like. A friendly, safe environment filled with well-meaning people doing nice things. Just ask the Winklevoss twins. People are connected in ways that are at once unimaginable and inevitable. Sites like Facebook and services like Twitter allow us to communicate everything, all the time, to everyone, immediately. What could possibly go wrong?

In this session, an eminent arbitrator and two expert advocates looked at the workplace implications of the rise of social media—the issues it creates in the workplace and how they fit—or don't fit—into our established labor laws and principles of contract administration. Each presented a brief review of the law as it has evolved to answer the brave new world of social media, followed by a presentation of three hypothetical fact situations that illustrated different facets of the issues posed by the tweets, posts, and links that flow by the millions (billions?) into and out of our workplaces each day. The audience was asked to play the role of arbitrator, with the gentle assistance of the panel, and to point us to the correct outcomes for each case.

Moderator: **Daniel J. Nielsen,** National Academy of Arbitrators, Lake Bluff, IL

Panelists: **Jennifer Dunn,** Franczek Radelet, Chicago, IL
Martin H. Malin, National Academy of Arbitrators, Chicago, IL
Timothy Hawks, Hawks Quindel, Milwaukee, WI

Daniel Nielsen: The secret to being a successful moderator in this business is to get a brilliant panel and to keep out of their way. I have been blessed in having a brilliant panel and plan on keeping pretty much out of their way. I'm going to just briefly introduce each of our panelists.

There's a consolidated outline that has been prepared by our panelists describing the murky world of the law of social media.[1]

[1]See Part II of this chapter, "Consolidated Outline."

The panelists will briefly describe their principal findings, and then we will examine three hypothetical fact situations.

Marty Malin, our first presenter, is a prolific scholar. He is a member of the Federal Services Impasses Panel, a respected arbitrator, and one of the leading educators in the field of labor relations. Also, he's a very dear friend of long standing, which is how I conned him into this.

Jennifer Dunn is one of the leading lights of the management bar in the City of Chicago. She is a partner with Franczek Radelet. Jennifer started her career with the Illinois Labor Relations Board, then went on to work with the Operating Engineers for a period of time, and then joined Franczek.

Rounding out our panel is the iron man of the National Academy of Arbitrators session, Tim Hawks. Tim is one of the leading union side labor lawyers in the State of Wisconsin, and provides a great deal of substance to our presentation.

Martin Malin: Thank you. Before beginning, I need to say that I am speaking only for myself. Please do not attribute anything I say to the Federal Service Impasses Panel or the Federal Labor Relations Authority or the Obama administration.

I am going to focus on the NLRA and authority from the National Labor Relations Board (NLRB) as they relate to social media. What follows is an update from the presentation that was given at the Annual Meeting. At that time there had not been much authority from the NLRB: two administrative law judge (ALJ) decisions and three general counsel (GC) memos. Since then, the Board has issued three significant decisions concerning social media.

The most recent GC memo is GC Memo 12-59.[2] The other two are GC Memo OM 12-31[3] and GC Memo OM 11-74.[4] These relate to two key sections of the NLRA: Section 7, which guarantees employees the right to engage in other concerted activity for mutual aid and protection, and Section 8(a)(1), which declares it to be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Issues before the NLRB generally fall under two areas. One deals with employer policies. Employers have social media policies, and

[2]National Labor Relations Board, General Counsel Memo 12-59 (May 30, 2012).
[3]National Labor Relations Board, General Counsel Memo 12-31 (Jan. 24, 2012).
[4]National Labor Relations Board, General Counsel Memo OM 11-74 (Aug. 18, 2011).

the question is: Are these policies interfering with, restraining, or coercing employees' exercise of their Section 7 rights? The answer from the General Counsel seems to be that most of the time they are because they're overbroad and would lead a reasonable employee to believe that Section 7–protected activity is prohibited. The critical issue is, given the way the policy is worded, Would a reasonable employee be deterred from engaging in Section 7–protected activity? The GC has found that most employer policies are overbroad. These policies prohibit things like disparaging the company, disrespectful conduct, inappropriate conversations, disclosure of confidential or sensitive information, the use of the employer's name or service marks without the employer's approval, or contacting customers or clients without the supervisor's permission.

GC Memo 12-59 had two significant additions to this. The first one ruled on a policy that had broad language but also had a proviso that said that it did not prohibit employees from engaging in activity protected by the NLRA. GC Memo 12-59 said that such a disclaimer was not sufficient to save an otherwise overbroad policy.

The second and perhaps more significant addition in GC Memo 12-59 was that it featured one employer policy that the GC found did not violate Section 8(a)(1). The GC appended to the memo, with the names redacted, the actual policy. I suspect we will see that policy replicated all over the country, because it seems to be a safe harbor for employers.

The critical characteristic of that policy, compared to policies that the GC found violated Section 8(a)(1), is that that policy had numerous concrete examples of what would violate the policy. The examples made clear to a reasonable employee what the policy was about. The policy was not about going after employees for talking about working conditions with their co-workers, for exchanging wage and salary information, for criticizing the employer's workplace policies, or any other activities that are protected by Section 7.

The NLRB's recent decision in *Costco Wholesale Corp.*[5] appears to be in accord with the GC memos. At issue, among other things, was the legality of an employer rule that prohibited employees from electronically posting statements "that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee

[5]358 N.L.R.B. No. 106 (Sept. 7, 2012).

Agreement. . . . " The Board held that the policy violated Section 8(a)(1). It reasoned that the policy "clearly encompasses concerted communications protesting the [employer's] treatment of its employees." The Board distinguished prior decisions that had held lawful employer policies addressing "verbal abuse," "abusive or profane language," "harassment," and "conduct which is injurious, offensive, threatening, intimidating, coercing or interfering with other employees." The Board also distinguished a prior decision that held lawful an employer rule prohibiting "statements which are slanderous or detrimental to the company or any of the company's employees," observing that in the prior case, the rule was placed among 19 rules prohibiting such egregious conduct as sabotage and sexual and racial harassment. To the Board, the key distinguishing factor was the context in which the different rules appeared. Thus, the Board drew some very fine lines between lawful and unlawful employer policies.

The second category of cases involves adverse employment actions, typically discipline or discharge, taken in reaction to employee postings on social media. Of course, the critical issue here is whether the employee's posting is protected under Section 7, which requires that the employee's conduct be concerted, for mutual aid and protection, and that it not be so indefensible as to lose its protection.

There is a great deal of really fine line-drawing here, as illustrated by the Board's recent decision in *Karl Knauz Motors, Inc., d/b/a/ Knauz BMW*.[6] The car dealership was having a BMW Ultimate Driving Event, and the general sales manager called all the sales representatives together in advance and mentioned that there would be a hot dog cart and cookies and chips. Two sales representatives criticized the choice of food, urging that this was not appropriate fare for a high-end event and a high-end vehicle. After the event, one of the sales representatives posted very sarcastic remarks about the food choice on Facebook.

The sales representative's Facebook posting also contained a picture and sarcastic commentary about an accident at the employer's adjacent Land Rover dealership. A sales representative at the Land Rover dealership had allowed a customer's 13-year-old son to sit in the driver's seat of one of their vehicles. The boy engaged the Land Rover and rolled over the customer's foot, down an embankment, and into a pond. The sales representative

[6]358 N.L.R.B. No. 164 (Sept. 28, 2012).

from the BMW dealership snapped away with his iPhone, and, of course, posted those pictures along with the sarcastic comments on Facebook.

To the typical employee, these two Facebook postings are comparable. Basically, the sales representative was being a smart-ass on his Facebook page. But the NLRB adopted the ALJ's analysis that the BMW posting was protected, the Land Rover posting was not protected, and the employee's discharge was lawful because it was motivated solely by the Land Rover posting.

The ALJ concluded that the posting about the Ultimate Driving Event was concerted because it related to the criticism of the choice of refreshments voiced by the discharged sale representative and a co-worker at the pre-event employee meeting. The ALJ found that the posting was for mutual aid and protection because the success of the Ultimate Driving Event could affect the number of sales, which would affect the employees' commissions.

The ALJ found that the posting about the Land Rover incident was not protected because the sales representative acted entirely on his own. There had been no prior related discussion with co-workers. The employee was simply being a smart-ass with respect to his employer. Thus, the employee's conduct was not concerted and, therefore, was not protected. Ultimately, the ALJ concluded that the employee was fired for the Land Rover posting, not for the BMW posting, and dismissed the unfair labor practice charge.

I suggest that the rationale in the *Knauz BMW* case does not correspond to the reality of employee thinking about workplace behavior. I suggest that most employees would regard the two postings as comparable because they were both sarcastic commentaries on events in the workplace. Employees might distinguish between the BMW and Land Rover postings on the ground that the Land Rover posting crossed a line of decency by sarcastically mocking a serious accident that caused personal injury and property damage. That distinction, however, was not the basis for the ALJ's analysis adopted by the Board. The distinction relied on by the ALJ, that the BMW posting concerned a matter that had been discussed by co-workers with their manager at the pre-event meeting, while the subject of the Land Rover posting had never been discussed with co-workers, is not a distinction, I submit, that many employees would think about in deciding whether a Facebook posting will be deemed protected.

The Board drew another fine line in the *Knauz* case. Knauz had a policy that provided:

> Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The majority found this policy violative of Section 8(a)(1) because a reasonable employee could interpret it as prohibiting Section 7–protected activity. Member Hayes, in dissent, characterized the policy as a "common-sense behavioral guideline" that promotes civility in the workplace. The majority suggested that the first two sentences of the policy, standing alone, might constitute such a lawful behavioral guideline, but focused on the final sentence's prohibition on disrespectful statements or statements injurious to the dealership's reputation, which the majority concluded would inhibit a reasonable employee from criticizing the employer's employment practices.

Another recent NLRB decision is *Hispanics United of Buffalo*.[7] A divided NLRB found that the employer violated Section 8(a)(1) by discharging five employees because of their Facebook postings. A co-worker had sent a text message to one of the five criticizing the job performance of the employee and the employee's colleagues and indicating an intent to complain to management. The recipient of the text message posted on her Facebook page that the co-worker was criticizing employees' job performance and asking what others thought about it. Four others replied criticizing the critical co-worker. The co-worker complained to management about the postings, resulting in the discharge of all five who posted.

The majority held that the five employees were engaged in concerted activity for mutual aid and protection. The majority reasoned that the employees' postings were for mutual aid and protection because they were making common cause against critiques of their job performance that they could reasonably expect would be reported to management. Member Hayes, in dissent, maintained that the employees were only venting about a co-worker and that the employee who made the original post did not mention in the postings any concern with the co-worker possibly complaining to management.

These early developments from the GC and the Board strongly suggest that as the law continues to evolve there will be many

[7] 359 N.L.R.B. No. 37 (Dec. 12, 2012).

more fine lines drawn. Whether such line-drawing provides practical guidance for employees and employers remains to be seen.

Jennifer Dunn: My remarks today are designed to sort of take Marty's comments one step further and address to what extent the parties in a collective bargaining relationship are really dealing with social media policies at the table. Are they negotiating about this? Do they have a bargaining obligation in the first respect?

The statistics on social media usage are really quite startling. There were 500 million active users on Facebook in 2011; today there are more than 900 million users, and it will hit 1 billion by the end of the year, if not sooner. Three hundred million photos are being uploaded to Facebook every day. There are 125 billion friend postings that exist on Facebook. YouTube gets 2 billion hits a day. Twenty-four hours of video are uploaded to YouTube every single minute. It's amazing that with all of the social networking that's going on we're getting any work done to begin with. But clearly, we are working. That's why we're here today. We're talking about the intersection of social media and the workplace.

This brings us to the next group of statistics we want to take a look at, which is, What are employers doing? Well, the statistics are equally startling, but for other reasons. Employers are increasingly turning to social media to connect with their customers and to build their brands. More than 80 percent of them are on Facebook. More than 60 percent of them are on Twitter. More than 70 percent of them are on LinkedIn, which is the business networking Web site that many of you probably use.

Employers are also using social media to connect with and communicate with employees, and they are even using things like LinkedIn to attract and to recruit talent. So, we're seeing the use of social media by employers not only after the employment relationship has been established but even before that.

At the same time, a recent study showed that nearly half of employers do not have a social media policy in place, and only a third of them have actually disciplined employees as a result of misuse or abuse of social media policies.

What's the point of all of these statistics? First, it clearly establishes how pervasive social media is today. These communications are front and center in our daily lives, and they are front and center in the workplace. But it also means that it's inevitable that the parties in a collective bargaining relationship are going to be dealing with this at the table. To date, the issue of whether social media policies are mandatorily subject to bargaining hasn't been

decided. It hasn't been directly addressed. Neither the NLRB nor any other public sector labor board has decided the issue, but it's likely that social media policies will be deemed a mandatory subject of bargaining. It's well-established precedent that any work rule, particularly one that has a disciplinary consequence, or one that can serve as a basis for discipline, is mandatorily negotiable. And there's really nothing apparent about social media policies in general that would cause us to depart from that precedent.

There may be certain employers for whom social media policies may not be mandatorily negotiable. I'm thinking about those companies whose very existence is social media, companies like Facebook and Twitter. That is what these companies are all about, and decisions about social media issues may lie so much at the core of their entrepreneurial control that a labor board wouldn't impose a bargaining obligation. Certainly, though, the effects of that policy would be negotiable.

Are parties actually bargaining about this? It appears that they are. Although the NLRB has not issued a decision on this, it did recently issue a complaint involving a hospital in Pittsburgh. In that complaint, one of the allegations included the fact that the hospital had adopted a social media policy without first notifying the union and bargaining about it prior to implementation. The parties settled that case prior to trial. Although we didn't see a decision on it, presumably as part of the settlement to resolve that allegation the parties did sit down and negotiate and talk about that policy at some point.

Who else may be bargaining about this? Last year, major league baseball owners reached terms on a successor contract with the Players Association. The terms of that successor contract include the following: all players shall be subject to a social media policy. Social media policies were definitely a topic at their table for that round of negotiations, and the policy itself was released by Major League Baseball earlier this year.

In the public sector, it does appear that government agencies, including the federal General Services Administration, are addressing this with the unions that represent their employees. So bargaining about social media policies is happening.

One final note I'd like to add is that, although this may not be a focal point for negotiations at the main table, it certainly is something that the parties would be smart to heed in advance of negotiations in the context of ground rules. Both unions and employers are increasingly using social media to communicate, not only with

their constituents about the status of negotiations, but also with the public. This is something we definitely see in public sector collective bargaining where Web sites are devoted exclusively to the context of the parties' negotiations and the status of those talks.

Timothy Hawks: My remarks are going to be focused on the intersection of social media and labor arbitration of discipline and discharge cases.

There are several things to take away from this. The first is that social media is as common as Jennifer just described it. We are encountering more and more cases involving problems with social media and its application in the workplace. Sooner or later, those cases are going to fall on your desks.

As they do so, I think you will find that they return us to an issue that came up in 1967, the second take-away point, and that is that you will be once again be asked to determine your position with regard to the application of the exclusionary rule when evidence is obtained by illegal or unfair methods.

The third take-away point is that there is significant federal law that regulates third-party access to Internet communications and third-party access to communications that are stored electronically. And those two pieces of legislation are substantially supported by criminal legislation that prohibits that conduct in certain cases.

Those laws are known as the Electronic Communications Privacy Act of 1986 (ECPA),[8] which was an amendment to the federal wiretapping law that was intended specifically to apply privacy protection to Internet communications. The second was the Stored Communications Act (SCA).[9] The third is known as the Computer Fraud and Abuse Act (CFAA).[10]

To illustrate how these laws have been applied and to give you some sense of how they are applied in the context of employment law, I refer to some selected cases in the outline that follows.[11] The first is *Konop v. Hawaiian Airlines.*[12] In that case, a dissident employee was critical of both the union and the employer, and specifically critical of one particular supervisor. The supervisor became concerned about the criticism that was showing up on the employee's blog, which required a user name and a password to get on to it. The employer obtained the user name and password

[8]18 U.S.C. §2510 *et seq.* (2006).
[9]18 U.S.C. §2701.
[10]18 U.S.C. §1030.
[11]See Part II of this chapter, "Consolidated Outline."
[12]Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002).

from a co-employee, who was also a target of the first employee's criticism, and, using that information, terminated the employee. Ultimately, the employer and supervisor were found to have violated the ECPA, and the employee ultimately realized a substantial judgment in his favor.

A second case of interest in terms of the application of the criminal provisions of the CFAA occurred in the Eastern District of Wisconsin in a public sector workplace. In that case, an employee who was fairly knowledgeable in the matter of Internet e-mail procedures figured out how to direct a copy of his supervisor's e-mail to his own e-mail address. He then used that information to the disadvantage of his supervisor. When this was discovered, it was referred to the federal prosecutor, who brought the CFAA criminal charge against the employee, who was subsequently found guilty and sentenced. An appeal to the Seventh Circuit resulted in an affirmation of the Eastern District's decision.

A third example of the sort of abuse that can occur outside of the employment context, but one that illustrates application of the CFAA, is *United States v. Drew*,[13] a case in which a group of middle school students decided to torment one of their co-students in the middle school, and created a fictional boy who befriended the girl on MySpace. Apparently a close relationship developed, at the end of which the fictional boy, using MySpace, communicated with the girl to the effect that the world would be a better place without her. She committed suicide. The middle school students responsible for this subsequently became the subject of a criminal prosecution. That prosecution failed, as the jury concluded that the prosecutor failed to provide or meet the elements of the criminal charge. But it still demonstrates how that law is being applied.

A fourth case involved an employee in New Jersey who developed a blog site limited by password and user name. Once again, a supervisor discovered it. He met with one of the co-employees that the supervisor knew was using the Web site and asked her for the user name and password. She gave it out. Subsequently, the supervisor dismissed the employee who created the blog. That employee brought charges against the employer on a number of grounds, including New Jersey state privacy law, but also the ECPA. The jury returned a verdict in favor of the employee and ultimately the decision was upheld, and a judgment was issued in favor of the employee.

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[13]259 F.R.D. 449, 452 (C.D. Cal. 2009).

I think the question for the arbitrators is, When you're presented with facts by the employer that are a direct product of the employer's or supervisors' violation of the ECPA, the SCA, or potentially even the CFAA, are you going to exclude the evidence? If not, then how are you going to rule on a case with regard to the underlying issue when the employees have engaged in the misconduct for which they have been charged?

Daniel Nielsen: Thank you for an enlightening session. It is our hope that this session has provided you with an awareness of issues that may come before you, along with insights into relevant rulings for guidance.

II. Consolidated Outline

Martin Malin,[14] Jennifer Dunn, Esq.,[15] and Timothy Hawks, Esq.[16]

Part One: Social Media and the National Labor Relations Act[17]

I. An Overview of the State of Social Media and the Workplace
   A. Proskauer Rose, LLP surveyed 120 multinational companies.[18] Some key findings:
      - 76.3 percent use social networking for business purposes; 37.3 percent have done so for less than one year
      - 29.3 percent actively block employee access to social networking sites at work
      - 27.4 percent monitor the use of social networking sites at work
      - 44.9 percent do not have any social networking policy in place
      - 56.6 percent have had to deal with issues concerning misuse of social networks; 31.3 percent have disciplined employees for misuse of social networks

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[15]Franczek Radelet, PC, Chicago, IL.
[16]Hawks Quindel, Milwaukee, WI.
[17]Prepared by Martin Malin.
[18]Proskauer Rose, LLP, Social Networks in the Workplace Around the World (2011).