

Trouble at the Virtual Water Cooler: Discipline of Employees for Social Media Activity



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Social media in modern American culture

- Social networking defined:
 - Web 2.0
 - Facebook, MySpace, LinkedIn, Twitter, YouTube, etc.



Other context: private sector

- NLRB G.C.'s reports: What is prohibited?
 - Overbroad social media policies that can be read to prohibit discussions of wages or working conditions; and
 - Termination or other discipline based on an employee's social media post discussing or planning group action about wages or working conditions (aka mutual aid and protection)



Example in a non-union setting (2012)

- Re California Workers' Rights book co-authored by David Rosenfeld, Nina Fendel, et al.





On-Duty Use Of Social Media

- When did the employee use the social media?
- On-duty or off-duty?
 - Lunch or rest break?
 - What technology did the employee use to access the social media?
 - Who owns the technology?
- Did the use provide a basis for disciplinary action?
 - Consider applicable statutes, rules, and/or language in CBAs/MOUs as a basis for discipline
- What is appropriate disciplinary action?
 - Is the impact on governmental entity a consideration?

Union & Employee Perspective:

- The majority in *Purple* has applied *Republic Aviation* to email
 - *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).
- In this moment in 2015, email is like the “natural gathering place” for employees to communicate with each other

Union & Employee Perspective:

Equipment vs. gathering place

- Under *Purple*, email is not “equipment” like a bulletin board
- Instead, a “gathering place” like a cafeteria
- *Purple* majority applied longstanding Supreme Court precedent guaranteeing the use of such natural gathering places for Section 7 communications.
 - *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978).

Union & Employee Perspective:

- *Purple Communications* signals:
 - a reemphasis by the Board on the importance of Section 7 rights, particularly relative to employer property rights, and
 - invites challenges to a number of employer restrictions on the use of equipment and facilities for organizing purposes

Union & Employee Perspective:

- The Board limited its decision to *employee* use of *e-mail*, explicitly leaving for another day:
 - (1) non-employee access to employer communications systems (for instance, outside Union organizers), and
 - (2) the use of employer communication technologies other than e-mail for Section 7 purposes (for instance, an employer-provided cell phone network)

Union & Employee Perspective:

- Yet, without deciding the issues, the majority opinion indicates,
 - that the presumptive right of access likely applies to almost all employer-provided communication systems, and
 - that the Act entitles non-employees to some level of access as well

Union & Employee Perspective:

- In response to the argument that employees have no right to use employer equipment for Section 7 purposes, the *Purple Board* stated bluntly:
 - “We reject its application here, and we question its validity elsewhere.”

Union & Employee Perspective:

- **What will the application of *Purple* look like?**
 - **Forwarding**
 - **Attachments**
 - **And more**

Union & Employee Perspective:

- “Forwarding”
 - Employees may “forward” documents, including documents relating to wages, hours and working conditions
 - Employees who have access to:
 - Personnel manuals
 - Work schedules
 - Benefit plans
 - Wage rates
 - Can forward them as part of Union and/or protected concerted activity

Union & Employee Perspective:

- “Attachments”
 - Employees may include attachments
 - The right to send attachments could possibly be limited, but nothing prevents employees from sending some attachments as part of emails
 - i.e., if employees are allowed to send attachments as part of regular work, employer will not be able to prohibit that conduct—it would be discriminatory

Union & Employee Perspective:

- “Reply all”
- “Blast emails”
- Off-duty employees can email on-duty employees

Union & Employee Perspective:

- ***Union Activity and Protected Concerted Activity***
 - **Amidst this talk of comparing emailing on non work-time vs. work-time,**
 - **don't overlook the right to engage in protected concerted activity!**

Union & Employee Perspective:

- If an employer allows email during work time about work-related matters, or personal use, it cannot prohibit its use by employees for mutual aid and protection
 - the degree of intrusion does not vary with content of the material
 - *See Eastex v. NLRB*, 437 U.S. 556 (1978); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Union & Employee Perspective:

- Thus, based on other Board precedent, no one should assume that use of company email during *work time* is always unprotected.
- Nor should anyone assume that an employer could prohibit all such email use during work time.

Union & Employee Perspective:

Employee use of work email for work-related purposes during *work time* is protected, even if that communication is critical of the employer

- Employees may criticize their employer's policies

Union & Employee Perspective:

- Moreover, if employees have the right to criticize the employer in strong and caustic language on social media sites, there seems no principled reason why they can't do so during non-work time on the employer's email system
 - see *Atlantic Steel*

Union & Employee Perspective:

- Surveillance and intimidation through monitoring of emails will take the same format as it does of physical monitoring of Section 7 activities in the workplace,
 - meaning it's not permitted if targeting employees specifically for engaging in such activity

Union & Employee Perspective:

- Employees should keep in mind that emails sent over company email can and may be viewed by management

Union & Employee Perspective:

- **Bargaining Obligation**
 - Employers with unionized workforces will have to bargain over the implementation of any such rules
- Be on the lookout for employer attempts to unilaterally implement such policies
- Unions should object and demand to bargain

Discipline of public employees for their use of social networking websites





Off-Duty Conduct: Nexus to Employment?

To justify disciplining a public employee for off-duty conduct, an employer must show:

- 1) that the misconduct bears some rational relationship to the employment; and
- 2) is of a character that can reasonably result in affect the employers business.



Lawful Off-Duty Conduct

□ CA's Lawful Off-Duty Conduct Law

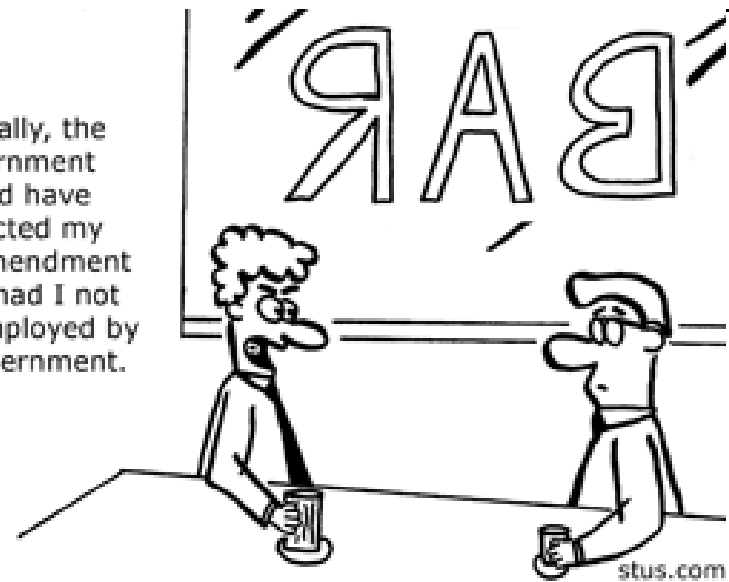
Labor Code section 96(k)

- Generally prohibits, demotion, suspension, or termination based on lawful off-duty conduct away from the employer's premises
- How far this reaches is as of yet unanswered in the context of social networking
 - Past cases construed this Section narrowly
- Does it even apply to public entities?

***Garcetti v. Ceballos* (2006)**

When public employees speak pursuant to their official duties, they are not entitled to First Amendment protection from workplace retaliation for the contents of that speech

Ironically, the government would have protected my First Amendment rights had I not been employed by the government.



Westmoreland v. Sutherland et al. **(6th Cir. 2011)**

- ❑ OH firefighter suspended for commenting for 8 min. to city council that budgetary decision to eliminate diver team caused drowning death of 7-year-old boy
- ❑ Spoke as a private citizen, not in uniform, off-duty
- ❑ Was a matter of public concern
- ❑ Did not make statement pursuant to official duties
- ❑ Remand: intentionally or recklessly false statements?
(*Pickering* standard)

employees who have been “dooiced”

- The fate of employees' grievances





Example

- ❑ Employee terminated from position
- ❑ Posted ad on Craigslist.org expressing in vulgar terms that he wished to engage in sexual relations with another man; pictures of his face and genitalia
- ❑ Anonymous customer complaint;
- ❑ Employer saw ad
- ❑ He would do it again, though more cautiously
- ❑ Arbitrator upholds termination

First Amendment protection from workplace discipline

- Two-part test under *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983)
 - public employee's speech must be made as a private citizen re matters of public concern; AND
 - The interests of the employee, as a citizen, in commenting upon matters of public concern must outweigh the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees

Fourth Amendment protection from workplace discipline

City of Ontario v. Quon (2010)

Key Facts:



- Police Department issues two-way pagers to SWAT team members and contracts with Arch Wireless
- Police Department tells officers that text messages are subject to the Department's e-mail monitoring policy

City of Ontario v. Quon cont'd

□ Key Facts (cont.):

- Ltd. tells Quon that he will not audit Quon's text message if Quon pays the overage charge
- Police Chief decides to audit Quon's messages
- Department obtains messages from Arch Wireless
- Quon sent sexually explicit text messages to his wife and mistress using pager supplied by Department





City's of Ontario's E-Mail Policy

- Key Provisions:

- City “reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice”
- “Users should have no expectation of privacy or confidentiality when using these resources”

- However:

- Policy did not mention text messages



Consistent theme or theory?

- Mutual aid and protection doctrine fairly clear
- First Amendment doctrine fairly clear
- Fourth Amendment: must have a reasonable expectation of privacy
- Otherwise:
 - Just a “gut check” test?
 - Nexus to employment?
 - Affirmative steps to safeguard material?



Duty to bargain over social media policies?

- Likely a mandatory subject of bargaining
- Analogize to email use, phone use or surveillance policies
- Analogize to other policies that have disciplinary consequences



Finale

- Question and answer period

Thank you for participating!