ISSUE 4 | VOLUME 1 | JANUARY 2011

SCHRPP quarterly

THE SOCIETY OF COUNTY HUMAN RESOURCE PROFESSIONALS OF PENNSYLVANIA NEWSLETTER

The Social Network meets *The Office* and that meeting is, well, awkward.

The Facebook Firing Case

By Michael Miller, Esq., Eckert Seamans

In a Connecticut case watched closely by labor relations lawyers across the country, the National Labor Relations Board ("NRLB") has accused a company of firing an employee in violation of the National Labor Relations Act after she criticized her supervisor on her personal Facebook page. This is one of the first cases in which the NLRB has intervened to argue that criticisms contained on a social networking site concerning a supervisor or an employer might constitute a protected activity and that employers would be violating the law by punishing both unionized and non-union workers for making such statements.

The NLRB exercised its jurisdictional right to file a complaint in front of an administrative law judge against American Medical Response of Connecticut which had fired Dawnmarie Souza, an emergency medical technician, accusing her, among other things, of violating a policy that barred employees from depicting the company "in any way" on Facebook or other social media sites.

American Medical Response directed Ms. Souza to prepare her response to a customer's complaint about her work. Ms. Souza was apparently unhappy that her supervisor would not let a representative of the union representing the company's workers help prepare her response. Ms. Souza then posted about her supervisor on the social networking site, Facebook by, among other things, using several vulgarities to ridicule him. She also had allegedly written, "love how the company allows a 17 to become a supervisor" — 17 is the company's shorthand for a psychiatric patient. The NLRB observed that Ms. Souza's comments "drew supportive responses from her co-workers" and led to further negative comments about the supervisor.

The NLRB has taken the position that the National Labor Relations Act affords workers a federally protected right to form unions, and it prohibits employers from punishing workers — whether union or nonunion — for discussing working conditions or unionization. In bringing the suit, the NLRB has argued that American Medical Response's Facebook rule was "overly broad" and improperly limited employees' rights to discuss working conditions among themselves. Further, the NLRB argued that another company policy that prohibited employees from making "disparaging" or "discriminatory" "comments when discussing the company or the employee's superiors" and "co-workers" was also overbroad in violation of the NLRA.

There is no final decision in the American Medical Response case. In fact, an administrative law judge is scheduled to begin hearing the case on January 25th. However, employers everywhere are now asking whether or not off-duty postings on social networking sites like Facebook may form the basis for discipline in the workplace.

Ironically, following the filing of the Souza case, the NLRB announced (on its own Facebook page) the following test for when "Facebook comments lose protected concerted activity status under the National Labor

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Relations Act." According to the NLRB's November 9, 2010 post, "a four point test applies: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."

So what is the line between public and private speech? Moreover, how is it reasonable that an employee's insulting and unprofessional speech about the employer is deserving of protection?

From the perspective of the NLRB, the NLRA protects the speech of employees who talk around the proverbial water cooler with their co-workers since employees possess the right to discuss wages, working conditions and unionization (or in this case to discuss their supervisor). In fact, the exchange of concerns and criticisms about the workplace is considered "concerted activity" or "organizational activity" by the NLRB and, therefore, an overly broad rule prohibiting concerted activity is, in the mind of the NLRB, a rule which chills the ability of workers to organize. Essentially, the NLRB does not draw a distinction between the water cooler and the "virtual water cooler" that many consider Facebook to have become.

From the perspective of many employers, personal criticisms of supervisors go to the heart of their ability to manage the workforce. Further, where personal criticism is belittling, insubordinate or where public statements undermine the public's faith in employer, employers have difficulty in seeing those statements as protected activity.

An emerging consensus from labor relations professionals is that the speech must be focused on wages, working conditions and unionization and not constitute a primarily private complaint relating only to a particular employee. If online complaints are scandalous and derogatory or personal, the less protection as organizational efforts those comments are likely to receive. In addition, the more facts that establish that an actual conversation occurred (as opposed to a unilateral post expressing frustration), the more likely that the NLRB will consider it protected speech regarding working conditions or unionization.

Most employers would be well advised to, again, check their personnel policies to determine how they address online commenting. If those policies are overbroad ("no negative comments ever") they are likely to be unenforceable. If, however, they are narrowly targeted to comments which are of a purely personal nature ("the other women in the office hate me because I'm younger") or disruptive ("my boss is so stupid"), then a reviewing agency is less likely to find those comments protected speech. As always, context and content matter and a bright line test difficult to establish.

While public employers in Pennsylvania fall under the jurisdiction of the Pennsylvania Labor Relations Board ("PLRB"), NLRB precedents are watched closely as they often predict how the PLRB will consider issues coming before it. In addition, unlike private employers, public employers have additional considerations regarding employee's statements since the First Amendment's protection on free speech and association has been incorporated to the various states through the Fourteenth Amendment. This means that public employers must carefully watch the context and content of the online comments to insure that a decision to discipline over work-related but off-duty comments do not violate an employee's right to protected speech either regarding: 1) wages, working conditions and unionization; or 2) matters of public concern.

What is clear is that the boundaries of the typical workplace, as well as the location in which work is taking place, are quickly being erased. And, just as clearly, the emerging labor law will adjust to meet those new realities. So, in an era of telecommuting and 24/7 Blackberry access, it is likely that all employers, both public and private, will have to adjust their thinking to address situations in which private conduct interferes with one's employment. ❖

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Performance Management Through the use of Feedback

By Dennette Moul, Rising Sun Consultants

Over the past several decades most organizations have moved towards the use of quantitative and measurable performance evaluation processes. These systems are typically driven by rankings and Likert scales. However, much debate exists about what scale is the most appropriate to encourage true developmental growth. So why are so many companies still struggling with high numbers of low performers? It might be because this type of purely quantitative performance information isn't really all that useful in creating impactful change.

Companies have pushed out automated, electronic performance evaluation software where both the supervisor and the employee go on-line and plug in the numbers; some may never even discuss the review! What employee really wants the sum of everything he or she has done over the past year to equal a number? Other organizations have used the recent talk about the lack of performance impact of the current evaluation systems to eliminate the performance management system lock, stock and barrel; providing no useful information to an employee about how he or she is doing!

A good employee wants feedback; she wants to know what she is doing well and where she can possibly improve. Performance management is systemic and needs to include multiple components; one of the most vital being useful feedback. Consistently provided performance feedback is worth more to an employee than a "5" on an annual performance evaluation.

The problem is that many supervisors just don't know how to give appropriate feedback. When you ask someone if they want feedback, what is the reaction you receive? It is probably a raised eye-brow because

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